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38 Cal.2d 802

HOGAN v. INGOLD et al.

L. A. 21794.

Supreme Court of California.

April 22, 1952.

Rehearing Denied May 15, 1952.

Stockholder's derivative action by Gladys Hogan, as executrix of estate of Clarence C. Hogan, deceased (substituted in lieu of Clarence C. Hogan, deceased), against R. F. Ingold, and others, based upon alleged conspiracy of stockholders named as defendants to exclude all other stockholders from corporate property. Plaintiff failed to furnish security for defendant stockholders' probable reasonable expenses in actions, including attorneys' fees, as required by statute, and the Superior Court, Los Angeles County, Arnold Praeger, J., dismissed action as to defendant stockholders. Plaintiff appealed. The Supreme Court, Schauer, J., held that dismissal of action under statute did not divest plaintiff of any substantive rights nor breach any constitutional guaranty.

Order affirmed.

Gibson, C. J., and Carter and Traynor, JJ., dissented.

Prior opinion, 229 P.2d 432.

1. Constitutional Law 🔑112

Corporations 🔑320(12)

In stockholder's derivative action upon four stockholders' alleged conspiracy to exclude all other stockholders from corporate property, where all but one of alleged wrongs occurred before plaintiff purchased his stock, dismissal of action upon plaintiff's failure to furnish security for defendant stockholders' expenses in action as required by statute, which became effective after plaintiff acquired stock but before action was commenced, did not divest plaintiff of any substantive vested right or breach any constitutional guaranty. Corporations Code, §§ 4, 830, 834, 834(a)(1); Fed.Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

2. Corporations 🔑320(11)

In stockholder's derivative action upon alleged conspiracy of four stockholders to exclude other stockholders from corporate property, evidence sustained findings that there was no reasonable probability that prosecution of cause of action would benefit corporation or its security holders and that plaintiff except for one transaction, was not owner of stock at time alleged wrongdoing occurred and did not acquire stock by operation of law from one who was. Corporations Code, §§ 834, 834(a)(1); Fed.Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

3. Constitutional Law 🔑191

Corporations 🔑320(4)

Stockholder did not acquire, as incident of purchase of stock, an unconditional vested property right to come into equity in a fiduciary capacity and, in that role, to institute and maintain stockholder's derivative action on behalf of corporation, based on four stockholders' alleged conspiracy to exclude other stockholders from corporate property, and dismissal of such action under statute which became effective after action was begun would not constitute retroactive application of statute and would not illegally deprive plaintiff stockholder of a valuable property right. Corporations Code, §§ 830, 834, 834(a)(1); Fed.Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

4. Corporations 🔑320(1)

Statute regulating stockholder's action instituted or maintained in the right of any domestic or foreign corporation does not apply to actions directly seeking to enforce personal rights of stockholders. Corporations Code, §§ 830, 834, 834(a)(1); Fed. Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

5. Corporations ⚷320(1)

Statute regulating stockholder's actions which are instituted or maintained in the right of any domestic or foreign corporation does not abolish stockholder's derivative actions, but merely imposes regulatory conditions on their institution and maintenance. Corporations Code, §§ 830, 834, 834(a)(1); Fed.Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

6. Constitutional Law ⚷106

In stockholder's derivative action, plaintiff nominates himself to act in fiduciary capacity, substantially as guardian ad litem for the corporation, and he has no vested property right which will compel court to accept him unconditionally in that capacity. Corporations Code, §§ 830, 834, 834(a)(1); Fed.Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

7. Constitutional Law ⚷48

Formulation of regulations for stockholder's derivative actions, including determination of qualifications required of plaintiff in instituting and maintaining suit in equity in right of another is a matter manifestly appropriate for state legislation, and such legislation must be upheld so long as no constitutional rights are invaded. Corporations Code, §§ 830, 834, 834(a)(1); Fed.Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

8. Constitutional Law ⚷191
Corporations ⚷320(12)

Statute authorizing court, in exercise of reasonable discretion, to require plaintiff stockholder in derivative action to furnish security for defendant's probable reasonable expenses, including attorney's fees, was not being given retroactive effect when applied to action which was commenced subsequent to enactment of statute upon cause of action which accrued before enactment. Corporations Code, §§ 830, 834, 834(a)(1); Fed.Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

9. Costs ⚷3, 4

Costs are given only by statutory direction and their allowance depends on terms of statute in force at time of accrual of right to have them taxed, and rule pertaining to allowance of cost may be changed or modified by statute during pendency of proceeding.

10. Corporations ⚷320(12)

Provision of corporations code that actions which are commenced and rights which have accrued before code takes effect are not affected by code, but that all procedure thereafter taken regarding such actions and rights shall conform to code so far as possible does not imply that statute regulating stockholder's derivative actions shall not be applied to such actions commenced after effective date of stockholder's action statute. Corporations Code, §§ 4, 830, 834, 834(a)(1); Fed.Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

◆

McLaughlin & Casey, Los Angeles, for appellant.

Kenny & Morris and Robert W. Kenny, all of Los Angeles, as amicus curiæ on behalf of appellant.

Flint & MacKay, William R. Flint, Roscoe C. Andrews, J. D. Willard and Hunter & Liljestrom, all of Los Angeles, for respondents.

SCHAUER, Justice.

[1] This case presents to this court for the first time the question as to whether section 834 of the Corporation Code[1] (Stats.

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[1] Section 834: "(a) No action may be instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation unless both of the following conditions exist:

(1) The plaintiff alleges in the complaint that he was a registered shareholder or the holder of voting trust certificates at the time of the transaction or any part thereof of which he complains or that his shares or voting trust certificates thereafter devolved upon him by operation of law from a holder who was a holder at the time of the transaction or any part thereof complained of.

(2) The plaintiff alleges in the complaint with particularity his efforts to secure from the board of directors such ac-

1949, ch. 499, § 1) is validly applicable to a stockholder's derivative suit commenced after the effective date of the statute but concerning wrongs allegedly committed before that date and which suit is instituted by a shareholder who acquired his stock otherwise than by operation of law, and at a time subsequent to the commission of the wrongs complained of but prior to enactment of the statute. We conclude that the statute is procedural, that application of it here is prospective and does not divest the plaintiff of any substantive vested right, and that the order of the trial court dismissing the action for failure to furnish security for costs and expenses as required should be affirmed.

The legislation in question imposes two principal conditions on the institution and maintenance of stockholder's derivative suits: (1) The complaint must allege that plaintiff "was a registered shareholder * * at the time of the transaction or any part thereof of which he complains" or that the shares devolved upon him by operation of law from one who was a registered shareholder at such time. (2) On motion (on the grounds specified in the statute and hereinafter epitomized) the court may require the plaintiff to furnish security for "the probable reasonable expenses, including attorney's fees, of the corporation and the moving party which will be incurred in the defense of the action." On failure to

tion as he desires and alleges further that he has either informed the corporation or such board of directors in writing of the ultimate facts of each cause of action against each defendant director or delivered to the corporation or such board of directors a true copy of the complaint which he proposes to file, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(b) In any such action, at any time within thirty days after service of summons upon the corporation or any defendant, the corporation or such defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish security as hereinafter provided. Such motion may be based upon one or more of the following grounds:

(1) That there is no reasonable probability that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its security holders;

(2) That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity.

The court on application of the corporation or any defendant may, for good cause shown, extend such 30-day period for an additional period or periods not exceeding sixty days.

At the hearing upon such motion, the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material: (a) to the ground or grounds upon which the motion is based, or (b) to a determination of the probable reasonable expenses, including attorney's fees, of the corporation and the moving party which will be incurred in the defense of the action. If the court determines, after hearing the evidence adduced by the parties at the hearing, that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the nature and amount of security to be furnished by the plaintiff for reasonable expenses, including attorney's fees, which may be incurred by the moving party and the corporation in connection with such action, including expenses for which said corporation may become liable pursuant to Section 830. A determination by the court that security either shall or shall not be furnished or shall be furnished as to one or more defendants and not as to others, shall not be deemed a determination of any one or more issues in the action or of the merits thereof. The corporation and the moving party shall have recourse to such security in such amount as the court shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court upon showing that the security provided has or may become inadequate or is excessive. If the court, upon any such motion, makes a determination that security shall be furnished by the plaintiff as to any one or more defendants, the action shall be dismissed as to such defendant or defendants, unless the security required by the court shall have been furnished within such reasonable time as may be fixed by the court.

(c) If any such motion is filed, no pleadings need be filed by the corporation or any other defendant, and the prosecution of such action shall be stayed, until 10 days after such motion shall have been disposed of."

furnish the required security within a reasonable time to be fixed by the court "the action shall be dismissed."

[2] The grounds upon which the motion for security may be based are: (a) That there is no reasonable probability that prosecution of the cause of action alleged against the moving party will benefit the corporation or its security holders; (b) That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity. The trial court in this proceeding concluded that ground (a) was established; its conclusion was amply supported if the statute is valid and applicable.

Plaintiff's complaint was filed on December 9, 1949; section 834 of the Corporations Code had become effective October 1, 1949; plaintiff became a stockholder not earlier than March, 1949, on conveyance to him by one Finnegan of 215 shares. All the transactions complained of, with one exception hereinafter noted, occurred prior to plaintiff's becoming a shareholder. The one transaction excepted (alleged leasing of property, with option to purchase at below its market value, to an organization controlled by defendants) assertedly took place on October 7, 1949, after plaintiff became a stockholder and after the effective date of the statute.

In material substance the complaint alleges: That plaintiff is the owner of 215 of a total of 1,235 outstanding shares of the Washington Holding Company, a corporation, and that the individual defendants concerned on this appeal own, or are registered as owning, shares in respectively stated numbers varying from 5 to 643, and aggregating 718; that the corporation, Washington Holding Company (hereinafter called Washington), has owned, since 1932, described real and personal property. Four individual defendants, Shoor, Ingold, Jenkins and Jesson control Washington and are the officers and directors thereof. Other defendants, Powell, Tanner and Hunt are officers of Washington. Since the organization of Washington in 1932, the four individual defendants have conspired to acquire all the property of Washington to the exclusion of the other shareholders, by issuing false financial statements of Washington, leasing its property to organizations under their control for less than its market rental value, failing to collect such rentals, representing that Mary Eloise Clark was a director when she was not, selling and acquiring stock for delinquent stock assessments unnecessarily levied during 1934–1939, and giving, in 1949, as heretofore mentioned, the lease with an option to purchase on improper terms. The individual defendants have concealed the foregoing from plaintiff. Since the action was commenced, plaintiff Hogan died and his executrix has been substituted in his place.

After the complaint was filed, defendants Ingold, Shoor, Tanner, Powell, Hunt and Jenkins moved, on the grounds stated in the statute, for an order requiring plaintiff to furnish security as therein provided. Supporting and opposition affidavits were filed and the matter heard. Pursuant to the motion, an order was made requiring security, and plaintiff having failed to furnish it within the time specified, the action was ordered dismissed as to the moving defendants. From the latter order this appeal is taken.

The affidavits presented on the motion raise various material issues of fact but, since it appears that the trial court based its order at least in part, and although indirectly, probably controllingly, on its finding, supported by ample evidence, that plaintiff (which term is used herein as indicating either the decedent who commenced the action or the present plaintiff) was, with the exception of the one transaction already noted, not the owner, registered or otherwise, of any stock at the time of any of the transactions or any part thereof complained of and did not acquire his stock by operation of law from one who was a stockholder at any such time, we treat the case on that basis.

Such finding, as above indicated, appears to have been substantially relied upon by the trial court in reaching its conclusion that there is no reasonable probability that prosecution of the cause of action alleged against the moving parties would benefit the corporation. It is to be noted, however, that the order dismissing the action is not based on a holding that the complaint fails to state a cause of action; rather, the court considered the facts as to the time and circumstances of plaintiff's acquirement of his stock, and the provisions of subdivision (a) (1) of section 834, and placed reliance thereon in reaching its conclusion that there was no reasonable probability that prosecution of the cause of action alleged would benefit the corporation, and hence, that it was proper to require plaintiff to furnish security for costs and attorney's fees in a reasonable amount. As previously mentioned, and now repeated for emphasis, it was for failure to furnish the security as ordered that the action was dismissed. Thus as applied here the statute did not operate to absolutely preclude plaintiff from maintaining the suit; it merely required him to furnish the security if he were to proceed further in his fiduciary capacity.

[3] Plaintiff contends that her decedent as an incident of acquiring ownership of the stock by purchase acquired an unconditional vested property right to come into equity in a fiduciary capacity and in that role to institute and maintain this action on behalf of the corporation as to all wrongs complained of and that to impose the conditions prescribed by section 834 on the institution and maintenance of the action is to give the statute retroactive effect and illegally deprive decedent and this plaintiff of a valuable property right. This contention cannot be sustained; a person has no property right in being appointed or in acting on his own nomination as a guardian *ad litem.* He may nominate himself but he cannot compel the court to accept his nomination; he has no property right to be accepted by the court to institute and maintain an action in the right of another on terms beyond the control of the court or the legislature.

[4] It should be observed that section 834 is not designed and does not operate to deprive a shareholder of any vested property right. By its very words the section relates solely to actions which may be "instituted or maintained *in the right of any domestic or foreign corporation* by the holder * * * of shares * * * of such corporation." (Italics added.) Since the statute is directed only at actions instituted or maintained "in the right" of the corporation it has no application to actions or suits seeking directly to enforce personal rights of shareholders. Stockholders, if they have a personal cause of action, are still free to sue the corporation, the majority stockholders, or the directors of the corporation, and to recover for any cause they can establish. It becomes important therefore to clearly understand at once the precise nature of a stockholder's derivative action.

In Whitten v. Dabney (1915), 171 Cal. 621, 630–631, 154 P. 312, this court said: "And here again it becomes necessary to call attention to the fact that these plaintiffs have no personal wrongs for which they are entitled to seek redress in this action. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his* or because *he* is entitled to the relief sought. He is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court.*' (3 Pomeroy's Equity, 3d ed., sec. 1095.) * * * What is the exact situation of a plaintiff in such an action? He is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other. His position in the litigation is in every legal sense the precise equivalent of that of the guardian *ad litem.* The guardian *ad litem* stands as the representative of some person incompetent to sue or be sued directly. He is appointed by the court to represent that incompetent's interests; to prosecute or defend with the highest diligence and good faith. The stockholder beginning this action does not even occupy the position of a creditor suing on his own account and on account of his fellow-creditors. In the latter case the creditor plaintiff has a direct personal interest in the litigation, and within limitations not here necessary to discuss, may deal with that litigation as his own. But the stockholder acts in purely a representative capacity. He is a guardian *ad litem* by virtue of statutory authority, empowered to do precisely what a guardian *ad litem* appointed by a court may do. He has gone into equity seeking redress for a corporation under disability to obtain relief itself, precisely as the guardian *ad litem* goes into court to obtain like redress for a client under disability by reason of incompetency or nonage. The principles governing the conduct of a guardian *ad litem* are in full strictness applicable to the conduct of such a plaintiff stockholder. Not only should a plaintiff in such a fiduciary capacity be willing to take no act that did not first receive the sanction of the court of equity to which he has appealed, but, more than this, he is not permitted to take any act without such sanction. (Waterman v. Lawrence, 19 Cal. 210, [79 Am.Dec. 212].) Where an action is prosecuted by a guardian *ad litem*, the infant is the real party. (Bowers v. Kanaday, 94 Ga. 209, [21 S.E. 458].) And the guardian *ad litem* cannot even be considered a party to the cause. (Thomason v. Gray, 84 Ala. 559, [4 South. 394]; Baltimore & Ohio R. R. Co. v. Fitzpatrick, 36 Md. 619; Tate v. Mott, 96 N.C. 19, [2 S.E. 176]; Duffy v. Pinard, 41 Vt. 297; Ingram v. Little, L.R. 11 Q.B.Div. 251.) And what are the principles governing the conduct of a guardian *ad litem?* It is the right and duty of the court to protect the interests of the incompetent represented by the guardian *ad litem* and to exercise supervision over the conduct of that guardian." See also, to like effect, Loeb v. Berman (1933), 217 Cal. 716, 720, 20 P.2d 685; Russell v. Wegand (1935), 5 Cal.App. 2d 259, 260, 266, 42 P.2d 381; Spellacy v. Superior Court (1937), 23 Cal.App.2d 142, 147, 72 P.2d 262.

Speaking likewise of the character of such suits the United States Supreme Court in Cohen v. Beneficial Loan Corp. (1948), 337 U.S. 541, 549, 69 S.Ct. 1221, 93 L.Ed. 1528, said:[2] "The very nature of the stockholder's derivative action makes it one in the regulation of which the legislature of a state has wide powers. Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law and may be subject to most complete and penetrating regulation, either by public authority or by some form of stockholder action. Directors and managers, if not technically trustees, occupy positions of a fiduciary nature, and nothing in the Federal Constitution prohibits a state from imposing on them the strictest measure of responsibility, liability and accountability, either as a condition of assuming office or as a consequence of holding it.

"Likewise, a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. * * * He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. * * * We conclude that the state has plenary power over this type of litigation. * * *

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[2] The Cohen case, in the question ultimately decided, may be distinguished from the case here. The court there stated its problem as follows (p. 543 of 337 U.S., p. 1224 of 69 S.Ct.): "The ultimate question here is whether a federal court, having jurisdiction of a stockholder's derivative action only because the parties are of diverse citizenship, must apply a statute of the forum state which makes the plaintiff, if unsuccessful, liable for the reasonable expenses, including attorney's fees, of the defense and entitles the corporation to require security for their payment."

The New Jersey statute which the court was considering was by its express terms declared applicable to pending actions. The action before the court had been commenced about two years before the statute was enacted. The court therefore had no occasion to consider or rule on the question as to whether application of the New Jersey law would be purely procedural and prospective in relation to actions instituted after its effective date. The majority held that the statute even when applied to create a liability in the pending case, where none had existed when the action was commenced, did not breach any constitutional guaranty and would be applied in the federal courts.

It would seem that if the statute were substantive, and other than prospective in operation, giving it effect in a pending action might impair the contract obligation or take property without due process. In the case before us no such problem arises. The statute itself does not impose any liability on the plaintiff. If he chooses to bring the suit, however, he must meet the conditions imposed.

"[P. 552 of 337 U.S., p. 1228 of 69 S.Ct.] A state may set the terms on which it will permit litigations in its courts. No type of litigation is more susceptible of regulation than that of a fiduciary nature * * * and we think * * * it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met."

[5] If the power of the state over this type of fiduciary litigation is plenary, as the Cohen case states, then surely such litigation is subject to regulation of the type provided by section 834. And if section 834 is applied only to actions instituted after its enactment it is neither substantive in character nor retroactive in operation. It does not in and of itself create any liability or deprive anyone of property or of any vested right either with or without due process nor does it impair the obligation of any contract. The stockholder will not incur any liability for costs if he does not essay to bring in equity a suit in the corporation's right. If he does bring such a suit he knows that he will be subject to the regulating provisions of the statute. There is no more reason to doubt the applicability of the statute to a fiduciary action brought in respect to wrongs assertedly perpetrated before the statute than if it concerned wrongs happening after the statute as long as the action is brought after the effective date of the legislation. In either case the operation of the statute is prospective and procedural because it does not deprive a person of any right which he had at the time of beginning the suit, but merely prescribes the conditions upon which the subsequently instituted equity suit may be brought and maintained. Obviously, it is only in respect to a claimed unconditional right to institute and maintain the fiduciary action in the right of the corporation, and to be unconditionally accepted by the court in that capacity, that plaintiff's claim of impairment goes. This is the only claim he can make because it is the only type of action affected by the statute and the statute does not abolish stockholder's derivative suits but merely imposes regulatory conditions on their institution and maintenance. Plaintiff's stock is still his; any personal rights of action he may possess as attributes or incidents of the stock are still his and, as already noted, are completely unaffected by section 834.

[6, 7] As already pointed out, by bringing a stockholder's derivative action the plaintiff nominates himself to act in a fiduciary capacity substantially as a guardian *ad litem* for the corporation, and he has no vested property right which compels the court to accept him unconditionally in that capacity. The formulation of regulations for that type of litigation including the determination of what qualifications shall be required of a plaintiff in order that he may institute and maintain a suit in equity "in the right" of another is a matter manifestly appropriate for state legislation, which must be upheld so long as no constitutional rights are invaded. In the light of the authorities already cited it is apparent that application of the statute under the circumstances shown here breaches no constitutional guaranty.

It may be further observed that even without the enactment of section 834 the plaintiff here would not have been permitted to maintain the suit (except possibly in relation to the one transaction alleged to have occurred after he acquired his stock) had it been brought in or transferred to (as upon showing a diversity of citizenship) a federal court, and that this court has never passed upon the question as to the capacity of a shareholder, who was not such at the time of the wrongs complained of, to maintain a derivative suit. Since Hawes v. Contra Costa Water Co. (sometimes cited as Hawes v. Oakland) (1881), 104 U.S. 450, 26 L.Ed. 827, 832, it has been the rule in the federal courts that a complaint in a derivative action must contain "an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law."

This rule is now embodied in the Federal Rules of Civil Procedure (Rule 23(b), 28 U.S.C.A.) and is enforceable in the federal courts even in states which permit derivative suits without such a showing (Venner v. Great Northern Ry. Co. (1907), 2 Cir., 153 F. 408, 411; affirmed (1908), 209 U.S. 24, 28 S.Ct. 328, 52 L.Ed. 666. Decisions of the courts of the several states are sharply conflicting and strong arguments can be found in support of either policy. (See Annotation 148 A.L.R. 1091, 1097.) In California the only case substantially in point which has been cited to us or which our research has disclosed is Harvey v. Meigs (1911), 17 Cal.App. 353, 364, 119 P. 941. The District Court of Appeal there took the view that the action could be maintained regardless of when and how ownership of the stock was acquired.[3] However, in view of the fact that we regard section 834 as controlling on this appeal we express no opinion as to whether, in the absence of such statute, we should follow or disapprove Harvey v. Meigs.

[8, 9] Insofar as section 834 authorizes the court on motion and in the exercise of a reasonable discretion to require that a plaintiff in a derivative suit furnish security for "the probable reasonable expenses, including attorney's fees," of the defendants sued, "which will be incurred in the defense of the action," and requires dismissal of the action on failure of the plaintiff to comply with the order within a reasonable time fixed by the court, there is no serious question either as to validity or applicability of the legislation. It is almost universally held that such statutes are not regarded as being given retroactive effect even when applied to actions pending at the time of enactment. Certainly they are not retroactive when applied to actions subsequently commenced (and this must be understood as the only respect in which a question is before us or in which we express our view) even though the cause of action accrued before enactment. The general rule is thus stated in 7 Cal.Jur. 305, § 43: "[C]osts are given only by statutory direction and their allowance depends on the terms of the statute in force at the time of the accrual of the right to have them taxed. This time, in regard to costs on appeal, is the time of the rendition of the judgment on appeal. It follows that the rule pertaining to the allowance of costs may be changed or modified by statute during the pendency of the proceeding." Directly supporting the above statement, see Turner v. East Side Canal & Irr. Co. (1918), 177 Cal. 570, 571–572, 171 P. 299, and cases there cited; Wilson v. Nichols (1942), 55 Cal.App.2d 678, 682, 131 P.2d 596 (hearing denied).

In 96 A.L.R. 1428 (annotation on "Statute relating to costs or attorneys' fees at commencement or at termination of action as controlling") the law is epitomized as follows: "It is well settled that the question whether costs may be allowed in an action or suit, as well as the determination of the method of their computation, is governed by the law as it exists at the time of the judgment which terminates the action or suit, rather than by the law as it existed at the time when the action or suit was commenced,—where there is no provision in connection with the new legislation which clearly saves or excepts therefrom costs in pending actions." The numerous illustrative cases which are cited show that statutes either increasing or decreasing the allowable costs, including attorney fees, are consistently applied to litigation pending when such statutes became effective, unless a contrary intent clearly appears from the statute.

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[3] See also Beal v. Smith (1920), 46 Cal. App. 271, 189 P. 341, which contains some discussion of the rights of such a shareholder who was without notice of the alleged fraudulent acts at the time he acquired his shares, but the case is decided on the ground that action was barred by the statute of limitations; Earl v. Lofquist (1933), 135 Cal.App. 373, 376, 27 P.2d 416, which contains a statement of the rule as announced in Harvey v. Meigs, supra, but again the holding was that action was barred by the limitations statutes.

It is noted that in Shielcrawt v. Moffett (1945), 294 N.Y. 180, 61 N.E.2d 435, 439, 159 A.L.R. 971, an attempt is made to distinguish between the recognized rule that "Liability for the payment of costs * * is ordinarily measured in accordance with the statute in effect at the time when costs and expenses are fixed by order or by judgment of the court, even though the proceeding may have been initiated before the statute took effect," and the situation here presented of imposing a *new* requirement that security for such costs be furnished by plaintiff. Whether this attempted distinction is sound or unsound does not now concern us and we imply no view on it whatsoever. In either event the case does not support the conclusion that application of section 834 to actions filed after its enactment would constitute retroactive application. The holding (p. 438 of 61 N.E.2d) is merely that the New York statute permitting the corporation defendant to "require the plaintiff [in a derivative suit] * * * to give security for the reasonable expenses, including attorney's fees," did not apply to actions pending at the time the statute became effective. Our statute, in its application to the case before us, involves only its effect on subsequently instituted actions and the Shielcrawt opinion expressly distinguishes such cases. The court there says (Shielcrawt v. Moffett (1945), supra, 294 N.Y. 180, 61 N.E.2d 435, 440): "If the statute had been in effect when the plaintiffs instituted this action they might not have been able or willing to give the required security; if applied to pending actions it might prevent these plaintiffs from trying the action after they had spent time and money in preparing it for trial. Though the Legislature has found that the statute is a just and reasonable solution of a serious problem, it does not follow that it would decide that it would be just and reasonable to apply the statute to actions then pending. * * *

"It is said that, when the Legislature provided that the defendant is entitled to require the plaintiff or plaintiffs to give security 'in any action instituted or maintained in the right of any foreign or domestic corporation,' it disclosed an intention that the statute should apply not only in actions thereafter instituted but also in actions previously 'instituted' and thereafter 'maintained'. The word 'maintained' may be used in a context where it clearly denotes that it includes pending actions. Cf. George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 53 S.Ct. 620, 77 L.Ed. 1265. In other context it has frequently been given other construction. See cases collated in 38 C.J., Maintain, §§ 2, 3, 4, 5. In the statute we are now construing it is at most equivocal and does not, we think, disclose an intent of the Legislature that it should be applied in actions previously instituted."

[10] Lastly, we are of the view that section 4 of the Corporations Code is pertinent. It provides that "No action * * commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." Certainly there is nothing in the quoted language which implies that section 834 shall not be applied to actions commenced after its effective date. Since the power of the state over the institution and maintenance of fiduciary actions of this character is plenary (Cohen v. Beneficial Loan Corp. (1948), supra, 337 U.S. 541, 550, 69 S.Ct. 1221, 93 L.Ed. 1528, there is no "right accrued" in the shareholder (to be accepted by the court as, in effect, a guardian *ad litem* for the corporation) to be affected and the declared policy of the state as to all procedure to be taken in derivative actions after the effective date of the statute should be given effect. (See Smallwood v. Gallardo (1927), 275 U.S. 56, 60–62, 48 S.Ct. 23, 72 L.Ed. 152.)

For the reasons above stated the order appealed from is affirmed.

SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The main question presented is whether section 834 of the Corporations Code is to be applied to past transactions, that is, retroactively, as in the case at bar. That section requires two things prerequisite to the maintenance of a derivative action by a corporation shareholder: (1) That he be a registered stockholder at the time the fraudulent transaction occurred and at the time of the commencement of the action, and (2) that he post security guaranteeing the payment of the expenses of the defense of the suit if he is unsuccessful.

Before discussing the main issue certain pertinent principles should be clarified inasmuch as the majority opinion either casts serious doubt upon them or repudiates them. The right to bring such an action is the established law of this state and elsewhere, except under the rules of procedure of the federal court, whether the shareholder *was or was not* a registered owner when the fraud was committed. It is a *substantial right* whether it be called procedural, property or otherwise. It is the *only* method whereby the fraud of the corporation management may be exposed and restitution obtained, contrary to the intimation of the majority opinion. In an attempt to ameliorate the serious consequence of its holding, the majority make the following highly misleading statements: "Stockholders, if they have a personal cause of action, are still free to sue the corporation, the majority stockholders, or the directors of the corporation, and to recover for any cause they can establish. * * * Plaintiff's stock is still his; any personal rights of action he may possess as attributes or incidents of the stock are still his and, as already noted, are completely unaffected by section 834." There can be no doubt that the majority is fully cognizant of the fact that there is no other remedy or cause of action known to the law available to obtain the relief sought, other than the one here involved. Historically speaking the remedy here sought is equitable, as will appear from the discussion to follow.

The majority cite and quote at some length from Whitten v. Dabney, 171 Cal. 621, 154 P. 312 relative to the capacity of a plaintiff in a so-called derivative action on behalf of a corporation and emphasis is placed upon the analogy made in that case between such a plaintiff and a guardian ad litem in the ordinary civil action. While this analogy strikes me as being inappropriate for obvious reasons, I can see no basis for resorting to terminology in order to impair plaintiff's right to prosecute a derivative action. It should be apparent that the analogy between a plaintiff in a derivative action and a guardian ad litem is wholly unrealistic as there is no requirement whatever that a guardian ad litem have any interest directly or indirectly in the subject matter or outcome of the litigation. He merely stands in the place of the plaintiff who lacks capacity to prosecute the action in his own name. Such is not the case when a corporation is in control of officers who have committed frauds which have resulted in pecuniary loss to its stockholders. There is no incapacity on the part of such corporation to seek redress for the loss sustained as the result of the fraudulent conduct of its officers, but the officers guilty of the fraud will not permit the corporation to sue in its own name to recover for the loss sustained. Hence, a stockholder who has indirectly suffered such loss in common with the other stockholders, has the right to prosecute such an action on behalf of himself and those similarly affected, including the corporation. Such right is a substantial property right as it may have the effect of substantially increasing the value of the shares of stock owned by the plaintiff by virtue of requiring the defrauding officers to return to the corporation the portion of its assets which they have misappropriated or misused to the detriment of not only the corporation but the shareholders thereof. While it is true as stated by the Supreme Court of the United States in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, that the plaintiff in such an action assumes a position of a fiduciary character, this does not mean that so far as his own interests are concerned, he is not acting for himself. The fiduciary capacity in which he serves is with relation to the corporation and the other stockholders whose interests he is seeking to advance in common with his own.

The rule here involved is stated in Fletcher Cyclopedia Corporations with supporting authorities: "In several of the states the rule is well settled that a stockholder may sue although he purchased his shares after the transaction complained of. And it is generally held immaterial that he purchased for the purpose of acquiring the right to sue. A subsequent stockholder cannot recover, however, even under this majority rule, (1) when he is not a bona fide stockholder, or (2) when himself guilty of acquiescence in the wrong, or (3) when himself guilty of laches, or (4) where the transferor of the stock would have been barred from bringing suit by laches or acquiescence or the like." (Fletcher Cyclopedia Corporations, [Perm. Ed.] § 5980.) The opposing view is chiefly represented by federal cases which are controlled by a rule of procedure (Fed.Rules of Civ.Proc., Rule 23[b]) similar to section 834. (Fletcher Cyclopedia Corporations, [Perm. Ed.] § 5981.) The majority rule has been established in this state. Harvey v. Meigs, 17 Cal.App. 353, 119 P. 941; see Earl v. Lofquist, 135 Cal.App. 373, 27 P.2d 416; Beal v. Smith, 46 Cal.App. 271, 189 P. 341. In the Harvey case the court said, 17 Cal. App. at page 364, 119 P. at page 945: "However this may be, both plaintiffs in any view have, on the showing made in the complaint, a right to prevent the payment of the fraudulent credits shown to stand on the company's books in favor of defendants. And if the defendants have without consideration and fraudulently appropriated $94,000 of the corporate funds which should be restored to its treasury, I fail to see why they have not a cause of action to compel such return even though they acquired their shares after such misappropriation. See the question fully considered in Just v. Idaho Canal & Irr. Co., 16 Idaho 639, 102 P. 381, 133 Am.St.Rep. 140." The majority opinion fails to point out any sound reason why a transferee of stock should not receive any rights of action incidental to ownership of the stock which the transferor had. There is no reason for doubting the soundness of the rule, for otherwise there is a grave question of discrimination. If a transferee cannot sue because he did not own stock when the fraud occurred, it would logically follow that if some qualified stockholder sued and recovered, the stock of the transferee could not benefit by the recovery. The benefit would have to go to his transferor. No one would advocate such a proposition. Hence it must follow that when the stock is transferred, the transfer carries with it the right to recover on behalf of the corporation for past frauds perpetrated by its officers. An expert in corporation law agrees that it is "* * * a sound rule on principle as each share represents an interest in the entire concern and the several shareholders are entitled to equal rights irrespective of when they acquired their shares. The corporate cause of action is enforced for the benefit of all the shareholders." (Ballantine, Abuses of Shareholders Derivative Suits: How Far is California's New "Security for Expenses" Act Sound Regulation? 37 Cal.L.Rev. 399, 414.)

Further, in this connection, and also pointing out the substantial character of the right, the United States Supreme Court has this to say in speaking of similar but less drastic New Jersey legislation than our section 834: "As business enterprise increasingly sought the advantages of incorporation, management became vested with almost *uncontrolled discretion in handling other people's money*. The vast aggregate of funds committed to corporate control came to be drawn to a considerable extent from numerous and scattered holders of small interests. *The director was not subject to an effective accountability.* That created strong temptation for managers to profit personally at expense of their trust. *The business code became all too tolerant of such practices.* Corporate laws were lax and were not self-enforcing, and *stockholders, in face of gravest abuses, were singularly impotent in obtaining redress of abuses of trust.*

"Equity came to the relief of the stockholder, who had no standing to bring civil action at law against faithless directors and managers. Equity, however, allowed him to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own. It required him first to demand that the corporation vindicate its own rights but when, as was usual, those who perpetrated the wrongs also were able to obstruct any remedy, equity would hear and adjudge the corporation's cause through its stockholder with the corporation as a defendant, albeit a rather nominal one. This remedy born of stockholder helplessness was long the chief regulator of corporate management and has afforded no small incentive to avoid at least grosser forms of betrayal of stockholders' interests. It is argued, and not without reason, that *without it there would be little practical check on such abuses.*" (Emphasis added.) Cohen v. Beneficial Loan Corp., 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528. And, speaking of the statutory requirement for security for expenses, 337 U.S. at page 555, 69 S.Ct. at page 1230: "However, it creates *a new liability where none existed before,* for it makes a stockholder who institutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims. Such liability *is not usual and it goes beyond payment of what we know as 'costs.'* If all the Act did was to create this liability, *it would clearly be substantive.* But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case. Therefore, a procedure is prescribed by which the liability is insured by entitling the corporate defendant to a bond of indemnity before the outlay is incurred. *We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device.*" (Emphasis added.)

In the face of those salutary and established principles the majority opinion arrives at the conclusion that section 834 was intended to apply to past transactions because, as to the expense security requirement, it is mere procedure, a proposition squarely contrary to the Cohen case, which holds that the requirement is more than for costs. That the statute would be given retroactive application in the instant case is clear. The last word by this court on the subject is that: "A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." Aetna Casualty & Surety Co. v. Industrial Accident Commission, 30 Cal.2d 388, 391, 182 P.2d 159, 160. There is by section 834 a requirement that security be posted by the plaintiff in derivative actions, and the plaintiff must have owned the stock when the fraud occurred. The right to maintain the action by one who acquired stock after the perpetration of the fraud without posting security for expenses both existed before section 834 was passed. If that section is applied in this case those rights are being affected. The new law is one, which in the language of the Aetna case, affects rights, obligations and conditions which existed prior to its adoption. That is true of both the expense and ownership requirements.

We thus come to the question of whether it was intended that section 834 should be applied retroactively. "It is an established canon of interpretation that statutes *are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.* * * * It is contended upon behalf of respondents that this rule of statutory construction has no application to procedural statutes, and that section 4661 relates solely to matters of procedure or remedy. Feckenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885; City of Los Angeles v. Oliver, 102 Cal.App. 299, 283 P. 298; San Bernardino County v. Industrial Accident Commission, 217 Cal. 618, 20 P.2d 673, and Davis & McMillan v. Industrial Accident Commission, 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095, are relied upon in support of the contention. In those cases, with one exception, it was held that the language of the statutes showed that the Legislature intended them to be applied retroactively, and the court was concerned mainly with the question of whether the Legislature has power to give those laws such retroactive effect. Since the question of the constitutionality of retroactive legislation and the question of the applicability of a rule of statutory construction are distinct (Ware v. Heller, 63 Cal.App.2d 817, 821, 148 P.2d 410, these cases are not in point. * * * If *substantial* changes are made, *even in a statute which might ordinarily be classified as procedural,* the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the *statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.*" (Emphasis added.) Aetna Casualty & Surety Co. v. Industrial Accident Commission, 30 Cal.2d 388, 393, 182 P.2d 159, 161. That the change in the law wrought by the adoption of section 834 is substantial and does affect existing rights is too obvious to require further discussion. True, section 834 states that no action may be "instituted or maintained", but that is not sufficient to abrogate the rule that to be construed as retroactive in operation on substantial rights a statute must clearly so state. In Shielcrawt v. Moffett, 294 N.Y. 180, 61 N.E.2d 435, 159 A.L.R. 971, the court had before it a New York statute similarly phrased, which required posting of security for costs if plaintiff in a derivative action owned less than a specified percentage of stock. The court interpreted the statute as not applicable to an action which was commenced before its adoption, and while it mentioned a possible distinction between that situation and where the action was commenced later, it emphasized the nature of the right affected as substantial and invoked the rule of construction against retrospective operation, stating, 61 N.E.2d at page 440: "It is said that, when the Legislature provided that the defendant is entitled to require the plaintiff or plaintiffs to give security 'in any action instituted or maintained in the right of any foreign or domestic corporation,' it disclosed an intention that the statute should apply not only in actions thereafter instituted but also in actions previously 'instituted' and thereafter maintained'. The word 'maintained' may be used in a context where it clearly denotes that it includes pending actions. Cf. George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 53 S.Ct. 620, 77 L.Ed. 1265. In other context it has frequently been given other construction. See cases collated in 38 C.J., Maintain, §§ 2, 3, 4, 5. In the statute we are now construing it is at most equivocal and does not, we think, disclose an intent of the Legislature that it should be applied in actions previously instituted." A reasonable interpretation is that the use of the phraseology in section 834 that no action may be "instituted or maintained" unless the stock ownership at the time of the transaction is alleged, and security is posted if required, is merely another way of stating that a shareholder has no right of action on behalf of the corporation unless those conditions exist or are complied with. Such construction carries no retroactive implication. It does not necessarily point to an intent to have the statute operate on accrued rights. At best those words are equivocal and must be read in the light of section 4 of the Corporations Code that: "No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible." True, reference is made to procedural statutes as applying to pending actions, but "rights" are also mentioned and here we have involved *substantial rights.* Section 4 is similar to a provision reading: "No part of it is retroactive, unless expressly so declared." (Civ. Code, § 3; Code Civ.Proc., § 3; Pol.Code, § 3.) That provision in those codes has been held to apply to amendments or additions to them as well as the original codes. Estate of Frees, 187 Cal. 150, 201 P. 112; Teralta Land & Water Co. v. Shaffer, 116 Cal. 518, 48 P. 613; Blade v. Superior Court, 102 Cal.App. 375, 283 P. 81.

Furthermore, it should be remembered that section 834 embraces the requirement of shareholding at the time named as well as the requirement of security in one cohesive coverage regulating derivative actions. It is not to be supposed that part of it is to be retroactive but not the remainder, the security mandate and stockholder prerequisite, for the first sentence purports to require all of the conditions to be on the same footing. There can be no doubt that the stock ownership requirement would operate upon a prior accrued right of vital importance.

In connection with the ownership requirement it should be observed that the majority opinion does not discuss that phase of section 834, with reference to retroactivity. It holds the expense-security requirement either is not being applied retrospectively, or even if it is, that is a proper construction of it. If such is true of that part of the section it must also be true of the ownership requisite, unless it is said that the parts of the section are severable, a problem heretofore mentioned by me but not even discussed in the majority opinion. If the majority thinks there is severability, it need not discuss the ownership feature. Otherwise it must.

The majority opinion endeavors to sidestep the ownership question by the statement: "As previously mentioned, * * * it was for failure to furnish the security as ordered that the action was dismissed. Thus as applied here the statute did not operate to absolutely preclude plaintiff from maintaining the suit; it merely required him to furnish the security if he were to proceed further in his fiduciary capacity." That is not true in any realistic sense. The majority concedes that the trial court based its dismissal of the action solely upon the fact that plaintiff was not an owner of stock when the fraud was committed. It was on *that basis, and that alone*, that the expense security was ordered by the court. The dismissal followed when the security was not furnished. But, nevertheless, it was in effect based upon the lack of stock ownership. It is idle to reason, as does the majority, that plaintiff was not injured because he could have posted the security and thus avoided dismissal. If he had supplied it, he would have suffered the burden imposed by section 834, and his complaint would be subject to dismissal on general demurrer for it shows that he was not an owner of stock when the fraud occurred.

Finally, it should be pointed out that there are grave questions of constitutionality involving equal protection of the law which were not decided in Cohen v. Beneficial Loan Corp., supra, 337 U.S. 541, 69 S.Ct. 1221, in connection with the requirement that security be posted to cover expenses including attorney's fees and that such expenses shall be allowed against the security if the action is unsuccessful. A situation is presented where the plaintiff must pay the defendant's attorney's fees if unsuccessful, but the defendant is not required to pay plaintiff's counsel fees if the latter wins. Such a statute is invalid unless there is some reason why plaintiffs are in a different position than defendants. See Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler Co., 260 U.S. 35, 43 S.Ct. 55, 67 L.Ed. 115; Atchison, etc., R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909. It may be argued that because of the danger of spite suits, bad faith suits, by stockholders in derivative actions it is proper to place those actions in a separate class, but that cannot apply here. Under section 834 plaintiff is to post security for attorney's fees when it appears on the motion therefor that the corporation would not benefit by the action. Suppose the court finds the corporation would probably benefit by the action, then the corporation should be required to post security for plaintiff's counsel fees, a wholly reasonable demand because the corporation is the one that benefits by the recovery; the action is on its behalf and ultimately for the good of all stockholders. Section 834 makes no such provision, however, and for that reason is strongly suspect of denying equal protection of the law.

I would therefore reverse the order of dismissal.

GIBSON, C. J., and TRAYNOR, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

110 Cal.App.2d 545

PEOPLE v. HARMON.

Cr. 2759.

District Court of Appeal, First District,
Division 1, California.

April 28, 1952.

Defendant was convicted in the Superior Court, in and for the County of San Benito, Thomas P. O'Donnell, J., of murder in the first degree, and he appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that instruction to effect that jury could consider confession even if it were false was not prejudicial to defendant though not supplemented by instructions concerning false statements made by person accused of crime, in view of fact that evidence, independent of confession, supported conviction.

Affirmed.

1. Homicide 🔑286(1), 289

In prosecution for murder allegedly committed during commission of robbery, instruction concerning intent to commit robbery so as to make crime murder in the first degree and general instruction relating to criminal intent were accurate and adequate.

2. Criminal Law 🔑1172(2)

In prosecution for first-degree murder, instruction to effect that even if confession were false jury could consider it was not prejudicially erroneous though not supplemented by instructions concerning false statements made by person accused of crime, in view of fact that there was ample evidence, independent of confession, to support conviction.

3. Homicide 🔑253(1)

Evidence, independent of confession, supported conviction for first-degree murder.

4. Criminal Law 🔑311, 331

Upon trial of issue of not guilty by reason of insanity, defendant had burden of proving his asserted insanity, and the state had the benefit of disputable legal presumption that he was sane.

5. Homicide 🔑270

Whether person convicted of first-degree murder was insane at time of offense was for jury. Pen.Code, §§ 1201, 1368.

6. Criminal Law 🔑778(3)

The plea of insanity is one of confession and avoidance and is predicated upon a finding of guilt beyond a reasonable doubt, and therefore person convicted of murder in the first degree was not entitled upon trial of issue of not guilty by reason of insanity to instruction in regard to presumption of innocence. Pen.Code, §§ 1201, 1368.

7. Criminal Law 🔑570(2)

On trial of issue of not guilty by reason of insanity, defendant must show by preponderance of evidence that he did not know nature or quality of act committed or that he did not know it was wrong to commit it, and must show that he was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. Pen.Code, §§ 1201, 1368.

8. Criminal Law 🔑625

The doubt mentioned in statute providing for hearing on question of sanity of accused prior to judgment when a doubt arises is such doubt as arises in the mind of the trial judge, rather than in the mind of counsel for defendant or in the mind of any third person, and the determination of a motion for a hearing upon issue of accused's sanity at time of trial is one which rests within sound discretion of court. Pen. Code, §§ 1201, 1368.

9. Criminal Law 🔑625

Court did not abuse discretion in denying motion by one accused of murder for inquiry as to his sanity at time of trial. Pen.Code, §§ 1201, 1368.

10. Criminal Law 🔑625

Record disclosed, contrary to defendant's contention, that trial court had not refused to entertain defendant's motion for a hearing on question of whether defendant was insane at time of trial. Pen.Code, §§ 1201, 1368.

◆

J. W. Lenahan, Burlingame, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Indicted for murder, the defendant was first tried upon his plea of "not guilty" and was found guilty of murder in the first degree, the jury fixing the penalty as confinement in the state prison for life. He was then tried before the same jury upon his plea of "not guilty by reason of insanity" and was found sane at the time the offense was committed. He moved for a new trial, which motion was heard and denied. He then requested a hearing under sections 1368 and 1201 of the Penal Code, which request was heard and denied. Thereupon judgment was rendered.

Defendant has appealed from the judgment and from the orders denying a new trial and a hearing under sections 1368 and 1201 of the Penal Code.

Defendant claims error (1) in instructions given on the issue of not guilty, (2) for asserted insufficiency of the evidence to support the verdict that he was sane when he committed the offense, and for failure of the court to instruct concerning the presumption of innocence, and (3) in the denial of his motion for an inquiry as to his sanity pursuant to the provisions of sections 1368 and 1201 of the Penal Code.

(1) *Concerning the trial on the issue of not guilty,* defendant claims error in respect to two instructions concerning intent and one relating to his confession.

These instructions on intent read as follows: "An essential element of the crime of which the defendant is accused is, intent, the law requiring that to constitute such a crime there must exist a union or joint operation of criminal conduct and criminal intent. However, this does not mean that one must know that such conduct is unlawful to be guilty of a public offense such as that charged against the defendant in this case. The intent to do the forbidden thing constitutes the criminal intent. The law requires that to be guilty of crime, one must intend the conduct that fits the description of the crime and must engage in that conduct knowingly and wilfully" and "the intent with which an act is done is manifested by the circumstances attending the act, the manner in which it is done, the means used, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity. For the purposes of the issues now on trial you must presume that the defendant was sane at the time of his alleged conduct which, it is charged, constituted the crime described in the indictment."

These instructions, defendant says, are correct as concerns general intent but that in this case the theory of the prosecution was that the decedent was killed by the defendant while engaged in the commission of robbery; in such a case, the law requires specific intent to commit robbery, for the killing to amount to murder in the first degree; therefore, these instructions on intent were incomplete and inadequate, prejudicially erroneous.

Defendant invokes the ruling in People v. Sanchez, 35 Cal.2d 522, 219 P.2d 9. In that case instructions similar to those above quoted had been given and the judgment was reversed for the refusal and failure of the court to give an instruction to the effect that intoxication must be taken into consideration in determining the specific intent. In the Sanchez case specific intent was an ingredient of some of the crimes charged (robbery and taking an automobile with intent to deprive the owner of its possession) and the defendant claimed intoxication as a defense, an issue from which the second instruction quoted diverted the attention of the jury in considering the defendant's mental condition.

[1] In the present case, the defense of intoxication was not presented by the defendant as an issue, and the defendant has selected but two instructions, criticising them as incomplete and ignoring many others that were given. The court by its instructions, viewed as a whole, fully and correctly advised the jury. We note, for example, to mention a few, that the court fully and correctly defined the various degrees of manslaughter and murder and the ingredients of each; the ingredients of robbery including specific intent; the meaning of such terms as "deliberate" and "premeditated";

the presumption of innocence; the requirement of joint operation of act and intent, and, in connection with intent, the mental condition of the defendant when the act was committed, his capacity or incapacity to form the intent, and the factors properly to consider in deciding such questions. The instructions as a whole were accurate and adequate on the point under discussion.

The defendant questions a portion of an instruction which the court gave on the subject of defendant's confession. The court, after (1) observing that evidence had been received tending to show that on an occasion other that this trial the defendant made a statement tending to prove his guilt, (2) defining what a confession is, and (3) advising the jury that, if it should find a voluntary confession was made, the jury was the exclusive judge as to whether or not the confession was true (in deciding which question the jury should consider all the circumstances connected with the making of the statement by the defendant as shown by the evidence), told the jury: "But even if you should find that a confession was false, either entirely or in part, it remains, nevertheless evidence for your consideration, to be given such significance as your judgment may determine under the instructions that I shortly shall give concerning false statements made by a person accused of crime."

Defendant claims the quoted portion was prejudicially erroneous because not supplemented by instructions concerning false statements made by a person accused of crime. His point is that the court thereby told the jury, "in effect, that if they believed defendant lied to the officers when he confessed his guilt, the fact that he had lied tended in some manner and to some degree to prove his guilt. Just how or to what extent was not stated. The jurors were to determine that for themselves, and according to their individual opinions as to what was expected of them in obeying the instruction." People v. Ford, 89 Cal.App.2d 467, 473, 200 P.2d 867. The state concedes that this was error but claims it was not prejudicial error. We find that the state's position is correct.

[2] The defendant did not testify at the trial. He had orally confessed to one of the police officers, giving a detailed account of his movements on the day of the killing. That confession was presented to the jury by the testimony of the officer. But there was ample evidence, quite independent of the confession, to support the verdict.

From defendant's confession it appeared that on December 13, 1950, he went by bus from Sacramento to San Francisco. On arrival he registered at a hotel under an assumed name; made application at a secondhand store to purchase a Luger pistol, giving his correct name and age. The next morning, December 14, he paid for the pistol, picking it up and also some cartridges. Later that day he took a taxicab, drove to a certain hotel and then to Pier 31 where he produced his pistol and told the driver "I want to get out of San Francisco, and you stay away from the bridges and stay away from the police." The driver went south on Bayshore Highway. Near Burlingame, defendant felt that the police would be looking for the cab so he instructed the driver to drive abreast another car. Defendant leaned out the window and with his gun waived the car to the side of the road. The cab and the car stopped, the cab about 50 to 100 feet in front. Defendant and the driver of the cab got out of the cab and while they were engaged in a discussion the driver of the other car escaped down the road at a high rate of speed. Defendant and the driver then reentered the cab and defendant felt that the people in the other car would inform the police so he told the driver to drive fast. Under defendant's orders the driver transferred to another road. Defendant asked the driver for his money and the driver gave him some dollar bills. Defendant felt that he could not let the driver go because he would tell the police. He thought he would have to get rid of the driver. When they got on the open highway, defendant had the cab stopped and told the driver to get out. They both alighted from the cab. (The spot was identified as nine-tenths of a mile from Highway 101 on the Chittenden Pass Road in San Benito County.) Defendant walked the driver away from the cab. He intended to knock the driver out with the gun. As they walked the driver looked as if he were going to take the gun away, so defendant fired the gun and the driver immediately dropped. Defendant went back to the cab. He had trouble starting it. He returned to the driver; turned him from his side to his back; searched him for more money and for matches to read the gas gauge. Defendant then drove toward Los Angeles in the cab. He did not sleep that night, although on one occasion he had tried; he thought the police would be looking for him. He drove all the way to Ventura, arriving there the next morning, December 15.

Independently of the confession, ample evidence in support of the verdict was adduced. One witness testified that as he was driving south on the Bayshore Highway, between Millbrae and Burlingame, a yellow cab drove alongside of him. Defendant was in the cab and ordered him to pull over, which the witness did, and stopped, thinking defendant had a gun. The cab stopped. Defendant got out, had a Luger pistol in his hand and was apparently giving instructions to the cab driver, talking and directing the driver, who seemed to be objecting. Seeing that the defendant was busy with the cab driver, the witness drove south at a high speed, 105 miles an hour, hoping he would be picked up by the highway patrol, that he might report the incident. He stopped at San Mateo and reported to the local police. Early the next morning, the cab driver was found lying, wounded, on the ground by the side of the highway near Hollister. He was taken to a hospital in Hollister for medical and surgical attention. The attending physician testified that the patient responded slowly to first aid measures. As he became conscious it was found that he was paralyzed from the neck down. An operation was performed to remove bony particles in the area of the spinal cord, which was in the pathway of the object which penetrated the neck. The patient improved for a few hours and then expired. The physician who performed an autopsy described the wound as caused by a foreign object which entered on the right rear side of the neck and passed through, across the vertebral column, leaving on the left side of the neck. Officer Nelder of San Francisco went to Hollister, December 15, to investigate the disappearance of a yellow cab and driver, and then to Ventura where the defendant had been apprehended. On the 16th he took the defendant to the cab driver in the hospital at Hollister. The driver identified defendant as the man who was in the cab, the man with the gun, the person who shot him. Defendant when arrested at Ventura had a Luger gun on his person, the very gun which the salesman of a San Francisco sporting goods firm testified the defendant ordered on December 13 and paid for and took with him on the 14th. Near the cab driver, when found by the highway patrol the morning of the 15th, there were several articles, one an empty cartridge case. A ballistics expert fired several bullets from this gun, compared their markings with those on the cartridge case found near the cab driver, and determined and testified that the latter was fired from this particular gun, defendant's gun.

This evidence, which supports the verdict independently of the confession, differentiates this case from People v. Ford, supra, 89 Cal.App.2d 467, 200 P.2d 867, in which "there was only slight circumstantial evidence of defendant's guilt aside from the confession." 89 Cal.App.2d at page 471, 200 P.2d at page 870. Our case is like People v. Liss, 35 Cal.2d 570, 219 P.2d 789; People v. Woods, 35 Cal.2d 504, 218 P.2d 981; and People v. Mize, 100 Cal.App.2d 584, 224 P.2d 452, in each of which the instruction under consideration was deemed erroneous but not prejudicial. In the Liss case there was an abundance of substantial evidence entirely independent of the confession to support the verdict. The independent evidence tended to prove that defendant had an opportunity to commit the theft charged. She had three times given a false name when questioned by the police officers, a fact which indicated consciousness of guilt. Also her failure to testify in her own behalf could have been considered by the jury as tending to indicate the truth of the evidence against her and as indicating that among the inferences which could reasonably be drawn, those unfavorable to her were the more probable. In the Woods case, the independent evidence was clear and convincing testimony to the transaction, supported by circumstantial evidence. In the Mize case, likewise, the independent evidence was abundant and substantial.

[3] In the instant case the independent evidence amply supports the verdict; also, defendant, as in the Liss case, by not testifying, made available to the jury the inferences mentioned in the Liss case. We may add, though not necessary to the decision on this point, that defendant has not suggested that his confession was other than wholly truthful or that Officer Nelder's narration of it was in the slightest degree inaccurate. Indeed, defendant's counsel at the conclusion of defendant's case said that, prior to Officer Nelder's testimony concerning the confession "I had every intention of having defendant testify but Mr. Nelder's account of those things, plus what was brought out by the doctors is so complete that I would not want to change any of it. I think it is true and I do not think I will take the time for repetition, so the defendant will rest."

(2) *In respect to the trial of the issue of not guilty by reason of insanity,* defendant claims that the evidence is insufficient to sustain the verdict. The record does not support his contention. Defendant claims that the testimony of five alienists, coupled with the absence of any testimony on this issue offered by the state, overcame and dispelled the presumption of sanity. This point is not well taken.

Three psychiatrists who testified on the trial of the plea of not guilty stated that in their opinion defendant did not have sufficient mental capacity to entertain any specific intent to commit a crime. Two of them testified that in their opinion defendant did not have sufficient capacity to form an independent judgment. At the trial of the plea of not guilty by reason of insanity, two court appointed alienists were the only witnesses. Each of them testified that in his opinion defendant did not understand the nature of his act. One testified that defendant did not have the capacity to differentiate right from wrong. The other testified that defendant would answer "Yes" if asked whether he thought a crime was wrong, that he would undoubtedly admit he knew he would be punished for a crime and would probably say that he knew what he was doing at the time he committed the crime.

[4, 5] Upon the trial of this issue, defendant had the burden of proving his asserted insanity. The state had the benefit of the disputable legal presumption that he was sane, a presumption that remained in to be weighed by the jury with all evidence adduced pro and con. We cannot say *as a matter of law* that the testimony of the alienists overcame this presumption. The jury had before it not only the presumption of sanity but also the conduct and demeanor of the defendant during both trials. In addition, certain portions of defendant's confession tended to indicate a consciousness of guilt and an awareness of the rightness or wrongness of his conduct. Thus, on the highway near Burlingame he attempted to switch cars because he felt the police would be looking for the cab. After failing in his attempt to get another car, he had the cab driver leave the scene at a high rate of speed and switch to another road as he felt the persons in the other car would inform the police. He was afraid to leave the cab driver because he would tell the police. He had the cab driver stop and get out of the car fearing that the cab driver was trying to signal with his lights. He walked the driver off the road and shot him when it looked as if the driver was going to take the gun away from defendant. He drove practically all night without sleep, for attempts to sleep were futile because he was afraid the police were looking for him.

People v. Chamberlain, 7 Cal.2d 257, 60 P.2d 299; People v. Babcock, 57 Cal.App.2d 54, 134 P.2d 54, and People v. O'Brien, 122 Cal.App. 147, 9 P.2d 902, furnish ample precedents for our conclusion upon this point.

[6, 7] Defendant speaks of the presumption of innocence and says there should have been an instruction in regard to that presumption. The presumption of innocence is not applicable upon the trial of the

issues under the plea of not guilty by reason of insanity. The defendant has already been tried and found guilty The presumption of innocence has already been overcome, for, as declared by statute, the effect of this presumption of innocence "is only to place upon the state the burden of proving him [the defendant] guilty beyond a reasonable doubt." Pen.Code, sec. 1096. The plea of insanity is one of confession and avoidance. It is predicated upon a finding of guilt beyond a reasonable doubt. People v. Troche, 206 Cal. 35, 44, 273 P. 767. Defendant has the burden of proof. He must show by a preponderance of the evidence that he did not know the nature or the quality of the act committed or that he did not know it was wrong to commit it. He must show that he was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. People v. Gilberg, 197 Cal. 306, 313, 240 P. 1000. We fail to see that the presumption of innocence played a part in the presentation of such a defense.

[8] (3) *Concerning the denial of defendant's motion for an inquiry as to his sanity under sections 1368 and 1201 of the Penal Code,* defendant claims that the trial judge harbored and announced a doubt as to defendant's sanity, wherefore the denial of the motion was prejudicially erroneous.

> "Section 1368 of the Penal Code provides: 'if at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined * * *.' The 'doubt' mentioned is one that must arise in the mind of the trial judge, rather than in the mind of counsel for the defendant or in that of any third person. People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123, and cases there cited, and the determination of a motion for a hearing upon the issue of a defendant's sanity at the time of trial is one which rests within the sound discretion of the court. Necessarily, an appellate court cannot measure to a nicety the basis for the ruling, and the trial judge must always be allowed a wide latitude. [Citations.]" People v. Lindley, 26 Cal.2d 780, 789, 161 P.2d 227, 232.

[9] We find nothing in the record of the present case that indicates an abuse of discretion.

[10] Defendant asserts the trial court refused even to entertain the motion, despite a doubt that was in the court's mind evidenced by the court's statement that defendant was perhaps mentally unbalanced. Neither point is well taken. Defendant presented his motion for a new trial and his motion for a hearing under section 1368 at the same time and the record indicates that the court listened and in no way curtailed his presentation of either motion. In denying the motion, the judge discussed various significant factors at some length. He referred to the fact that a jury on two occasions very recently had considered various aspects of the defendant's mental condition. The alienists did not convince him that "the boy, while perhaps mentally unbalanced, was none the less of sufficient mental capacity to know right from wrong. His entire conduct during the day in question and for a day or two preceding, all indicated to me that while possibly there was some mental quirk present in him, he still possessed sufficient mental ability to realize what he was doing and the nature and consequence of his act." The court was not there indicating doubt concerning defendant's sanity. Quite the contrary.

The judgment and the orders appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

110 Cal.App.2d 484

WALTER v. ADAMS, County Clerk, et al.
Civ. 8218.

District Court of Appeal, Third District,
California.
April 22, 1952.

Proceeding in mandate by E. L. Walter against E. G. Adams, as County Clerk and Registrar of Voters of Merced County and John A. Colburn, real party in interest, for order directing Adams to omit from ballots to be used at primary election the name of Colburn as candidate for office of Judge of Atwater Judicial District, wherein Colburn demurred to Walter's petition. The District Court of Appeal, Third District, Per Curiam, held that Colburn had abandoned his office as Atwater City Judge prior to assumption by county of responsibility for that court and, therefore, that he was not a judge of a superseded court who was thereby entitled to run for election to judgship in new district.

Demurrer overruled; writ of mandate to issue to Adams as County Clerk.

1. Officers 🔑63

Code provisions relating to events causing vacancy in office are not exclusive in their operation and an office may be vacated by abandonment when the officer manifests a clear intention to abandon the office and its duties, thereby creating a vacancy without the necessity of a judicial determination. Government Code, § 1770.

2. Officers 🔑63

Abandonment of a public office, which may be treated as constructive resignation, may be inferred from conduct, but what acts will constitute abandonment or implied resignation depend upon circumstances of the particular case and the controlling law.

3. Mandamus 🔑168(4)

In proceeding by primary election candidate for judgeship in judicial district against county clerk and another candidate to have county clerk remove from ballot the name of defendant-candidate on grounds that he could not qualify as judge of a superseded court, evidence established that defendant-candidate had abandoned his office as city court justice before responsibility for city court was assumed by county. Gen.Laws, Act 1880, § 1 et seq.

4. Judges 🔑29

Where judge of city court abandoned that office prior to date that judicial district created to absorb city court became effective, he was not, as of the effective date, a judge of a superseded court who, would be entitled to succeed to newly created court until the judicial district election. Gen.Laws, Act 1880, § 2.

5. Judges 🔑10

In act for the creation of judicial district, provision that judges of superseded courts should be judges of the newly created justice courts until election of successor, unless they disclaimed desire to so succeed to new court, would not be construed as having been intended to operate so as to abrogate general right of public officer to abandon his office. Gen.Laws, Act 1880, § 2.

6. Mandamus 🔑143(1)

Where matters which allegedly disqualified candidate for judgeship in justice court were not exclusively within his control and curable by him by election time, mandamus proceeding by another candidate to establish opponent's alleged disqualifications prior to election time was not premature. Code Civ.Proc. § 159a; Gen.Laws, Act 1880, § 1 et seq.

7. Elections 🔑126(4)

Former city court judge who had, by his acts, abandoned that office prior to date that county assumed responsibility for city court, and who was not an attorney, and who had not taken Judicial Council justice court examination, was not eligible to appear on primary election ballots as candidate for justice court. Gen.Laws, Act 1880, § 1 et seq.

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C. Ray Robinson by James A. Cobey, Merced, for appellant.

Dunne, Dunne & Phelps, San Francisco, Preston, Braucht & George, Merced, Don C. Mayes, Dist. Atty., Merced, for respondents.

PER CURIAM.

This is a proceeding in mandate by petitioner Walter to secure an order of this court directing respondent, the County Clerk of Merced County, to omit from the ballots to be used at the primary election to be held June 3, 1952, the name of John A. Colburn, the real party in interest herein, as a candidate for the office of judge of the Atwater Judicial District. (A judicial district created by action of the Board of Supervisors of that county, pursuant to the Municipal and Justice Court Act of 1949, as amended, Deering's General Laws, Act 1880.

From the pleadings it appears that Colburn, prior to August 1, 1951, and continuously thereafter until at least the 28th day of December, 1951, was admittedly the duly qualified and acting city judge of the City Court of Atwater, a sixth class city. Petitioner Walter was, prior to August 1, 1951 and continuously thereafter through December 31, 1951, the incumbent justice of the peace of Township No. 8 of said county and as such held court in the city of Atwater.

On August 1, 1951, at a meeting of the Atwater City Council, at which meeting Colburn was present, a motion was duly made and adopted that the city clerk be instructed to write the County Board of Supervisors requesting that the county assume the responsibility of the city court on January 1, 1952. Judge Colburn also attended a meeting of the City Council held on November 7, 1951, at which time "brought up the question of the new court system which was slated to be effective on January 1, 1952" (excerpts from minutes of Council meeting). At this meeting he stated to the Council "his understanding" concerning the disposition of revenue derived from "city arrests and violations", and after a brief discussion of that subject the same was tabled pending receipt of full information through the city clerk. On December 19, at a meeting of the City Council, at which Judge Colburn again was in attendance, a letter to the Council from Judge Walter was read wherein he requested the City of Atwater to deliver all of the records of the city court to his court on Saturday, December 29, 1951, "in order to enable him to work during the weekend and be ready to handle all business on January 1st. 1952" (excerpts from minutes of Council meeting). Apparently in pursuance thereto the Council at that meeting instructed the city clerk to contact one Uhle with regard to auditing the city court dockets and the books of Judge Colburn "for the reason of Colburn's termination of office on December 31st, 1951."

Although the answer of Judge Colburn to the petition alleges that on December 28, 1951, he, "in the presence of the city clerk and the chief of police of the City of Atwater and newspaper photographers", delivered to Judge Walter "as requested by said City Council" his seal of office but he denies that Walter thereupon took the oath of office of city judge but avers that at said time Judge Walter "took an oath of office as prospective judge of the justice court of the Atwater Judicial District so that petitioner might thereafter act as said judge of said justice court of the Atwater Judicial District when said court came into existence on January 1, 1952." Colburn further avers that "since January 2, 1952, [he] has not acted or purported to act as city judge of the city court of the City of Atwater."

On January 2, 1952, the City Council of Atwater, by a motion duly made and carried, appointed Judge Walter to "handle city court cases and that the records show that the appointment and transfer of records be retroactive to December 28, 1951."

At the hearing before this court on April 14, 1952, evidence of occurrences subsequent to December 28 was offered in evidence by petitioner subject to the court's ruling upon a motion to strike of Counsel for Judge Colburn. We have concluded that, with respect to those matters hereinafter mentioned, the motion must be overruled and the matters objected to considered as in evidence. From such evidence it appears that Judge Walter took an oath to perform the duties of city judge of the City of Atwater on December 28, 1951. Furthermore from the evidence it appears that Judge Colburn received and receipted for three traffic violation fines, signing the receipts "E. L. Walter, By J. A. Colburn"; that from December 28, 1951 through December 31, 1951, and after receiving the seal and the records of the city court Judge Walter presided as judge of said city court in matters then before it; and that on January 2, 1952, Judge Colburn accepted employment by the County of Merced in the capacity of a guard at the County Rehabilitation Center. It further appears that on February 16, 1952, in the City of Merced, the Judicial Council, pursuant to the provisions of said act, gave a qualifying examination for those who, although not attorneys, aspired to the office of judge of the new judicial districts, and that Judge Colburn did not take such examination.

Relying upon the foregoing summary of the facts petitioner seeks to prevent the respondent County Clerk from placing the name of Judge Colburn on the ballot for the June 3, 1952 primary election as a candidate for the office of justice of the Eighth Judicial District of Merced County. His primary contention is that the enumerated acts constituted an abandonment by Colburn of the office of city judge and therefore he was not a justice of a superseded court on January 1, 1952 as that term is used in the applicable statutes, and therefore Colburn is not now qualified to have his name appear on the ballot as mentioned. And as petitioner Walter was the incumbent of the Class B Justice Court on that date he was, in accordance with the provisions of the act, the only eligible judicial officer within the newly created judicial district, and hence the only one who could become the judge of said judicial district court and could remain as such until the election or appointment and qualification of his successor.

His argument in support of such contention rests in the main upon the provisions of the Municipal and Justice Court Act of 1949, Deering's General Laws, Act 1880, which provides in part, in section 2 thereof, that "On January 1, 1952, * * the judges or justices of existing courts inferior to the superior court in any city, township or judicial subdivision * * * for which a * * * justice court is established shall, if eligible, become and be the judges [or judge] of such * * * justice court until the election or appointment and qualification of their [his] successors as hereinafter provided. If, however, the number of incumbent judges or justices who are eligible to become judges of a * * * justice court and who have not by written statement filed with the county clerk on or before December 30, 1951, disclaimed their desire to succeed to office exceeds the number of judicial offices provided by law for such * * * justice court, said incumbents shall not automatically succeed to judicial positions in the * * * justice court, and the existing courts shall continue to function within the district until the first judge or judges of said * * * justice court shall be elected by the qualified electors of the district at the first general state election held following the expiration of 90 days and qualify."

He further relies upon the eligibility provisions as set forth in part of section 13 of the act, providing that "* * * the judges * * * of a justice court shall be electors of the judicial district * * * in which they are elected or appointed; provided, that this requirement shall not affect the right of any person to automatically succeed to an office or position under Sections 2, 3, and 4 of this act; * * *. No person shall be eligible to the office of judge of a justice court unless he either has been admitted to practice before the Supreme Court of this State or has passed a qualifying examination under regulations prescribed by the Judicial Council; provided, that this requirement shall not apply to the incumbent of a superseded inferior court who succeeds to the office of judge of a justice court or is elected thereto at the first election of judges under this act or who seeks re-election to such office."

Respondent contends that Government Code, section 1770 provides the exclusive method by which such an office can be vacated, that is, "an office becomes vacant on the happening of any of the following events before the expiration of the term: * * * (c) His resignation. * * *

(g) His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the State with the permission required by law." Also that there is no showing that any attempt was made to comply with the provisions of Government Code section 1750, which provides in part that "resignations shall be in writing, and made as follows: * * * (d) By all officers of a county or judicial district not commissioned by the Governor, to the clerk of the board of supervisors of their respective counties."

It is Colburn's argument that since he has not taken any of the steps specified in the code sections, and since the appointive body, i. e. the Atwater City Council took no official action to appoint a successor and thereby impliedly remove him from office until January 2, 1952, nor had he filed a disclaimer as provided for in section 2 of the Municipal and Justice Court Act of 1949, he was, on January 1, 1952, the incumbent city judge and therefore qualified to have his name appear on the June 3, 1952 ballot for the office in question. He further contends that even assuming the procedures set forth in the quoted sections are not exclusive and there may be an abandonment of an office nevertheless in order to constitute an abandonment the actions of the office holder must be voluntary and intentional.

[1, 2] Although, as respondent states, Government Code, section 1770 enumerates the "Events causing vacancy in office" and provides that "an office becomes vacant on the happening of any of the following events before the expiration of the term: * * * (c) His resignation", that is not to say that the quoted portion of said section is exclusive. In the early case of People v. Porter, 6 Cal. 26, 27, it was held that "the tenure of an office" depends on "the incumbent." The rule as stated in 43 Am.Jur. § 172, p. 26, is that "The abandonment of an office may be indicated by the action of the incumbent in voluntarily surrendering it to another under a mistaken belief that the latter has been elected as his rightful successor, or even by acquiescing in his own removal." and that text, speaking of the elements necessary to constitute such an abandonment, says in section 173, "In order to constitute an abandonment of office, the abandonment must be total, and under such circumstances as clearly to indicate an absolute relinquishment. Moreover, the officer should manifest a clear intention to abandon the office and its duties, although his intention may be inferred from conduct. If the acts and statements are such as clearly indicate absolute relinquishment, a vacancy is thereby created without the necessity of a judicial determination." Also in McQuillin on Municipal Corporations, Vol. 3. § 12.123, p. 439, it is stated that "An office may be vacated by abandonment. Abandonment may be treated as a constructive resignation. * * * But what acts will constitute abandonment or implied resignation of an official depend, of course, upon the circumstances of the particular case and the controlling law."

In line with the general rule this court in People v. Davidson, 2 Cal.App. 96, 83 P. 159, held that a finding that one person had abandoned the office of constable was sustained by the evidence where it appeared that Herson, under the belief that one Peters was the successful candidate for the office of constable, vacated his office, gave Peters his badge, pistol, handcuffs, acquiesced in Peters' desire to appoint him a deputy, took the oath as such deputy and continued to thereafter so act. These facts, the court says, "conclusively show a surrender and abandonment."

[3] In the present case the facts show that over a long period beginning in August 1951, to the date he filed his intention to become a candidate for the office, Colburn evidenced no intent to retain the office of city judge; to the contrary he acquiesced and participated both actively and passively in a series of events culminating with the public ceremony on December 28, 1951; he participated with the City Council in a discussion relative to the merger of the two courts on January 2, 1952; he advised the Council concerning matters involved in the merger; he raised no objection when the Council discussed the "termination of his court on January 2,

1952"; he voluntarily delivered the records of his court, including the seal thereof, to Walter; he signed Walter's name by his own to the records of the city court on December 30, 1951; he acquiesced in Walter's acts as city judge between December 29 and December 31; he took employment by the County of Merced in a position wholly incompatible with that of a judge of the Atwater Judicial District; he did not by word or act evidence any intent whatsoever to retain his position as judge of the city court of Atwater. We cannot interpret these actions in any other manner than that Colburn voluntarily intended to and did effect an abandonment of his office as city judge on December 28, 1951.

[4] Colburn further contends he is eligible to have his name placed on the primary ballot by reason of the fact that he has not filed a disclaimer of his desire to be a candidate for the office of judge of the new judicial district as provided in section 2 of the Municipal and Justice Court Act of 1949, and that by virtue of said provision he cannot be held to have abandoned his office; the essence of the argument in this regard appears to be that in the absence of a formal resignation on his part the disclaimer provided for in said section is the only other means by which he could have removed himself from eligibility.

[5] It necessarily follows that if we are correct in our conclusion herein that Colburn abandoned his office as of December 28, 1951, then the provisions contained in said section 2 are of no materiality. He was not an incumbent of a superseded judicial office on January 1, 1952, hence the disclaimer provision has no application as to him. Furthermore we do not construe this provision as having been intended to, or that it did, operate so as to abrogate the general right of a public officer to abandon his office.

[6, 7] Colburn's final contention is that the petition for the writ is premature. In support thereof he argues that to grant the writ at this time would be to hold that eligibility must be established prior to the election—a conclusion contrary to the rule of this state.

The petition alleges that it is not denied that "Neither Petitioner nor the Real Party in Interest has been admitted to practice before the Supreme Court of this State and neither has taken the qualifying examination for judge of a justice court under regulations prescribed by the Judicial Council." The record before us further shows that on February 16, 1952, the Judicial Council, acting in pursuance with the provisions of the act, conducted such an examination in the City of Merced.

We cannot agree with his argument that under such circumstances he could conceivably fulfill all of the requirements of a candidate for such office as of the date of election, June 3, 1952.

The situation thus presented is not at all analogous to that in the case of Samuels v. Hite, 35 Cal.2d 115, 216 P.2d 879, the case relied upon by Colburn. There can be no question but that the legislature provided three qualifications of eligibility, (1) incumbency as of January 1, 1952, (2) admission to the practice of law or (3) the successful passing of an examination prescribed by the Judicial Council.

It may be argued that in the Samuels case if the candidate could have shown (which he could not) that he would have been eligible as of the date of the election he would have satisfied the requirements of section 159a of the Code of Civil Procedure. However, that is not the situation presented in the instant case. Here the condition of Colburn's eligibility was not something exclusively within his control such as the taking of the qualifying examination given by the Judicial Council. In fact, as stated, such an examination was given on February 16, 1952 but that he failed to avail himself of the opportunity to take the same. Furthermore the condition of his eligibility was not such as could be met by the mere passage of time as may be inferred in the Samuels case, since he admits he is not licensed to practice law in this state. Therefore, in the absence of any showing to the contrary,

> either more or less than the aggregate amount called for in the surveys of the tracts within it, the proper course is to apportion the excess or deficiency among the several tracts. So, in the absence of any agreement or question of title by adverse possession, shortage in a block which has been platted into lots will be prorated among the several lots".

The judgment is reversed, with directions to proceed in accordance with the views herein expressed.

PEEK, J., and SCHOTTKY, J. pro tem., concur.

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110 Cal.App.2d 539

KLASSEN v. BURTON et al.

No. 14994.

District Court of Appeal, First District,
Division 1, California.

April 28, 1952.

Rehearing Denied May 28, 1952.

Hearing Denied June 26, 1952.

Taxpayer's action by R. A. Klassen against Edward R. Burton, and others, as councilmen of the City of San Carlos, and others, to test the validity of a city ordinance which created a city manager form of government. The Superior Court, San Mateo County, Murray Draper, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Bray, J., held that the fact that the emergency clause of the ordinance was unconstitutional did not impair the validity of the remainder of the ordinance, where the adoption of the ordinance was sufficient to comply with the law as to a nonemergency measure, and the ordinance contained a saving clause declaring that the council would have passed the ordinance irrespective of the unconstitutionality of any part thereof.

Affirmed.

Municipal Corporations 🔑111(4)

Fact that emergency clause of city ordinance establishing city manager form of government was void as in violation of initiative and referendum clause of Constitution, did not impair validity of the remainder of the ordinance, where adoption of ordinance was sufficient to comply with law as to a nonemergency measure, and the ordinance contained a saving clause declaring that the council would have passed the ordinance irrespective of the unconstitutionality of any part thereof. Government Code, § 36937; Const. art. 4, § 1.

J. W. Coleberd, Richard P. Lyons, South San Francisco, for appellant.

L. John Waldier, San Carlos, for respondents.

BRAY, Justice.

This appeal by plaintiff from a judgment entered in favor of defendants raises the single question—is a void emergency clause severable from the other clauses in an ordinance of a sixth class city?

Facts.

There is no conflict as to the facts. Plaintiff brought this taxpayer's action to test the validity of Ordinance No. 217 adopted by the City Council of San Carlos, a municipal corporation of the sixth class. The purpose of the ordinance is shown by its title: "* * * Creating and Establishing a City Manager Form of Government for Said City, Defining the Authority, Powers and Duties of the City Manager * * *." Among other clauses is one to the effect that if any part of the ordinance is held unconstitutional, such decision shall not affect the validity of the rest of the ordinance, and the council declares that it would have passed the ordinance irrespective of the unconstitutionality of any part of it.

Then follows the clause which constitutes the basis for the attack here: "This Ordinance is hereby declared to be an Ordinance for the immediate preservation of the public health, welfare and safety on the ground and for the reason that there is a vacancy in an important office in the City of San Carlos, to-wit: the office of

City Manager, and it is necessary that this office and department of said City be immediately administered in conjunction with the City Manager form of government created and established in this Ordinance for the best interests and immediate advantage of the citizens of San Carlos. Therefore, this Ordinance shall take effect immediately * * *."

The ordinance was adopted and published in all respects as required by law. The council in nowise acted under the ordinance until approximately four months after its adoption, when it appointed defendant Brod city manager. (The other defendants are officials of San Carlos.) Under the statutes governing sixth class cities a nonemergency ordinance does not take effect for thirty days. Government Code, § 36937. The form of the action was to recover salaries paid defendant Brod as such city manager and to enjoin future payments.

Validity of Ordinance.

Plaintiff contends that the ordinance is void in toto because of the unconstitutionality of the emergency clause. It is conceded that that clause is void as in violation of article IV, section 1 of the Constitution (the initiative and referendum clause) which so far as material here reads: "* * * *no measure creating or abolishing any office* or changing the salary, term or duties of any officer, or granting any franchise or special privilege, or creating any vested right or interest, *shall be construed to be an urgency measure.*" (Emphasis added.) That section also requires "a yea and nay vote, upon a separate roll call" as to the statement of facts constituting the urgency. That was not done. Plaintiff contends that the invalidity of the emergency clause voids the entire ordinance. Defendants contend, and we agree, that this clause is separable and hence the ordinance is otherwise valid. It is obvious from the language of the saving clause above-mentioned that it was the intention of the council as evidenced in that clause to adopt the ordinance even though the emergency clause falls. Plaintiff relies heavily on Brown v. Boyd, 33 Cal.App.2d 416, 91 P.2d 926, 928. In that case a San Francisco ordinance adopted as an emergency measure created three additional peace officers. It was declared an urgency measure "because of the imminent expiration of the civil service list of eligibles for captains", etc. Section 13 of the San Francisco charter, St.1931, p. 2973, requires that an ordinance not be passed until "after two readings and votes at separate meetings of the board, which meetings shall be at least ten days apart. * * *" The ordinance was not so adopted. Considering it to be an emergency measure, it was adopted at the first reading. The main question considered by the court was whether the San Francisco charter was limited by section 1, article IV of the Constitution (supra). The court held that it was and the ordinance being one creating an office "was such an ordinance as could not be declared an urgency measure under the constitutional limitation. It was void in its inception * * *." 33 Cal.App.2d at Page 423, 91 P.2d at page 930.

Plaintiff argues that this decision and particularly the court's language "It was void in its inception * * *" is a holding that an emergency clause in an ordinance creating an office is inseparable from the rest of the ordinance and invalidates the whole. That question was not before the court. There the entire ordinance had to stand or fall on the emergency clause, because the ordinance had not been adopted by the proceedings required for a nonemergency measure. In our case, however, the method of adoption was such as required of nonemergency measures.

In determining the severability of an emergency clause in an ordinance it is of some value to consider the purpose of section 1, article IV of the Constitution as shown by its language. The section is dealing with the initiative and referendum, and generally requires a specified period before a legislative measure may go into effect. This is to give an opportunity for a referendum. It then provides, in effect, that where there is a public urgency the measure may take effect immediately, that is, before there can be a referendum. However, it apparently does not intend that this limitation on the right of referendum shall apply to certain types of measures, the creation of an office being one type, and therefore provides that as to these there can be no urgency which might interfere with the right of referendum. So, where a measure is adopted containing an emergency clause which is void, if the adoption of the measure was sufficient to comply with the law as to a nonemergency measure, and the legislative body indicates that it would have adopted the measure without the urgency clause, there is no good reason why the void clause may not be separated from the balance of the measure. The people still have the right of referendum before the measure takes effect. In the two cases of Stockburger v. Jordan, and Stockburger v. Riley, cited as Stockburger v. Jordan, 10 Cal.2d 636, 76 P.2d 671, the court had somewhat the same question as we are considering, as concerned a measure of the state Legislature. Chapter 304, Statutes of 1937, p. 665, relating to certain oil lands owned by the state, granted certain extensive powers to the director of finance. The act contained an urgency clause, providing that the act should take effect immediately. Notwithstanding this clause, a referendum was brought against the act. The court held that the urgency clause was void as in violation of section 1, article IV of the Constitution, as it changed the duties of the director, that section prohibiting the changing of the duties of an officer by an emergency measure. It then held that although ineffective as an emergency measure, it was subject to the referendum, and one having been filed, the act could not go into effect until there was a favorable vote of the people. Clancy v. Stockburger, 10 Cal.2d 651, 76 P.2d 678, a companion case to the two other Stockburger cases (supra), states that the court in those cases "held that chapter 304, Statutes of 1937, was not an emergency measure, and, therefore, as a referendum petition * * * had been filed against said measure, the same was ineffective until it had been approved by the vote of the electors * * *." Were the contention made by plaintiff in our case the law, that is, if the urgency clause falls the entire measure falls, the court in the Stockburger cases would have held that the statute enacting chapter 304 would not be subject to referendum because, it having been determined that the emergency clause was void, the entire statute would be void and there would be nothing for a referendum to apply to.

Morgan v. City of Long Beach, 57 Cal. App. 134, 207 P. 53, dealt with an ordinance creating an office, which ordinance contained an urgency clause. The clause, however, set forth no facts showing the urgency. This court did not directly pass on the validity of the clause but stated, 57 Cal.App. at page 139, 207 P. at page 55: "* * * assuming, as claimed by respondent, that no facts existed justifying the declaration of urgency contained in the ordinance, it was not void by reason of such fact, but, at most its operative effect was postponed until thirty days had elapsed * * *." In denying a petition for hearing the Supreme Court after pointing out that the judgment had been reversed and there would be a new trial, stated that the defendant should be allowed to prove that there was no foundation in fact for the statement of urgency in the ordinance, and said, 57 Cal.App. at page 140, 207 P. at page 55: "If the court should find that there was no such foundation, the declaration would be ineffectual to bring about the immediate taking effect of the ordinance, and it would not take effect for 30 days after its passage * * *."

In People v. Phillips, 76 Cal.App.2d 515, 173 P.2d 392, it was contended that the penal statute under which the defendant was convicted was unconstitutional on two grounds, one of which was that it was passed as an urgency measure but no emergency existed and no facts showing one were set forth in the act. As to this ground the court stated, 76 Cal.App.2d at page 521, 173 P.2d at page 396: "Under the general rule if no emergency existed or the urgency declaration were invalid that would not impair the validity of the remainder of the statute which would take effect at the regular time appointed by law. [Citations.] California cases are in accord with this principle. [Citations.] Hence here in any event the statute became effective 'ninety days after the final adjournment of the session of the Legislature which passed such act' (California Constitution Art. IV, § 1) and is not subject to this type of attack by the appellant at this late date."

These cases are all distinguishable from Brown v. Boyd, supra, 33 Cal.App.2d 416, 91 P.2d 926, in that in all of them the mechanics of adopting the measures in question were those applicable to a non-emergency measure, while in the Brown case they were not.

We cannot agree with plaintiff's contention that the urgency clause is so connected with the rest of the ordinance as to be inseparable therefrom or as to render the ordinance inoperative as a complete legislative enactment excluding the urgency clause therefrom. The urgency matter, the necessity for an immediate city manager form of government, was not of such a type that a thirty-day delay would make it inadvisable, impracticable or undesirable to still have it. As well said by the Honorable Murray Draper in the court below, in referring to the Brown case, "The very core of that ordinance was the urgency clause. Either the Ordinance was effective at once or it could never have any effect." Here the action of the council shows that the urgency clause was not a vital part of the ordinance. They took no action whatever under the ordinance until more than thirty days had elapsed. Action was neither required nor taken until well after the time the ordinance would have become effective if it contained no urgency clause. Of course, the action of the council after the adoption of the ordinance cannot affect the validity of the ordinance when passed. We have referred to it, not for that purpose, but to show how inessential to the ordinance as a whole the urgency clause is. There is no reason to hold that that clause is an essential part of the ordinance and its invalidity does not destroy the entire ordinance. This is not a situation to which the following language in In re Portnoy, 21 Cal.2d 237, 131 P.2d 1, quoted by plaintiff, applies. "* * * where the invalid portions of the statute are so connected with the rest of the statute as to be inseparable, it is clear that the entire act must fall." 21 Cal.2d at page 242, 131 P.2d at page 3. Rather it is one to which the following language from the same case applies: "The rule is well settled, where such a severability clause is included, that the valid portions of a statute or ordinance which is partially unconstitutional will be upheld if the remaining portion is severable and constitutes a completely operative expression of the legislative intent." 21 Cal.2d at page 242, 131 P.2d at page 3.

In view of our decision it becomes unnecessary to discuss plaintiff's contention that defendants are liable to the city for an illegal expenditure of public money. Such contention was based on the claim that the entire ordinance was void. As we have held it to be valid, the contention falls.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

KRIEGER et al. v. BULPITT et al. *

Civ. 18660.

District Court of Appeal, Second District, Division 2, California.

April 28, 1952.

Hearing Granted June 26, 1952.

Attorneys sued a former client, on contract, entered into in lieu of retainer, for plaintiffs to defend former client in divorce proceeding in return for 10% of property they obtained for him as his sole property as result of settlement or litigation. The Superior Court, Los Angeles County, Thurlow T. Taft, J., entered summary judgment in favor of plaintiffs and they levied execution upon an airplane which had been sold about three weeks before to claimant. The claimant filed a third party claim to the airplane and sought to have its title determined. The Superior Court, Los Angeles County, Taft, J., found that the former client was owner of the airplane, that the claimant held the unpaid balance of the purchase price in trust for the former client, and that the sum should be applied to the payment of plaintiffs' judgment, and entered judgment accordingly, and the claimant appealed. The District Court of Appeal, McComb, J., held that contract for contingent fees in divorce proceedings was void as against public policy and that judgment entered upon it was unenforceable.

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* Subsequent opinion 251 P.2d 673.

Judgment reversed with directions to enter judgment in favor of the claimant.

1. Judgment ⚷485

Whether a judgment is void on its face must be determined from an inspection of the judgment roll alone.

2. Judgment ⚷27

If a judgment is void there is nothing which the parties can do either by conduct, stipulation or judicial decree which will give it validity.

3. Contracts ⚷138(1)

A contract which is void as against public policy is entirely unenforceable.

4. Judgment ⚷486(1)

A judgment or decree attempting to enforce a contract which is void as against public policy does not impart any validity to contract and such judgment is subject to attack in a collateral proceeding.

5. Contracts ⚷138(4, 6)

The doctrine of estoppel is inapplicable to a contract which is void as against public policy and the court, of its own motion, will refuse to enforce such contract when its invalidity becomes apparent.

6. Attorney and Client ⚷147

A contract between an attorney and client in a divorce action for a contingent fee is against public policy and is void.

7. Attorney and Client ⚷147
Contracts ⚷138(6)

A contract between divorce suit defendant and his counsel, made in lieu of retainer, for ten percent of the amount of property obtained for defendant as his sole property as the result of settlement or litigation, was void as against public policy and could not be given vitality by any act of the parties or the court, and it was duty of the court, on its own motion, to refuse to enforce judgment on the contract when the invalidity appeared.

8. Contracts ⚷138(1)

In attorneys' suit on fee contract, which was in fact void as against public policy because it provided for contingent fees in divorce proceeding, judgment for attorneys would not be affirmed on theory that void contract was evidence of the reasonable value of attorneys' services.

Alexander Ruiz, in pro per.

Arnold D. Krieger and Morgan W. Gordon, Beverly Hills, for respondents.

McCOMB, Justice.

From a judgment determining that defendant was the owner of a Beechcraft airplane, No. NC 66440, and that third party claimant (Alexander Ruiz) held the proceeds of the sale of the airplane in trust for defendant, Mr. Ruiz appeals.

Chronology

1. On or about March 8, 1949, defendant and plaintiffs entered into an agreement reading as follows:

"March 8, 1949

"Krieger, Harper & Klein
139 South Beverly Drive
Beverly Hills, California
"Re: Bulpitt vs. Bulpitt
Superior Court No. SMD–6373
"Gentlemen:

"I have heretofore employed you as my attorneys to represent me and my interests in the above entitled divorce proceeding. You have, at my request, filed substitution of counsel, appeared at a hearing, and have expended time and effort investigating and familiarizing yourself with the issues.

"Being mindful of the considerable amount of services which will be required and the fact that the plaintiff, by and thru her attorney, is seeking to obtain all of the property jointly belonging to Dr. Helen Bulpitt and myself, and the difficulties which necessarily will be encountered in obtaining a sizable portion of said estate for me by way of settlement or litigation, and being unable at present to give you a retainer, as requested by you, or to pay for your services as rendered herein, I propose an offer to you of the following contingent arrangement with regard to payment of your fees: I do agree and propose to pay you for your services rendered and to be rendered herein a sum equivalent to ten per cent (10%) of the amount of property, both real and personal, which you may obtain for me as my sole property by way of settlement or litigation, it being understood that the payment to you shall be fixed and determined in accordance with the values on such real and personal property, accounts receivable, chattels, choses in action, and shall be the appraised value thereof as fixed and determined by an appraiser or appraisers; it being understood, however, that in any event, the amount of your fee shall not be less than five thousand dollars ($5,000.00), nor more than $7,500.00.

"Your signature affixed hereunder shall constitute your acceptance of the foregoing arrangement for payment of your fees, which shall thereafter constitute our written agreement.

"Paul A. Bulpitt, M.D.
Paul Adams Bulpitt.

"Accepted:

"Krieger, Harper & Klein,
By A. D. Krieger."

2. Pursuant to said employment plaintiffs negotiated a property settlement with the attorneys for defendant's wife; defendant orally approved the agreement but thereafter refused to execute it and permitted his wife to obtain an interlocutory decree of divorce by default in the action which she had previously filed against him.

3. After defendant refused to pay plaintiffs an attorneys' fee pursuant to his agreement of March 8, 1949, they instituted an action against him alleging the express contract and the trial court granted a summary judgment in plaintiffs' favor making the following specific findings of fact:

"That on the 8th day of March, 1949, the parties herein did enter into a written agreement, by which the defendant promised and agreed to pay plaintiffs as their fees and compensation a sum equal to ten per cent (10%) of the appraised value of the property, both real and personal, which plaintiffs obtain for defendant as his sole property by way of settlement or litigation in the suit then pending, entitled 'Helen Green Bulpitt vs. Paul Adams Bulpitt.' That the defendant, in said written agreement, contracted to pay plaintiffs a stipulated minimum fee of Five Thousand Dollars ($5,000.00) for their services, with a maximum fee therein fixed at Seventy-five Hundred Dollars ($7500.00).

"4. That each and all of the material allegations in plaintiffs' complaint are true, and that plaintiffs are entitled to compensation in accordance with said written agreement. That plaintiffs have failed to establish, however, the maximum fee fixed and stipulated in said written contract between the parties, but have fully established the right to the allowance of the minimum fee therein fixed and stipulated in the sum of Five Thousand Dollars ($5,000.00)."

4. Defendant discharged plaintiffs as his attorneys and employed third party claimant to represent him and on the 30th day of March, 1951, third party claimant purchased from defendant the Beechcraft airplane here in question.

5. On April 16, 1951, plaintiffs levied execution issued pursuant to the summary judgment which they had obtained against defendant, upon the Beechcraft airplane.

6. Mr. Ruiz filed a third party claim to the airplane and sought to have title determined pursuant to the provisions of section 689 of the Code of Civil Procedure. After hearing, the court found third party claimant was not the owner of the airplane, but that defendant was the owner thereof and $3,701.66, the sum remaining in third party claimant's possession as the balance of the purchase price obtained upon the sale by him of the airplane, was

held by him in trust for the benefit of defendant, and the sum should be applied to the payment of plaintiffs' judgment against defendant.

Judgment was entered accordingly.

The sole question involved on this appeal is:

Was the judgment obtained by plaintiffs against defendant void?

This question must be answered in the affirmative and is governed by these pertinent rules:

[1] (1) Whether a judgment is void on its face must be determined from an inspection of the judgment roll alone. (Hunter v. Superior Court, 36 Cal.App.2d 100, 112[7], 97 P.2d 492.)

[2] (2) If a judgment is void there is nothing which the parties can do either by conduct, stipulation or judicial decree that will give it validity. (Hunter v. Superior Court, supra, 36 Cal.App.2d at page 113[8], 97 P.2d 492.)

[3, 4] (3) A contract which is void as against public policy is entirely unenforceable. A judgment or decree attempting to enforce it does not impart any validity to it, and such judgment is subject to attack in a collateral proceeding. (Hunter v. Superior Court, supra, 36 Cal.App.2d at page 114, 97 P.2d 492; cf. McFayden v. Town of Calistoga, 74 Cal.App. 378, 384[6], 240 P. 523.)

[5] (4) The doctrine of estoppel is inapplicable to a contract which is void as against public policy and the court, of its own motion, will refuse to enforce such a contract when its invalidity becomes apparent. (Brown v. Brown, 8 Cal.App.2d 364, 368[4], 47 P.2d 352.)

[6] (5) A contract between an attorney and client in a divorce action for a contingent fee is against public policy and is void. (Newman v. Freitas, 129 Cal. 283, 289*, 61 P. 907, 909, 50 L.R.A. 548; cf. Hill v. Hill, 23 Cal.2d 82, 87, 142 P.2d 417.

The statements in Ayres v. Lipschutz, 68 Cal.App. 134, 139[5], 228 P. 720, relied on by plaintiff, which tend to indicate a different rule are not the law for the reason that the Supreme Court in denying a hearing expressly reaffirmed the rule in Newman v. Freitas, supra.

[7] Applying the foregoing rules to the facts of the instant case, an examination of the judgment roll discloses that the judgment which plaintiffs obtained against defendant was predicated upon a contract for a contingent fee in a divorce action which, under rule (5), supra, was a void contract as against public policy and therefore under rules (2), (3) and (4), could not be given vitality by any act of the parties or the court, it having been the duty of the court, on its own motion, to refuse to enforce the judgment when the invalidity appeared.

[8] There is no merit in plaintiffs' argument that the void contract was evidence of the reasonable value of their services and that we should therefore affirm the judgment, because the trial court did not predicate its judgment upon the reasonable value of services rendered but gave judgment upon the theory of an express contract.

For the foregoing reasons the judgment is reversed with directions to the trial court to enter a judgment in favor of third party claimant. The purported appeals from other orders are dismissed.

MOORE, P. J., and FOX, J., concur.

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* In Newman v. Freitas, Mr. Justice Van Dyke, speaking for the Supreme Court of California, in referring to a contract for a contingent fee in a divorce action, thus states the rule: "Therefore any agreement for divorce, or any collateral bargaining promotive of it, is considered unlawful and void. (2 Bishop on Marriage, Divorce, and Separation, sec. 696; Greenwood on Public Policy, 490.)"

110 Cal.App.2d 672

McKAY v. COCA-COLA BOTTLING CO. OF SANTA BARBARA et al.

Civ. 18752.

District Court of Appeal, Second District,
Division 3, California.
April 30, 1952.

Proceeding in the matter of the petition of John J. McKay, in a representative capacity for, by and on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 186, its officers and members, for an order confirming an award in arbitration, against Coca-Cola Bottling Co. of Santa Barbara, Frank Gandolfo, and another, individually and as copartners doing business under the firm name and style of Coca-Cola Bottling Co. of Santa Barbara. The Superior Court of Santa Barbara County, Atwell Westwick, Hugh E. Brierly, JJ., entered a judgment adverse to the defendants and entered an order quashing writ of execution and defendants appealed. The District Court of Appeal, Shinn, P. J., held that a clause of collective bargaining agreement meant that defendant could adopt more favorable wages or other conditions granted to a competitor by union, or suffered or permitted to be enjoyed by such competitor, except as were established by arbitration to which union was a party, and did not mean that once wages of defendant's drivers were fixed by arbitration the protection conferred by clause against favoritism being shown to defendant's competitors was lost.

Judgment and order affirmed.

1. Labor Relations ⊂⊃257

Provision of collective bargaining agreement entered into between labor union and defendant employer providing that contract could be reopened each year for negotiation of wages, hours and conditions of employment, and providing for arbitration if parties could not agree, and provision that provision of agreement between union and competitor of defendant more favorable to defendant's competitor than terms of defendant's agreement should be deemed applicable to defendant's agreement at defendant's option, would be harmonized and each would be given effect in accordance with intentions and purposes of parties. Civ.Code, §§ 1641, 1642, 1650.

2. Labor Relations ⊂⊃257, 433

Under collective bargaining agreement entered into between labor union and defendant employer providing that contract could be reopened each year for negotiation of wages, hours and conditions of employment, and providing for arbitration if parties could not agree, and providing that provision of agreement between union and competitor of defendant more favorable to defendant's competitor than terms of defendant's agreement should be deemed applicable to defendant's agreement at defendant's option, latter provision could not be invoked to limit arbitration procedure but would be effective to protect defendant against wage advantages which union might grant to defendant's competitors or suffer or permit them to enjoy.

3. Execution ⊂⊃7

Before an execution may properly issue judgment must be for money and amount due and persons to whom payable must be determined with exactness. Code Civ.Proc. § 682.

4. Execution ⊂⊃7

Where judgment went no further than to approve arbitration award which stated minimum wage guarantee for its specified employees should be specified sum weekly, and money due to employees could not be determined from judgment, execution was improperly issued. Code Civ.Proc. § 682.

◆

Schauer, Ryon & McMahon, Santa Barbara, for appellant Coca-Cola Bottling Co.

Todd & Todd, San Francisco, for appellant and respondent John J. McKay, etc. et al.

SHINN, Presiding Justice.

In a representative capacity, plaintiff John J. McKay, secretary-treasurer of Teamsters Union Local 186, brought this action for confirmation of an arbitration award pursuant to Code of Civil Procedure, section 1287. Over defendant's objections judgment was entered confirming the award, and a writ of execution was issued. Later, on defendant's motion the writ was quashed. Defendant appeals from the judgment confirming the award and plaintiff appeals from the order quashing the writ. We will first consider the appeal from the judgment.

Defendants (doing business as a partnership) and Local 186 entered into a collective bargaining agreement on March 1, 1947. The wages of all drivers, whether delivering Coca Cola or Beer, were fixed at a minimum of $60 per week. Duration of the agreement was to be five years with a provision for reopening for wage negotiations on March 1 each year, provided notice was given sixty days prior to that date. Notice was given in 1948 and on March 1, 1949, a supplemental agreement regarding wages was adopted. This supplemental agreement set the wages of all defendant's employees except the beer sales drivers. Deliverers of Coca Cola were to receive $66 per week. With respect to beer drivers the supplemental agreement provided that the wages of the beer drivers should be fixed by arbitration.

A board of three arbitrators (one employer representative, one union representative and one neutral arbitrator) met October 4, 1949, to consider what the minimum wage rate for beer drivers should be. At that time defendant was voluntarily paying $63 per week. The union was asking for a rate of $75 per week. It was stipulated that all of defendant's competitors in the Santa Barbara area were paying $63 to soft drink drivers and two competitors were paying only $63 to beer drivers. During the arbitration hearing defendant adopted this wage for its drivers, under a contract provision hereinafter set forth. It developed that prior to June 1, 1949, other competitors paid $72.50 per week to beer drivers which was the rate received by 95 per cent of the beer drivers in California. On March 14, 1950, the neutral arbitrator rendered a decision that the minimum wage scale should be $72.50. The union arbitrator concurred.

It is stated in appellant's opening brief: "Despite the provisions of Code of Civil Procedure, Section 1280, the arbitration provisions of the Code of Civil Procedure apply to this type of labor contract arbitration. Levy v. Superior Court, 15 Cal.2d 692, 104 P.2d 770, 129 A.L.R. 956." We shall so assume.

Defendant's claim of error in the judgment is that the powers of the arbitrators were limited by the terms of the contract and that the award violates controlling contract terms. Those to be considered are the following: (1) The special agreement for arbitration in the 1949 agreement: "With respect to the wages, hours and conditions of employment of the Beer Sales Drivers, Warehousemen, Checkers and Helpers, it is agreed that the compensation for the employees of employer handling beer and the determination of their proper classification shall be made the subject of an arbitration, determination and award which shall be made in due course, to take effect from March 1st, 1949, and which shall be final and binding upon the parties"; (2) the general arbitration clause of the 1947 contract: "11. Parties hereto agree that wages, hours and conditions of employment shall be open to negotiations on March 1st of each year by written notice given by either party to the other by December 1st of each year commencing with December 1st, 1947. If the parties cannot agree, any matter of differences in respect thereto shall be subject to arbitration in the manner provided by paragraph 5 of the aforesaid agreement"; and (3) the most favored employer clause of the 1947 agreement: "7. The Union agrees that in the event it shall suffer, permit, or enter into any contract, agreement, understanding or condition between the Union and any competitor of the Employer, which is more favorable to Employer than the terms of this agreement, such contract, agreement, understanding, or condition shall, at the option of the Employer, be applicable to and deemed incorporated in this agreement, provided, however, that the foregoing shall not apply to any award to which the Union is a party, which shall be arrived at by arbitration. * * *"

The argument defendant makes may be stated as follows: At the time of the arbitration two of defendant's competitors were paying but $63 minimum wage to beer drivers; defendant elected to avail itself of its right under paragraph 7 to take the benefit of the wage rate being paid by these competitors and therefore the arbitrators were without power to fix a wage for defendant's beer drivers in excess of $63 per week minimum.

The meaning of this argument is that defendant could not be required to pay more, by means of an arbitration award, than its competitors were paying. The question was presented to the arbitrators whether paragraph 7 so limited their powers as to forbid their fixing the wages of defendant's beer drivers at more than $63 per week. Their decision reads in part as follows:

> "Issue No. 1: Inasmuch as the agreement of March 1, 1947 (Ex. 1) provides for a weekly wage of $60.00 per week for beer sales drivers and the lowest wage paid by any competitor of the employer is $63.00 per week, under the 'favored nations clause' of said agreement is such a competitor one that has a contract, agreement or understanding with the union more favorable than the terms of the agreement with the employer if the award to be made is higher than the wage paid by such competitor?
>
> "Decision: No. Such a competitor does not have a contract, agreement, or understanding with the union more favorable than the terms of the union's agreement of March 1, 1947. (Ex. 1.)"

When defendant elected, under paragraph 7, to adopt a wage of $63 per week, its contract was thereby modified and the original wage became nonoperative. Manifestly a competitor paying a wage of $63 per week has a more favorable contract than one who is paying $72.50. Plaintiff argues that defendant would not have been discriminated against before the award unless some competitor was paying less than $60 per week, nor after the award unless a competitor was paying less than $63 per week. The latter part of the argument is an attempt to justify the reasoning of the arbitrators. It ignores the fact that by the award the wage rate of $72.50 is substituted for the former rate and is thereby written into the agreement. The decision, in its reasoning, evades the real question. But if the arbitrators reached a conclusion which was within the scope of a proper arbitration, unsound reasoning would not invalidate the result.

As defendant construes the several quoted provisions the arbitration procedure could not be used at all unless some competitor was at the time operating under a contract more favorable to the union in some respect than that of defendant. Even then, and specifically as to wages, an award could not exceed the amount being paid by the competitor. We cannot agree.

[1] Under the broad provisions for arbitration the contract may be reopened as of March 1st of each year for negotiation of wages, hours and conditions of employment and for arbitration if the parties cannot agree. The use of arbitration procedure for the fixing of wages is not limited to situations in which it appears that some competitor is paying a higher wage. The arbitration clauses stand alone. So does the most favored employer provision. The former are not modified by the latter. They should be harmonized and each be given effect in accordance with the intentions and purposes of the parties. Civ. Code, secs. 1641, 1642, 1650. Paragraph 7 does not purport to limit the right of the union to make wage contracts with defendant or its competitors. It operates prospectively, after the contracts are made. If this were not so, uniform contracts with several employers could not be opened annually or at all except for the purpose of lowering wages. There is nothing which suggests that the parties had any such intention. It was not expressed and cannot be inferred without ignoring clear provisions of the contract. It follows that the arbitrators had the power to fix the wages of defendant's drivers at a figure in excess of $63 per week.

[2] Although we agree with plaintiff that paragraph 7 may not be invoked to limit the arbitration procedure, it is nevertheless effective to protect defendant against wage advantages which the union may grant to defendant's competitors or suffer or permit them to enjoy.

It was established at the hearing that the union had not taken action to open the contracts of defendant's competitors who were paying the $63 weekly wage. That is not a matter which affects the present controversy. But lest there be some misunderstanding of our views, we may add that in our opinion paragraph 7 means that defendant has a right to adopt more favorable wage or other conditions granted to a competitor by the union, or suffered or permitted to be enjoyed by such competitor, except such as are established by arbitration to which the union is a party. It does not mean that once the wages of defendant's drivers are fixed by arbitration the protection against favoritism being shown to competitors is lost.

That the arbitrators did not construe the contracts as we understand them, and employed faulty reasoning in arriving at their conclusion, is of no moment. The award was not in excess of their powers and was properly confirmed by the court.

Three weeks after entry of the judgment confirming the award, plaintiff petitioned for a writ of execution in the amount of the retroactive wages allegedly due under the judgment. The order for the writ was signed by a judge other than the one who heard the cause. After the writ was returned satisfied, defendants moved to quash execution. Grounds for the motion were that the judgment was not for money but was one altering a contract. The motion to quash was granted and plaintiff appeals from the order granting the motion.

[3, 4] The appeal is without merit. Before an execution may properly issue the judgment must be for money and the amount due and the persons to whom payable must be determined with exactness. Code Civ.Proc. sec. 682; Feldmeier v. Superior Court, 12 Cal.2d 302, 307, 83 P.2d 929, 119 A.L.R. 927; Bank of America v. Standard Oil Co., 10 Cal.2d 90, 73 P.2d 903. The judgment of the superior court went no further than to approve the arbitration award. The arbitrator's decision stated the minimum guarantee for beer drivers should be $72.50 per week. This was a minimum guarantee. The wage rate was $17 per week plus a commission of 4 cents per case on bottled beer and 3½ cents per case on canned beer. At the arbitration hearing it was stipulated that beer drivers' commissions had not amounted to the minimum guarantee at any time up to the time of arbitration. There was nothing in the decision about subsequent times. It is thus clear that the money due could not be determined from the judgment. It had been agreed that the award would be retroactive but there was nothing in the judgment or arbitration decision to indicate the amount of that award. Thus, the execution was improperly issued for the reason that by the judgment plaintiff McKay was not entitled to any money, nor was the amount due the employees and their identity fixed by the judgment.

The judgment and the order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

110 Cal.App.2d 623

MEYERS et al. v. BOARD OF SUP'RS OF LOS ANGELES COUNTY.

Civ. 18847.

District Court of Appeal, Second District, Division 3, California.

April 29, 1952.

Charles E. Meyers, and others, brought certiorari proceedings against the board of supervisors of the County of Los Angeles to review action of board in confirming on appeal a decision of the regional planning commission of the county granting a special permit to the county to operate a refuse dump. The Superior Court of Los Angeles County, Frank G. Swain, J., denied writ and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that action of board in confirming decision of regional planning commission after reading transcript of hearing before zoning board which made recommendation to planning commission, without notice to plaintiffs and without granting plaintiffs a hearing, was not in excess of jurisdiction of board under ordinance.

Affirmed.

1. Certiorari ⚷12

A writ of review tries only jurisdiction of an inferior board or tribunal exercising judicial functions. Code Civ.Proc. § 1074.

2. Counties ⚷21½

Amendments to ordinance providing for creation of zones in unincorporated area of county operated as though subject of amendment had been originally incorporated in ordinance.

3. Statutes ⚷167(1)

Where it clearly appears that intention of legislative body is to revise in a later act the entire subject matter of a former act, the later act operates as a repeal of former act although it contains no express words to that effect.

4. Statutes ⚷164

Generally amendment of an act operates as a repeal of its provisions to extent that they are materially changed by, and rendered repugnant to, the amendatory act, since it is the latest expression of legislative body upon subject.

5. Counties ⚷21½

A zoning ordinance authorizing a planning commission of county to grant or deny special use permit and providing for an appeal to legislative body which created commission is valid. Government Code, § 65330; Gen.Laws, Act 5211b, § 6.3.

6. Counties ⚷21½

Where regional planning commission of county granted special permit to county to operate a refuse dump, and owners of homes within radius of 500 feet of property on which dump was to be operated filed notice of appeal with board of supervisors, requesting that plenary hearing be granted to them and that they be permitted to introduce additional evidence, action of board of supervisors in confirming decision after reading transcript of hearing before zoning board which made recommendation to planning commission, without notice to homeowners and without granting them a hearing, was not in excess of jurisdiction of board under ordinance.

John W. Preston and John W. Preston, Jr., Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by petitioners from an order denying a peremptory writ to review the action of the Board of Supervisors of the County of Los Angeles in confirming on appeal a decision of the Regional Planning Commission of the county granting a special permit to the County of Los Angeles to operate a refuse dump.

Petitioners, each of whom is the owner of improved real property in City Terrace, an unincorporated area in the County of Los Angeles, occupied by him and his family as a home, brought this proceeding on behalf of themselves and all other persons similarly situated.

On December 28, 1950, the County of Los Angeles, by its board of supervisors, filed an application with the regional planning commission of the county for a special permit to establish, operate and maintain a refuse disposal dump in unimproved land owned by it and contiguous to City Terrace. The application states it was filed "As required by Chapter Six of the Zoning Ordinance (Ordinance No. 1494)." The county's land was then zoned M-3,[1] and could not be used for a dump without a special permit.

On December 29, 1950, post cards giving notice of a hearing to be held on January 11, 1951, before the zoning board of the commission, were mailed to all persons whose names and addresses at that time appeared on the latest available county assessment roll as being owners of property within a radius of 500 feet of the property involved. On December 31, 1950, a notice of the time and place of the hearing was published in a newspaper of general circulation.

On and prior to January 11, 1951, petitioners and other property owners filed written protests with the planning commission, protesting the granting of the permit on the ground that the "dump would be unsanitary, noisy, a menace to the health of the adjacent land owners and their families and a nuisance, and that such maintenance would greatly decrease property values in the vicinity of said dumps and operations."

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[1] An unclassified zone. (Ord. 1494 [as amended, 1951 ed.], § 101.)

On January 11, 1951, a public hearing was held by the zoning board of the planning commission; and on January 17, 1951, it made its findings and recommended to the planning commission that the permit be granted.

On the same day, January 17, 1951, the planning commission, after having received a summary of the testimony presented at the hearing and the findings and the recommendation of the zoning board, approved the recommendation, determined that the permit, as recommended, would be consistent with the intent and purposes of the zoning ordinance, and, by letter, notified the county that its application had been approved and that the permit would become effective, subject to certain conditions.

On January 30, 1951, petitioners filed a notice of appeal with the board of supervisors, requesting that a "plenary hearing" be granted to them and that they be permitted to introduce "additional" evidence. Their appeal was based on the same grounds as those advanced at the hearing before the zoning board of the commission.

On April 18, 1951, the board of supervisors, following a reading of the transcript of the hearing before the zoning board, without notice to petitioners and without according them a hearing, confirmed the decision of the planning commission.

The petition for review alleges that the board of supervisors acted arbitrarily and without jurisdiction in affirming the planning commission's decision; that the action of the board, in denying petitioners' appeal without giving them an opportunity to be heard or to submit evidence, resulted in depriving them of a substantial right "to wit, the right to be heard by the Board of Supervisors and to show that the operation of a cut and fill dump in close proximity to their several homes will deprive them of the several values thereof, in whole or in part, without due process of law"; and that petitioners have no right of appeal from the action of the board of supervisors, nor any plain, speedy or adequate remedy at law or in equity.

The petition prayed that a writ of review be granted directing the board of supervisors to certify a transcript of the record and proceedings to the court, and that the order confirming the issuance of said permit be set aside and annulled as being made without jurisdiction.

[1] The question is whether the board of supervisors acted in excess of its jurisdiction. A writ of review tries only the jurisdiction of an inferior board or tribunal exercising judicial functions. Code Civ. Proc., § 1074; Borchard v. Board of Supervisors, 144 Cal. 10, 14, 77 P. 708; Garvin v. Chambers, 195 Cal. 212, 220, 232 P. 696; Cole v. Board of Supervisors, 27 Cal.App. 528, 531, 150 P. 784.

Ordinance 1494 as amended, under which the proceeding for the special permit was brought, is the "Basic Zoning Ordinance" of the County of Los Angeles. It contains, among other things, the procedure for obtaining the special permit sought here. (Ch. 6, Arts. 1, 2, and 3, §§ 601–665.) After the filing of an application, a time and place for a public hearing is fixed. (§ 637.) A notice of the time and place of such hearing must be published once in a newspaper of general circulation in the county, and post card notices must be mailed to all persons whose names and addresses appear on the latest available assessment roll of the county as owning property within a distance of 500 feet from the exterior boundaries of the area actually to be occupied by the use for the maintenance of which the application is filed. (§ 638.) The hearing may be conducted either by the zoning board of the planning commission or by the planning commission itself, if it so determines. (§ 631.) When the hearing is conducted by the zoning board, as here, it reports its findings to the planning commission and recommends the action which it concludes the planning commission should take. (§ 639.) Upon receiving the zoning board's report, the planning commission may: "(a) Approve and adopt the findings and recommendations of the Zoning Board. (b) Require a transcript or summary of the evidence introduced before the Zoning Board. Upon receipt of such transcript or summary the Commission shall take such action as in its opinion is indicated by such evidence. (c) Refer the matter back with or without instructions to the Zoning Board for further proceedings. (d) Set the matter for hearing before itself. At such hearing the Commission shall hear and decide the matter de novo as if there were no Zoning Board." (§ 640.)

Within fifteen days after the receipt by the applicant of notice of the action of the planning commission, any person dissatisfied with its action may appeal to the board of supervisors. (§ 659.) Upon receiving a notice of appeal the board of supervisors may: "(a) Affirm the action of the Commission, or (b) Require a transcript or recording of the testimony and all other evidence upon which the Commission made its decision. Upon receiving such evidence the Board of Supervisors shall take such action as, in its opinion, is indicated by such evidence; or (c) Refer the matter back with or without instructions to the Commission for further proceedings, or (d) Set the matter for hearing before itself. At such hearing the Board of Supervisors shall hear and decide the matter de novo as if no other hearing had been held." (§ 662.) The decision of the board of supervisors on appeal is final and conclusive as to all things involved in the matter. (§ 665.)

It is apparent from the record that all steps necessary to vest jurisdiction in the planning commission to grant or deny a special permit under Ordinance 1494 as amended, were followed, and no contention is made that the findings of the zoning board are unsupported by the evidence given at the public hearing, at which time petitioners' protests were duly considered. Petitioners charge that the refusal of the board of supervisors to grant them a hearing *on appeal* was an act in excess of its jurisdiction. The ordinance gives the board, on appeal, the power to proceed as it did here, to require a transcript of the testimony and all other evidence upon which the planning commission made its decision and, upon receipt thereof, take such action as, in its opinion, may be indicated by the evidence. It may affirm the action of the planning commission without any further hearing, or it may, in its discretion, order a hearing de novo. Whichever action is taken, the board of supervisors acts in the exercise of its jurisdiction and not in excess of it.

There is no merit in petitioners' claim that Ordinance 3371, upon which they rely to sustain their contention that the board of supervisors acted in excess of its jurisdiction, is controlling because it was never specifically repealed or superseded or in anywise affected by the Basic Zoning Ordinance.

[2] Ordinance 1494, which, as amended, is now the Basic Zoning Ordinance, was first adopted September 12, 1927. It was then entitled "An ordinance providing for the creation in the unincorporated area of the County of Los Angeles of twelve (12) zones and prescribing the classes of uses of buildings, structures, improvements and premises in said several zones." On May 31, 1939, Ordinance 3371, upon which petitioners rely, was adopted. It was entitled "An ordinance amending section 2 of and adding sections 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8 and 2.9 to Ordinance No. 1494 (New Series), relating to rubbish dumps." [2] It should be noted that the scope of this ordi-

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[2] §§ 2.4 to 2.8 relate to the procedure for obtaining a permit, the mailing and publishing of notices of hearing before the commission, the filing of reports by the Health Officer and County Fire Warden showing the effect of the proposed dump on the public health, and whether or not the dump may be a fire hazard.

§ 2.9 reads: "After a public hearing upon an application to maintain a rubbish dump the Regional Planning Commission shall report to the Board of Supervisors its findings as to whether or not the proposed rubbish dump will or will not: (a) Be in the proper zone. (b) Comply with this and all other ordinances pertaining to rubbish dumps. (c) Constitute a health menace. (d) Constitute a fire menace. The Commission shall also recommend the granting and denial of the permit. The recommendation shall be accompanied by a transcript of the testimony received at the public hearing. The Board shall thereupon grant or deny the permit."

nance was a limited one. It merely amended one of the sections of Ordinance 1494, and added several subdivisions thereto pertaining to rubbish dumps. The effect of this amendment was to make it operate precisely as though the subject matter had been originally incorporated in Ordinance 1494. Treadwell v. Yolo County, 62 Cal. 563, 564. On December 13, 1949, Ordinance 5447 was adopted, effective January 13, 1950. It was entitled "An ordinance amending Ordinance No. 1494 thereby amending official plans of the Master Plan of Land use." It in part provided: "The Board of Supervisors of the County of Los Angeles do ordain as follows: Section 1. Ordinance No. 1494 entitled 'An Ordinance providing for the creation in the unincorporated area of the County of Los Angeles of zones and prescribing area requirements and the classes of uses of buildings, structures, improvements and premises in said several zones,' adopted September 12, 1927, is amended to read: An ordinance providing for the creation in the unincorporated area of the County of Los Angeles of zones and prescribing area requirements and classes of uses of buildings, structures, improvements and premises in said several zones." [3]

[3] It clearly appears, not only from the foregoing but from the introductory sections of Ordinance 5447, that it was the legislative intent to revise the entire subject matter of Ordinance 1494. Where it clearly appears that the intention of the legislative body is to revise in the later act the entire subject matter of the former one, the later act operates as a repeal of the former although it contains no express words to that effect. Treadwell v. Yolo County, 62 Cal. 563, 564; Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 614–615, 195 P.2d 501.

[4] Petitioners can derive no comfort from section 106 of Ordinance 1494 as amended, which provides that Ordinance 1494 shall not be construed to amend or repeal any part of any other ordinance not specifically amended or repealed "except in such particulars or matters as this ordinance is more restrictive than such other ordinances or part thereof; and that in all particulars wherein this ordinance is not more restrictive each such other ordinance shall continue and shall be in full force and effect." It is the general rule that an amendment of an act operates as a repeal of its provisions to the extent that they are materially changed by, and rendered repugnant to, the amendatory act, since it is the latest expression of the legislative body upon the subject. California Employment Comm. v. Arrow Mill Co., 45 Cal.App.2d 668, 672, 114 P.2d 727; People v. Weitzel, 201 Cal. 116, 118, 255 P. 792, 52 A.L.R. 811; 23 Cal.Jur. 693, § 83; 50 Am.Jur. 556, § 552. We think it apparent that the provisions of Ordinance 1494, as amended by Ordinance 3371 with respect to the granting or denying of special permits for the maintenance of rubbish dumps and the procedure therefor, were materially changed by Ordinance 5447. This latter ordinance completely revised Ordinance 1494, as amended by Ordinance 3371 and by other ordinances. Perhaps the most radical changes are that a special use permit for refuse disposal is now automatically granted in an M–3 zone "except when operated by, or under control of the County" (§ 501 (a) (36)), and with respect to the powers of the planning commission and the board of supervisors, as heretofore shown. Under Ordinance 3371, the only function of the planning commission with respect to the granting or denying of a special use permit pertaining to refuse dumps was to hold a public hearing thereon and report its findings and recommendation to the board of supervisors, and only the board could grant or deny the permit. Under Ordinance 1494, as amended by Ordinance 5447, the planning commission is authorized to grant or deny a permit and the board acts merely as a reviewing body.

[5, 6] A zoning ordinance authorizing a planning commission to grant or deny a special use permit and providing for an appeal to the legislative body which created the commission, is valid. Stat.1937, ch.

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[3] Ordinance 1494 as amended, reads the same in the 1951 edition of the Basic Zoning Ordinance.

665, § 14, p. 1824, Stat.1947, ch. 807, § 71, p. 1919, now Government Code, § 65330; 2 Deering's Gen.Laws, Act 5211b, § 6.3; Wheeler v. Gregg, 90 Cal.App.2d 348, 361–363, 203 P.2d 37; Mitchell v. Morris, 94 Cal.App.2d 446, 448–451, 210 P.2d 857; See Johnston v. Board of Supervisors, 31 Cal. 2d 66, 71–78, 187 P.2d 686; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 475, 197 P.2d 218. The power of the board of supervisors, as a reviewing body, to grant a hearing de novo is discretionary and not mandatory. It did not, therefore, exceed its jurisdiction in denying petitioners a hearing de novo. Petitioners had their day before the planning commission.

Petitioners contend that the superior court should have reviewed the action of the board of supervisors under section 1094.5 of the Code of Civil Procedure.[4] Assuming petitioners' contention to be correct, there was no showing that the board of supervisors proceeded without or in excess of its jurisdiction, or that there was not a fair trial, or that there was any prejudicial abuse of discretion.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

110 Cal.App.2d 678

MORRIS et al. v. VOSSLER.

Civ. 4375.

District Court of Appeal, Fourth District, California.

April 30, 1952.

Action by Mark Morris and wife against Herman A. Vossler to quiet title and to determine boundary line between two parcels of land wherein the defendant filed a cross-complaint to quiet his title. The Superior Court, Tulare County, Frank Lamberson, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that there was sufficient evidence to support the finding of the court as to the essential elements necessary to establish an agreed boundary.

Judgment affirmed.

1. Boundaries 🔑37(5)

In action to quiet title and to determine boundary line between two parcels of land, evidence was sufficient to support the finding as to essential elements necessary to establish an agreed boundary.

2. Boundaries 🔑46(1)

The essential elements necessary to establish an "agreed boundary" are: an uncertainty as to position of boundary, an agreement to establish a common boundary line, a marking or occupation of real property to such line and an acquiescence in the line thus established for a period equal to statute of limitations.

See publication Words and Phrases, for other judicial constructions and definitions of "Agreed Boundary".

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Ralph E. Wallace, Fresno, for appellants.

John R. Berryhill, Calvin L. Russell, Russell B. Henry, Tulare, for respondent.

GRIFFIN, Justice.

Action to quiet title and to determine boundary line between two parcels of land in Tulare County. Plaintiffs Mark Morris and his wife alleged that on February 21, 1947, they acquired property in the southwest quarter of the southeast quarter of section 22, township 21 South, Range 26 East, M. D. B. & M., by deed, which property is described by metes and bounds, and alleged that defendant Herman A. Vossler claimed some interest therein. Defendant alleged ownership of the southwest quarter of section 22, denied plaintiffs' ownership and, by way of cross-complaint to quiet his title, claimed interest in a strip of land about 26 feet wide lying between the two properties and containing about two acres. The boundaries of this strip are evidenced by an old fence, erected about 40 years ago on the easterly side of said strip, which runs in a northerly and southerly direction, and a survey line made by plaintiffs' engineer, west of the fence line and running parallel with the fence across section 22.

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[4] "§ 1094.5 * * * (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. * * *"

The court found generally in favor of defendant and quieted his title to said strip of land upon the claimed theory that the true boundary between the southeast quarter and the southwest quarter of section 22 was in dispute and uncertain and that there was an agreement between the coterminous owners of said properties, predecessors in interest of both plaintiffs and defendant, establishing and locating the true boundary between said properties along the fence line as more fully set forth in the findings; that said fence was built prior to the year 1907; that defendant and his predecessors in interest farmed, occupied and improved the property up to the said fence line continuously since said date, and that the respective owners acquiesced in said line as being the true line for a period equal to the statute of limitations. It then found that for more than 50 years an irrigation ditch, running northerly and southerly west of and parallel to said fence in the disputed area, has been built and used to carry water for irrigation of the southwest quarter of said section. Judgment was entered accordingly.

On plaintiffs' appeal, they contend that judgment should have been in their favor and that the findings and judgment in favor of defendant are not supported by the evidence for the claimed reasons that the record is silent as to any effort having been made to locate any of the corners of section 22 at the time the fence was built; as to any absence or destruction by the elements, or otherwise, of any of the corners of said section; as to any mistake in measurement, or that the land was measured, at or about the time the fence was built; as to any uncertainty in the location of the north and south quarter section line between the properties; as to the time when the purported agreement to establish the boundary was made, or deemed to have been made; as to who built the fence or when it was built, or that it was built to establish a boundary; as to any occupancy of the land east of the fence line in question, or that it was cultivated or actually occupied by anybody prior to 1915; and that since both properties were described in the deeds by metes and bounds, and since the north and south quarter section line dividing section 22 was capable of being located with certainty, defendant could not claim any uncertainty as to its location.

In support of plaintiffs' contentions they offered in evidence a map made from a survey in 1946, showing certain monuments and corners as well as courses and distances, which map contains notes of finding corners from ties of former surveys.

Defendant's evidence shows that the fence was built some time prior to 1907, and that defendant had occupied and used a portion of the strip openly and adversely as a water reservoir for irrigation of his lands, and that he and his predecessors in interest used and maintained an irrigation ditch approximately 20 feet in width along said strip and west of the fence line for more than 50 years. A 14-inch concrete irrigation pipe was laid by defendant at a cost of $3,260 in said strip for the purpose of irrigating his adjoining orchard. Defendant resided on or near the property all his life. His father purchased it in 1907. The fence, in 1915, continued northerly through the north half of section 22 on the same line as the fence here in question and it was then "considered" to be the north and south center line of section 22. This fence line was some 20 feet east of a survey bolt now in place in the concrete highway running along the north boundary of that section and, according to the record, there have been discrepancies between the old and the new surveys in section 22 and in that area, and fences have been subsequently moved. It was related by an engineer that the only survey notes in existence were those found in the county surveyor's office from the year 1917 to 1948, and that some of the monuments now in place are imbedded in the concrete highway which is of more recent construction. According to the testimony of Mr. Green, predecessor in interest to plaintiffs, he purchased this property in 1915, and he testified that he made no survey at that time; that he considered the fence line as his westerly boundary line and that "our agreement was that we recognized it as being the boundary line" between the properties involved. However, he did testify that about that time he wanted to cut up his property in 40 acre tracts and that he had a surveyor employed for that sole purpose; that they assumed the fence line was the boundary line; that he talked to the Vosslers about it and a question arose as to whether the fence was on the exact line; that they "accepted the fence, as being on the line * * * as far as our rights were concerned, * * * and we established the line just as it was." Defendant testified that there used to be a government stake within a few feet of the original fence line on the north but that was not true as to the south terminous of the line, and that they always "recognized that the fence was off a few feet one way or the other" but the fence "didn't run exactly straight". Predicated upon this statement, counsel for plaintiffs argues that since defendant did not believe the line of the fence to be the real boundary this evidence is fatal to the application of the rule of agreed boundaries, citing such cases as Friedman v. Southern California Trust Co., 179 Cal. 266, 176 P. 442; and Pedersen v. Reynolds, 31 Cal.App.2d 18, 87 P.2d 51. The cases relied upon by plaintiff are factually different and do not form the basis for a reversal of the finding here made or the judgment based thereon. Beginning with the decision in Martin v. Lopes, 28 Cal.2d 618, 170 P.2d 881; Crook v. Leinenweaver, 100 Cal.App.2d 790, 224 P.2d 891; Mello v. Weaver, 36 Cal.2d 456, 224 P.2d 691; Carr v. Schomberg, 104 Cal.App.2d 850, 232 P.2d 597; and ending with Glenn v. Cook, 108 Cal.App.2d 784, 239 P.2d 680, the courts of this state have thoroughly reviewed the law concerning the establishment of boundaries by agreement, and, in each of the cited cases, have upheld a finding of an agreed boundary line as against a boundary line determined by measurement alone. In Hannah v. Pogue, 23 Cal.2d 849, at page 856, 147 P.2d 572, 576, where plaintiff contended that there must be direct evidence of uncertainty or dispute as to the true boundary line and that there must be direct evidence that there was an agreement, the court said:

> "It is the rule * * * that the court may infer that there was such an agreement ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between the lands of two owners." (Citing cases.)

In that case a fence was in existence when plaintiff purchased the property. She testified she knew of no agreement that the fence should constitute the boundary line. The court held that this testimony would not necessarily rebut the inference that there was such an agreement, for the inference may be made that an agreement was inherent in the long standing acceptance of the fence as the boundary, and said:

> "It is unnecessary to decide whether on this evidence the agreement can be assigned to this particular date, (1917) for the precise date of agreement is immaterial in view of the acceptance of the fence as a boundary over a long period of years."

In Mello v. Weaver, supra, 36 Cal.2d at page 460, 224 P.2d 691, the court said that a dispute or controversy is not essential but it may be evidence of the existence of a doubt or uncertainty, and it is not a requirement that the uncertainty should appear from the deed or from an attempt to make an accurate survey from the calls in the deed. The fact that an actual survey is possible is not conclusive of the question whether a doubt existed as to the location of a common boundary and thus the doubt may arise from a believed uncertainty which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time the agreement is deemed to have been made. And if in good faith the parties resolve their doubt by the location of a common boundary it will be considered the boundary called for by the deed.

[1, 2] We conclude that there is sufficient evidence to support the finding of the court as to the essential elements necessary to establish an agreed boundary, i. e., that there is (1) an uncertainty as to the true position of the boundary; (2) an agreement to establish a common boundary line; (3) marking or building up to the agreed boundary; (4) occupation of the real property to such line; and (5) acquiescence in the line thus established for a period equal to the statute of limitations.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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110 Cal.App.2d 524

DALY CITY v. SMITH et al.

Civ. 14915.

District Court of Appeal, First District, Division 1, California.

April 28, 1952.

Rehearing Denied May 28, 1952.

Hearing Denied June 26, 1952.

Action by City of Daly City against H. H. Smith, and another, to condemn certain land for street purposes. The Superior Court, County of San Mateo, Leonard R. Avilla, J., fixed the value of the land condemned at $4,465, and defendants appealed. The District Court of Appeal, Peters, P. J., held that where the opinion filed by the trial judge was ambiguous as to whether, in the opinion of the trial court, defendants' experts were entitled to fix damages based upon the fact that defendants were forced to give up a contemplated specific plan, such ambiguity would be resolved in favor of upholding the action of the trial court.

Affirmed.

1. Appeal and Error 🔑717

An opinion filed by trial judge may be used to aid appellate court in ascertaining the process by which the judgment has been reached, but such opinion cannot be used as or substituted for, findings of trial court, nor can it be used to modify or impeach those findings. Rules on Appeal, rule 5(a).

2. Appeal and Error 🔑934(1)

Where an opinion filed by trial judge is ambiguous, all ambiguities must be resolved in favor of upholding action of trial court if such can be reasonably done. Rules on Appeal, rule 5(a).

3. Eminent Domain 🔑136

Measure of damages in condemnation proceeding is market value of parcel taken, plus any depreciation in market value of the area retained.

4. Eminent Domain 🔑131

"Market value", as respects measure of damages in condemnation proceeding, is the price that would be paid by a willing purchaser from a willing seller purchasing with a full knowledge of all the uses and purposes for which the property is reasonably adapted.

See publication Words and Phrases, for other judicial constructions and definitions of "Market Value".

5. Eminent Domain 🔑202(4)

Generally, value in terms of money for a particular use is not admissible in measuring damages in condemnation proceeding, since it is the market value that is involved, and not the value to the owner or to the condemner.

6. Eminent Domain 🔑202(4)

In measuring damages in condemnation proceeding, all reasonable uses must be considered and evidence of the value of the highest and most valuable use is admissible, not as a specific measure of value, but as factor in fixing market value.

7. Eminent Domain 🔑202(4)

Evidence that a proposed use based upon a proposed plan would result in a profit is sometimes admissible in measuring damages in condemnation proceedings, not for purpose of enhancing damages by showing the loss to the owner of a particular plan of operation, but to show that such proposed plan is a feasible plan and should be considered in fixing market value.

8. Eminent Domain ⚷262(3)

Where the opinion filed by trial judge in condemnation proceeding was ambiguous as to whether, in opinion of judge, owners' experts were entitled to fix damages based upon fact that owners were forced to give up proposed plan to construct a motel on premises, such ambiguity would be resolved in favor of judgment based on correct statement that owners' experts were not so entitled to fix damages.

9. Eminent Domain ⚷219

Where both parties in condemnation proceeding produced qualified experts and trial judge visited the property in question and pictures and maps of property were introduced in evidence, fact that parties' experts radically differed on issue of value of property did not place a burden on the court to appoint experts to assist it in resolving the conflict. Code Civ.Proc. § 1871.

◆

Gardiner Johnson, Roy D. Reese, San Francisco, J. W. Coleberd, Richard P. Lyons, South San Francisco, for appellants.

Frank B. Blum, Roger Anderson, San Francisco, for respondent.

PETERS, Presiding Justice.

H. H. and Annie D. Smith own 5.48 acres of land partially fronting on Mission Street and partially fronting on Hillside Boulevard in Daly City, San Mateo County. The city brought an action to condemn a portion of this area for street purposes. The proposed street will cut the Smiths' property in two. The Smiths, in their answer, claimed $47,040 for the parcel condemned, and $147,560 as severance damage. The trial court, on sharply conflicting evidence, fixed the value of the land condemned at $4,465, and found no severance damage. Judgment was entered accordingly. The Smiths appeal, contending that an opinion rendered by the trial judge demonstrates, to a certainty, that he erroneously and prejudicially rejected and refused to consider all of the testimony presented by them, and further, that the trial court abused its discretion in failing to appoint its own expert witnesses.

The parcel in question is an irregularly shaped piece of land with a small frontage on Mission Street and a larger frontage on Hillside Boulevard. The portion of the land fronting on Mission Street is zoned for commercial purposes. The balance of the land is not so zoned. The condemned portion runs from Hillside Boulevard, on an angle to Mission Street, but it leaves the Mission Street property with lots deep enough to be used for commercial purposes. The area slopes up sharply from Mission Street and Hillside Boulevard. In 1944 the Smiths purchased 8½ acres, including the 5.48 acres still owned by them, for $7,500. Since 1944 they have done "considerable" grading on the property, with the end in view of constructing a motel on the premises. Apparently the Smiths had applied for a permit to construct such a motel prior to the inception of this condemnation proceeding. The Smiths now operate a motel about a half mile from the property.

The only buildings now on the 5.48 acres are a temporary building formerly used by the Catholic Church as a school, and a small temporary structure on skids, usable as a tool house. There are no buildings of any kind on the condemned property.

The condemned portion totals .72 of an acre or a total of 31,579 square feet. The 5.48 acres contain 238,700 square feet.

H. H. Smith and two experts testified on behalf of appellants. All agreed that the land was ideally located for a motel, and that such use was the highest and best use to which the land could be put. H. H. Smith admitted that he had worked out a detailed plan for the development of the property, and, in fact, had prepared a model of the proposed motel as it would appear after the requisite grading had been done. This model, although referred to, was not introduced into evidence, and appellants ultimately withdrew their offer to introduce it. Smith testified that his estimates of value, both for the condemned portion and for depreciation in value of the remainder of the property, were not based upon any single detailed plan, because he had not finally decided upon a plan. He had previously testified, however, that his opinion of the value of the land taken was based on a plan he had "in mind," and that his estimate of severance damage was also based on the fact that by reason of the condemnation proceeding he was prevented from carrying out this plan.

Smitten, called as an expert by appellants, testified that he based his estimates "to a great extent" on the very plan proposed by Smith, because, in his opinion, that plan constituted the highest and best use to which the property could be put. However, later in his testimony he definitely indicated that his estimates were not based on any specific plan, but on the use of the property for a motel.

Love, the last expert produced by appellants, thought that the property could best be used as a motel, but testified that his estimates of value were not based on any single plan.

There were motions to strike the testimony of Smith and Smitten (and also that of Love for a different reason) on the ground that their estimates of value were based on the premise that the appellants had been prevented from carrying out a specific plan, but the court, recognizing the more general testimony given by both witnesses, denied the motions. The motion as to Love was also denied.

The evidence of these three witnesses can be summarized as follows:

Smith, H. H.

Highest and best use	modern motel
Value of portion taken	$ 47,040.00
Severance damage	159,234.00
Benefits	.00

Smitten, Kenneth.

Highest and best use	modern motel
Value of portion taken	$ 39,827.00
Severance damage	116,621.00
Benefits	.00

Love, Harry J.

Highest and best use	modern motel
Value of portion taken	$ 40,768.00
Severance damage	162,032.00
Benefits	.00

The experts for respondent, four in number, were much more conservative in their estimates. They were all of the opinion that there was no severance damage, and that the remaining property would be substantially benefited by the improvement. All of these witnesses gave consideration to the use of the property as a motel in fixing their estimates. The testimony of these four witnesses can be summarized as follows:

Phillips, Joseph J.

Highest and best use	commercial and residential
Value of portion taken	$ 3,330.00
Severance damage	.00
Benefits	9,232.00

Castle, Linval H.

Highest and best use	commercial and residential
Value of portion taken	$ 4,465.00
Severance damage	.00
Benefits	32,710.00

Hollebaugh, Clifford W.

Highest and best use	first and second residential
Value of portion taken	$ 3,000.00
Severance damage	.00
Benefits	1,610.00

Smith, Norwood B.

Highest and best use	commercial and residential
Value of portion taken	$ 3,086.50
Severance damage	.00
Benefits	29,300.00

By stipulation it was agreed that the trial judge could visit the property, and apparently he did so on two occasions.

Based on this evidence, the trial court found in accordance with the testimony of respondent's experts that there was no severance damage, and fixed the value of the condemned parcel at $4,465, the highest figure testified to by any of respondent's experts.

It is apparent that, so far as the sufficiency of the evidence is concerned, the case presents nothing more than a conflict in the evidence. It is equally apparent that the findings of the trial court are amply supported by substantial evidence. Appellants concede that if only the transcript, the findings and judgment were before us, they would have no substantial question of law to present on this appeal. But, they argue, the findings are subject to attack because the trial judge filed an opinion in which he disclosed, so it is argued, that he completely disregarded all of their expert testimony just as if he had stricken it from the record. This, they contend, was prejudicial error.

[1] Before considering that opinion something should be said about the proper function such an opinion plays on an appeal. Since the adoption of Rule 5(a) of the Rules on Appeal in 1943, there can be no doubt that such opinion properly may be incorporated in the record on appeal. The rule so provides. Such opinions are welcomed by the appellate courts. But their function is limited. They may be used to aid the appellate court in ascertaining the process by which the judgment has been reached. Stone v. L. A. County Flood Control Dist., 81 Cal.App.2d 902, 185 P.2d 396. In that case it was contended that the opinion, written on the granting of a motion for a new trial, contained inconsistent statements and demonstrated that the trial judge had inaccurately analyzed the evidence and incorrectly applied the law. The court stated, 81 Cal.App.2d at page 907, 185 P.2d 396, at page 399: "While an opinion of the judge of the trial court will aid the appellate court in ascertaining the process by which a judgment has been reached it will not be considered in determining whether or not the verdict of the jury or the findings of the court are supported by the evidence. [Citing four cases.] The order when made by the court concludes the case and it cannot be impeached by the judge's opinion. The question that concerns the reviewing court is whether or not the final decision, judgment or order is correct and not whether the reasons expressed in the opinion are in harmony with the result reached or whether they sustain the decision. [Citing a case.]

"Rule 5(a) makes the opinion a part of the record on appeal and thereby places it officially before the reviewing court for its consideration, but it does not modify the limitations found in the foregoing citations upon the effect to be accorded it. [Citing three cases.]"

The opinion cannot be used as or substituted for the findings, nor can it be used to modify or impeach them. Strudthoff v. Yates, 28 Cal.2d 602, 170 P.2d 873. In that case the court stated, 28 Cal.2d at page 615, 170 P.2d 873 at page 881: "The long established rule that the opinion of the trial judge cannot be substituted for nor used to modify the findings or judgment (De Cou v. Howell, 190 Cal. 741, 751, 214 P. 444) is a complete answer to the plaintiffs' contention concerning the determination as to the value of the orange groves. 'The findings of fact * * * must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision.' Goldner v. Spencer, 163 Cal. 317, 320, 125 P. 347, 348. 'No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final conclusion * * * by filing the "decision" (findings of fact and conclusions of law) provided for by * * * the Code of Civil Procedure.' Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179, 1181."

With these well settled rules in mind we turn to the opinion of the trial court. It reads as follows:

> "This action in Eminent Domain by the City of Daly City to acquire for the city a portion of defendants' unimproved real property for the purposes of a city street, is characterized by the remarkable fact that lowest appraisal of the market value of the land so sought to be acquired testified to by the owners' witnesses is $156,448.00 including severance damage and the highest appraisal testified to by plaintiff City's witnesses is $4,465.00 with no severance damage. In considering evidence presented in such sharp conflict and so widely divergent it would appear that the qualification, experi-

ence, integrity, bias or prejudice of the witnesses becomes an important factor and must be thoroly considered in an endeavor to arrive at the fair market value of the property. In this regard the Court finds all of the witnesses on both sides to be well qualified and entitled to credence. A careful and critical study of the testimony of each leads the Court to the strong conviction and conclusion that the reason for the amazing divergence of opinion among the expert witnesses lies in the fact that all of the owners' witnesses, in arriving at their approximation of highest and best use and market value, had in mind some peculiar, particular plan of the owner for the use of the property, and that all of their testimony was thereby consciously or unconsciously influenced unduly by such plan. This appears very evident from the fact that thru out their testimony runs a succession of references to 'this plan,' 'his plan,' and 'it is all planned.'

> "That the measure of compensation and the market value for the highest and best use of the property may not, under our law, be based upon the value to the owner under some particular peculiar plan is, of course, well established.
>
> "The Court finds the highest and best use of the property here involved to be partly residential and partly commercial, and fixes the market value at $4,465.00 with no severance damage."

Appellants argue that this opinion demonstrates that the trial judge refused to consider the testimony of their experts because he felt that such witnesses arrived at their estimates of market value because they had in mind some peculiar, particular plan of the owner for the use of the property, and because the trial judge was of the opinion that, under the law, the measure of compensation may not be based upon value to the owner of the loss of some peculiar, particular proposed plan of operation. Thus, say appellants, even though the trial judge stated that appellants' experts were well qualified and entitled to credence, he determined the issue of value solely from respondent's testimony. This, they argue, was tantamount to an order striking the testimony of appellants' experts. They make this argument even though the trial court expressly denied motions to strike that testimony.

[2] If it be assumed that, if the opinion did disclose an erroneous reasoning process, it could be used to secure a reversal of a judgment admittedly supported by evidence, we are of the view that the opinion does not disclose an erroneous reasoning process. At most, the opinion is ambiguous. In such cases all ambiguities must be resolved in favor of upholding the action of the trial court if such can be reasonably done. People v. Megladdery, 40 Cal.App.2d 748, 773, 106 P.2d 84.

[3–6] That the opinion of the trial court did not apply an erroneous theory of law is demonstrated by a brief reference to the applicable law. In a condemnation proceeding the measure of damages is the market value of the parcel taken, plus the depreciation in the market value of the area retained, if such depreciation occurs. Market value is the price that would be paid by a willing purchaser from a willing seller purchasing with a full knowledge of all the uses and purposes for which the property is reasonably adapted. It is hornbook law that it is market value that is involved, and not the value to the owner or to the condemner. For that reason it is generally held that value in terms of money for a particular use is not admissible in such cases. Sacramento etc. R. R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979; Long Beach City H. S. Dist. v. Stewart, 30 Cal.2d. 763, 185 P.2d 585, 173 A.L.R. 249; Santa Ana v. Harlin, 99 Cal. 538, 34 P. 224; 1 Nichols on Eminent Domain (2d ed.), § 217, p. 658; Orgel on Valuation Under Eminent Domain, § 30, p. 97; 1 Bonbright, Valuation of Property, p. 413; Schmutz, Condemnation Appraisal Handbook, p. 14; Hanson and Pollard, Condemnation Appraisal Procedure, p. 66. All reasonable uses must be considered. Evidence of the value of the highest and most valuable use is admissible, not as a specific measure of value, but as a factor in fixing market value. People v. Ocean Shore Railroad, 32 Cal.2d 406, 196 P.2d 570, 6 A.L.R.2d 1179.

In Los Angeles v. Kerckhoff-Cuzner Co., 15 Cal.App. 676, 115 P. 654, the trial court excluded a diagram of the area involved showing existing and contemplated improvements. The court stated, 15 Cal.App. at page 677, 115 P. 654 at page 655: "At best this evidence could only be received for the purpose of showing the complete use for which the property was adapted, considering the use then being made of it. Appellant could not be allowed to show enhanced damage which it would suffer by reason of being prevented from carrying out a particular scheme of improvement, existing only in contemplation at the time of the trial. The trial court * * * simply declined to allow appellant to show the location and size of its proposed improvements, and by this ruling we think no error was committed."

The court made it quite clear that evidence of proposed improvements may be admissible to show adaptability of the land for that use, but it cannot be admitted to show enhanced loss because the owner is prohibited from carrying out that particular improvement. In other words, it is not value in use, either actual or prospective, to the owner that is involved, but value in exchange—market value—that is the test. Joint Highway Dist. No. 9 v. Railroad Co., 128 Cal.App. 743, 18 P.2d 413; People v. Jones, 67 Cal.App.2d 531, 155 P.2d 71.

[7] In some cases evidence that a proposed use based upon a proposed plan would result in a profit is admissible, not for the purpose of enhancing the damages by showing the loss to the owner of a particular plan of operation, but to show that such proposed plan is a feasible plan and should be considered in fixing market value. United States v. 25.406 Acres of Land, etc., 4 Cir., 172 F.2d 990, certiorari denied 337 U.S. 931, 69 S.Ct. 1496, 93 L.Ed. 1738.

[8] The statement in the opinion of the trial judge that all of the experts were entitled to credence certainly does not mean that the trial judge was required to believe all of their testimony. It simply means that, in the opinion of the judge, all of the experts gave honest opinions based upon the factors they considered. The balance of the opinion is ambiguous. If the trial court meant that appellants' experts were not entitled to consider the proposed plan of the appellants to construct a motel on the premises in considering whether the property was adaptable for that purpose as one of its uses, the trial court was clearly wrong. On the other hand, if it meant that appellants' experts were not entitled to fix damages based upon the fact that the owners were forced to give up a contemplated specific plan, it was clearly correct. The opinion is ambiguous in this respect. Such ambiguity must be resolved in favor of the judgment. So resolved, the opinion correctly states the law.

[9] The only other point urged by appellants is that, because of the great divergence of opinion among the experts, the trial court, on its own motion, should have appointed experts to assist it in resolving this conflict, and that failure to do so was an abuse of discretion as a matter of law. The contention is without merit. Section 1871 of the Code of Civil Procedure permits the court, in a proper case, on the motion of any party, or on its own motion, to appoint experts. Undoubtedly that section applies to condemnation proceedings. City of Los Angeles v. Clay, 126 Cal.App. 465, 14 P.2d 926. In the instant case no motion was made by anyone for the appointment of such experts. Both sides produced qualified experts. The judge visited the property. Pictures and maps of the property were introduced into evidence. Whether the trial court needed further help in resolving the issues was a matter resting with it. Certainly it is not the law that whenever the parties' experts radically differ on the issue of value, the court must, as a matter of law, appoint experts. If that were so, such experts would have to be appointed in practically every case where expert evidence is admissible. The point is without merit.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

110 Cal.App.2d 386

HAYWARD LUMBER & INVESTMENT CO. v. CONSTRUCTION PRODUCTS CORP.

Civ. 18725.

District Court of Appeal, Second District, Division 1, California.

April 16, 1952.

Action on a contract by Hayward Lumber & Investment Company, a corporation doing business under the firm name of Hayward Hallett Equipment Company, against Construction Products Corporation. From an order of the Superior Court of Los Angeles County, Philbrick McCoy, J., which partially dissolved an attachment levied on certain properties of defendant, plaintiff appealed. The Court of Appeal, Drapeau, J., held that the computation of damages alleged by plaintiff met the test required by law, and it was error to dissolve the attachment.

Order reversed.

1. Attachment ⚿5

Attachment will lie in an action for breach of contract when it appears by reference to the contract, complaint, and affidavit for attachment that the computation of damages alleged is reasonable, definite, and readily ascertainable.

2. Attachment ⚿14

When an action is based upon contract, statutory provisions for attachment in contract actions are applicable, and a proper case for attachment is presented, though one count of the complaint sounds in tort. Code Civ.Proc. § 537.

3. Attachment ⚿5

Where plaintiff corporation alleged that defendant corporation had sold parts supplied to it under contract amounting to $3,483.98 which defendant failed and refused to pay and that plaintiff was damaged in the further sum of $5,305.94 by defendant's breach of agreement to sell certain minimums or, even if not sold, to purchase same and pay plaintiff therefor, allegations were sufficient to authorize attachment. Code Civ.Proc. § 537.

Philip T. Lyons, Los Angeles, for appellant.

Larwill & Wolfe, Los Angeles, for respondent.

DRAPEAU, Justice.

Attachment was levied upon certain properties of defendant corporation, at the instance of plaintiff corporation. Plaintiff appeals from an order dissolving the attachment in part.

There were four counts in the complaint. The order dissolving the attachment released all property except $2,000 cash. Total demands against defendant in the first and fourth counts do not exceed this amount. So no point is made as to the effect of the order as to these two counts.

It is alleged in the second cause of action that under the terms of a written contract between the parties plaintiff put defendant in possession of certain parts and materials; that defendant agreed to sell said parts and materials at prices listed in the contract, and to pay to plaintiff the proceeds thereof; that defendant sold $3,483.98 of said parts and materials and failed and refused to pay said sum or any part thereof to plaintiff.

It is alleged in the third cause of action that in said contract defendant agreed to sell a minimum quantity of said parts and materials, or in the event defendant did not sell such minimum defendant would purchase the same and pay plaintiff therefor; that defendant breached the terms of said contract in that defendant failed to either sell said minimum or purchase the same from plaintiff, to the damage of plaintiff in the sum of $5,305.94.

[1] Attachment will lie in an action for breach of contract when it appears by reference to the contract, complaint, and affidavit for attachment that the computation of damages alleged is reasonable, definite, and readily ascertainable. Force v. Hart, 205 Cal. 670, 272 P. 583; Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653; DeLeonis v. Etchepare, 120 Cal. 407, 52 P. 718; Lewis v. Steifel, 98 Cal.App.2d 648, 220 P.2d 769; Eaton v. Queen, 78 Cal.

App.2d 571, 177 P.2d 997; Oil Well Core Drilling Co. v. Barnhart, 20 Cal.App.2d 677, 67 P.2d 696.

[2] Even if one count of a complaint sounds in tort, when the action is based upon contract the provisions of Section 537 of the Code of Civil Procedure are applicable, and a proper case for attachment is presented. Filipan v. Television Mart, 105 Cal.App.2d 404, 233 P.2d 926.

[3] Plaintiff corporation met the test required by the law, and it was error to dissolve the attachment.

The order is reversed.

WHITE, P. J., and DORAN, J., concur.

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110 Cal.App.2d 479

SAN FRANCISCO BREWING CORP. v. JOHNSON, Treasurer of State et al.

ACME BREWERIES v. JOHNSON, Treasurer of State et al.

Civ. 7983, 7984.

District Court of Appeal, Third District, California.

April 22, 1952.

Rehearing Denied May 7, 1952.

Hearing Denied June 19, 1952.

Actions by the San Francisco Brewing Corporation and by Acme Breweries against Charles G. Johnson, as Treasurer of the State of California, and others to recover taxes paid by plaintiffs on exported alcoholic beverages. The Superior Court, Sacramento County, Percy West, J., rendered judgments in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that the plaintiffs had waived their exemption, insofar as the transactions involved were concerned, by their failure to comply with the State Board of Equalization's rule prescribing the procedure to be followed as a condition precedent to claims for tax exemption for exported alcoholic beverages.

Affirmed.

1. Intoxicating Liquors 🔑90(1)

State Board of Equalization's rule prescribing procedure to be followed as condition precedent to claim for tax exemption for exported alcoholic beverages was within authority delegated to board by Alcoholic Beverage Control Act, and failure to comply with rule constituted waiver of exemption. Administrative Code, rule 54, tit. 4 art. 10, § 54; Gen. Laws, Act 3796, §§ 23, 23b.

2. Intoxicating Liquors 🔑90(1)

Where beer was first exported and thereafter tax was paid, and no attempt was made to comply with State Board of Equalization's rule prescribing procedure to be followed as condition precedent to claim for tax exemption for exported alcoholic beverages, taxpayers were not entitled to credit for taxes paid, even though rule was adopted prior to enactment of statutory provision authorizing credit as to taxes paid on beer subsequently exported. Gen.Laws, Act 3796, § 23b; Administrative Code, rule 54, tit. 4, art. 10, § 54.

◆

E. R. Hoerchner, San Francisco, for appellants.

James Sabine and Ernest P. Goodman, Deputy Attys. Gen., for respondents.

PEEK, Justice.

These are consolidated appeals from judgments in favor of defendants which were entered following the sustaining of demurrers to the respective plaintiffs' complaints without leave to amend.

Each complaint contains identical allegations that the State Board of Equalization levied additional assessments on beer made by plaintiffs; that all of said beer was sold for export and was actually exported; that plaintiffs paid such assessments and thereafter petitioned the Board for reassessment, which was denied, as was their petition for a refund; that the sole ground for the Board's action was the alleged failure of plaintiffs to comply with Rule 54, Title 4, Article 10, Section 54, Cal.Adm.Code. Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were sustained without leave to amend and judgments were entered accordingly.

Section 23 of the Alcoholic Beverage Control Act, Deering's General Laws, Act 3796 provides for an excise tax on beer sold in this state by a manufacturer, except as otherwise provided in said Act. The pertinent portions of Section 23b of said Act, as amended, provide in part:

> "It shall be presumed, for the purposes of this act, that all beer manufactured in this State by a manufacturer, * * * has been sold in this State by such manufacturer unless proven to the satisfaction of the board, in verified reports on forms prescribed by the board, that such alcoholic beverage * * * (3) has been exported without this State or sold for export by the licensee making the report * * *.
>
> "No excise tax mentioned in Section 23 hereof shall be or is imposed by this act upon any beer exported by a licensed manufacturer from within this State to any place without the State or sold by a licensed manufacturer for export from within this State to any place without the State and actually exported from this State * * *.
>
> "Any claim for exemption from excise tax under this section must be made to the board, in such manner as the board shall prescribe.
>
> "In the event excise taxes under this act have been paid on beer subsequently exported from the State or sold for export and actually thereafter exported from this State, a taxpayer may claim and shall be allowed credit with respect to such tax in any report filed or assessment made under this act."

Said Rule 54 of the State Board of Equalization prescribes two procedures as conditions precedent to claims for tax exemption for exported alcoholic beverages: First, in the case of purchase and delivery to an out of state purchaser in this state for export in purchaser's own vehicle, said purchaser must apply to the Board for an identification permit, which permit must be presented at the time of making purchases, to the California taxpayer, who in turn must complete a prescribed form (See Form 260). Second, in the case of delivery made outside of the state by a common carrier, the taxpayer must support his claim for exemption by a copy of the shipping documents receipted for by the common carrier.

Appellants first contend that as section 23b of the Alcoholic Beverage Control Act is a statutory exemption of exported beer from imposition of excise taxes as provided in the Alcoholic Beverage Control Act, the exemption cannot be destroyed by a rule or regulation of the Board.

Respondents' answer is that section 23b has made compliance with the Board rule mandatory for a taxpayer claiming an exemption; that the right to exemption is not destroyed by said rule because (1) the statute expressly conditions the right to exemption on a compliance with the procedure prescribed by the Board, and (2) because said rule is a reasonable regulation prescribing a very simple procedure for claiming exemption.

Although appellants endeavor to distinguish the case, it would appear that Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106, 1107, is determinative of the question here presented. In that case Chesney, a war veteran, by a writ of mandate, sought to compel H. L. Byram, county tax collector of Los Angeles County, to allow the $1,000 property tax exemption given to veterans by Article XIII, section 1¼ of the Constitution, which provides in part that

> "* * * property to the amount of one thousand dollars of every resident of this State who has served in the army, navy, marine corps or revenue marine service of the United States in time of war * * * *shall be* exempt from taxation * * *." (Emphasis added.)

Chesney had failed to comply with Political Code section 3612, which provided the procedure by which advantage could be taken of the exemption. But he contended such provision was unconstitutional and void as an invalid statutory limitation upon his constitutional right of exemption. "The sole question then", the court stated, "* * * is whether the waiver provision of section 3612 of the Political Code is an invalid infringement upon a constitutional right, or is a valid legislative provision regulating the exercise or assertion thereof." In answer thereto the court held that even though Chesney was clearly entitled to an exemption, by his failure to follow the method provided in said section 3612, he had waived the right. The court further held that although the constitutional provision was self-operative the legislature had the power to enact legislation providing reasonable regulation for the exercise of the right conferred by the Constitution; and that since the legislation so enacted provided a uniform procedure for the exercise of the right so conferred, it could not be construed to be an invalid limitation on said right.

[1, 2] We are convinced that the present case comes squarely within the principle so enunciated. Here the Board was specifically authorized to prescribe the procedure for "any claim for exemption from excise tax * * * in such manner as the Board shall prescribe." Pursuant to the authority so delegated the Board, by Rule 54, set forth the procedure to be followed. Applying the principle stated to the facts presented it cannot be said that such rule was not within the authority so delegated nor was it an invalid limitation of the statutory exemption. Hence in the absence of any showing to the contrary it must be construed to be a reasonable and valid exercise thereof. American Distilling Co. v. State Board of Equalization, 55 Cal.App.2d 799, 805, 131 P.2d 609. Therefore appellants' failure to comply therewith must, on the authority of the Chesney case, be held to be a waiver of the exemption insofar as the transactions here involved are concerned.

Appellants' second contention likewise is without merit. Paragraph 4 of Section 23b does not, as appellants contend, provide that "'a taxpayer *shall be allowed credit*' in the event excise taxes under this act *have been paid* on beer sold for export and actually thereafter exported from this state." (Emphasis appellants'.) To the contrary the paragraph specifically provides that *"in the event excise taxes under this act have been paid on beer subsequently exported* * * * or sold for export and actually thereafter exported * * * a taxpayer may claim and shall be allowed credit with respect to such tax in any report filed or assessment made * * *." (Emphasis ours.)

It is admitted by appellants that the beer was first exported, that thereafter the tax was paid, and that no attempt was made to comply with Rule 54. But they contend that said rule could not apply to claims for exemption made under paragraph 4 of the section since Rule 54 was enacted by the Board prior to the time that paragraph 4 was added to Section 23b.

However, as previously stated, it must be borne in mind that under the provisions of pagragraph 3 of Section 23b it becomes mandatory for one who makes *"any claim* for exemption * * *" under that section to make his claim "* * * to the board, in such manner as the board shall prescribe." (Emphasis added.) Nowhere in the section is there any provision for, or relief granted to, one who has failed to pay the tax until after the beer has been exported—the precise situation presented in the instant case.

It necessarily follows that since *any claim* for exemption of excise taxes for ported beer under the Alcoholic Beverage Control Act "must be made to the board, in such manner as the board shall prescribe", and since admittedly no attempt was made to comply with Rule 54, which was adopted by the Board pursuant to such statutory authority, appellants' second contention is also without merit.

The judgments are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

Hearing denied; SCHAUER, J., dissenting.

110 Cal.App.2d 650

PEOPLE v. WESTER.

Cr. 764.

District Court of Appeal, Fourth District, California.

April 29, 1952.

The defendant was convicted of burglary. The Superior Court of San Diego County, C. M. Monroe, J., entered judgment on verdict of guilty and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that testimony of accomplice was sufficiently corroborated to sustain conviction.

Judgment affirmed.

1. Criminal Law 🔑511(5, 6)

In prosecution for burglary, testimony of accomplice was sufficiently corroborated by admissions and confessions of defendant, by defendant's ownership of truck involved and possession of stolen property, and by fact that defendant and accomplice were together practically all during period in question.

2. Criminal Law 🔑412(2), 1137(5)

In prosecution for burglary, admission into evidence of defendant's signed statement was neither prejudicial nor error where it was submitted into evidence by consent and where person who acted as interpreter at time of taking statement also testified to what defendant had said.

3. Criminal Law 🔑736(2)

In prosecution for burglary, question whether defendant's confessions were free and voluntary was one of fact for the judge and jury.

4. Criminal Law 🔑698(1)

In prosecution for burglary, permitting owner of store which had been burglarized to answer question whether he had given defendant, or any other person, permission to enter his store on night in question was not error in absence of objection to question.

5. Criminal Law 🔑698(1)

In prosecution for burglary, where photographs of heel marks found at scene were introduced in evidence, but no one testified concerning relation between defendant's shoes and heel marks found, admission of defendant's shoes into evidence was not error in absence of objection.

6. Criminal Law 🔑938(1)

Upon motion for new trial after defendant was convicted of burglary, two affidavits stating that affiants saw defendant in pool hall on night in question and affidavits of due diligence filed by defendant and his attorney were not sufficient to show that evidence stated therein would have affected result upon new trial, and denial of motion for new trial was not abuse of court's discretion.

Wallace D. Dorman, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with burglary on two counts, and with two prior convictions. A jury found him guilty of second degree burglary on both counts and he was sentenced to prison, the two sentences to run concurrently. He appeals from the judgment and from an order denying his motion for a new trial.

On the morning of May 4, 1951, the owner of a hardware store in Fallbrook found that the store had been broken into during the night. A hasp fastening a sliding door at the rear had been broken and the safe had been opened with force. Seven revolvers had been taken, and about $1,000 in money had been taken from the safe. On the morning of May 8, the owner of a butane plant in Fallbrook found that the building had been entered by forcing the latch on a window. He had a collection of 21 rifles and shotguns, and these were missing.

One Baldwin, who was 17 years old, had been staying with the defendant in his room in Fallbrook for some two weeks before these incidents occurred. About 4:00 A. M. on May 8, a police officer found Baldwin asleep in the defendant's pickup truck in a gasoline station in Tijuana. There were two guns on the front seat of the car. Baldwin was arrested and taken to the police station and an officer remained to watch the car. A few minutes later the defendant came to the car and got in. The officer arrested him and took him and the car to the police station. Fourteen rifles, three shotguns and a revolver were found in the car, all of which were identified as having been taken from the two places in Fallbrook.

Baldwin at first told the Tijuana police that he alone had broken into the butane plant and brought the guns to Tijuana. He later said that this was not true, and that the defendant had told him to take the blame. In his testimony at the trial he told in detail how he and the defendant had entered the hardware store, about the opening of the safe and the taking of the money and revolvers, where the money was divided and that the defendant gave him $275; that they then went to Tijuana and what they did the next few days, including a trip to Ensenada; and that they returned to Fallbrook on the night of February 7. He then told of the breaking into the butane plant and the taking of the guns; that they returned to Tijuana and parked the truck; that the defendant left for the purpose of trying to sell the guns; that two persons came to the truck saying they understood that some guns were for sale; and that he then fell asleep.

On May 9, two officers from San Diego had several conversations with the defendant in Tijuana. In the first of these, at the jail, the defendant told one of these officers that he had committed both of these burglaries. The defendant was then taken to the office of the federal district attorney at Tijuana. While waiting to see the district attorney the defendant told the San Diego officer that he and the boy got only about $500 out of the safe at the hardware store, that he had blown the money on liquor, and that he then pulled the job at the butane plant because he was broke. The defendant was then taken into the federal district attorney's office where he was questioned by a Mexican officer. The questions were asked and answered in English, and the interrogator translated the defendant's replies into Spanish and this was taken down in Spanish by a stenographer. After his statement was completed it was read to the defendant in English and signed by him. An English translation of this statement was admitted into evidence by consent, and the Mexican officer also testified as to what the defendant said at that time.

Later that day, at the jail in Tijuana, two San Diego officers had a further talk with the defendant. He told them in detail how he and the boy had entered the hardware store on the night of May 3, and how they had taken some revolvers and money from the safe; that he went to Tijuana and spent all of his money; that he was unable to sell the revolvers since they were stolen from his car; that they returned to Fallbrook on the night of May 7, with the intention of burglarizing the butane plant since he knew that the owner had a collection of rifles and shotguns; that he effected entrance by using a screwdriver on the window and forced the lock on the gun cabinet with the same screwdriver; that he and Baldwin took the guns and returned to Tijuana; and that they had only been there a half hour when they were picked up by the police. The defendant's story, as told to the officers, corresponded almost exactly with the story told by Baldwin at the trial.

The defendant took the stand and admitted being with Baldwin during practically all of the time in question, except for a few hours at the time of each robbery. He said that the boy had asked for his help in robbing the hardware store but he refused. He said he had been on a drinking spree during this period and claimed that he gave Baldwin the keys to his truck on the evening of May 7, and that he did not see the truck again until about 2:30 in the morning when he happened to see it parked by a gasoline station. He denied making any confessions to the San Diego or Tijuana officials, and while he admitted signing a statement and that it had been read to him he claimed that he signed it because he was told that it was necessary for him to do so in order to be deported.

[1] It is first contended that the evidence is insufficient to support the judgment. It is argued that the only evidence connecting the defendant with the two crimes is that of the accomplice Baldwin, that the testimony of Baldwin was not only improbable but is not sufficiently corroborated by other evidence, and that it appears that the defendant did not have much, if any, money during the few days' stay in Tijuana because he testified that Baldwin paid most of their expenses and loaned him money several times.

No improbability appears in connection with Baldwin's testimony, although he testified that the defendant used a screwdriver in forcing an entrance into the hardware store whereas the defendant told the officers that he used a small wrench. The defendant owned the truck in which the stolen property was found, and the evidence justifies the inference that the stolen property was in his possession. The testimony of the accomplice was sufficiently corroborated by the admissions and confessions of the defendant, by his ownership of the truck and possession of the stolen property, and by the admitted fact that he was with Baldwin practically all of the time during the period in question.

[2–5] Four assignments of error during the trial are made. The first is the receipt into evidence of the written statement of defendant given to the federal district attorney in Tijuana. This was signed by the defendant and a translation of it into English was added thereto by consent. The person who acted as interpreter at the time the statement was taken also testified to what was said by the defendant at that time. The statement signed by the defendant tended to corroborate the testimony of this official, and neither error nor prejudice appears. It is next contended that the confessions obtained from the defendant were not free and voluntary. While the defendant testified to this effect, the testimony of the various officials was flatly to the contrary. The question was one of fact for the judge and jury, and the evidence fully sustains their findings in that regard. It is next contended that the court erred in permitting the owner of the hardware store to answer a question as to whether he had given the defendant, or any other person, permission to enter his store on the night of May 3rd. No objection to the question was made and no error appears. Error is also assigned in that the court allowed the defendant's shoes to be received in evidence. Photographs of certain heel marks found at the scene of one of the burglaries were also introduced in evidence, and it is argued that no one testified as to the relation between the defendant's shoes and the heel marks so found. No objection was made and the jury was left free to make its own comparison.

[6] The final contention is that the court erred in denying the defendant's motion for a new trial. On this motion the affidavits of two persons were presented stating in effect that they saw the defendant in a pool hall in Fallbrook at some time between eight and ten p. m. on the night of May 3rd. Affidavits of due diligence were also filed by the defendant and his attorney. The affidavits were far from sufficient to indicate that they could have affected the result in the event of a new trial, and no abuse of discretion appears.

The defendant's claim that his counsel at the trial failed to properly and adequately present his defense is entirely baseless and without merit. The appellant has been most ably represented on this appeal by different counsel, appointed by this court at his request.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

PEOPLE v. GUASTI.

Cr. 4736.

District Court of Appeal, Second District,
Division 2, California.
April 22, 1952.

Rehearing Denied May 2, 1952.
Hearing Denied May 22, 1952.

Prosecution for perjury. From a judgment of conviction in the Superior Court of Los Angeles County, Philip H. Richards, J., defendant appealed. The District Court of Appeal, McComb, J., held that the evidence was sufficient to establish the corpus delicti and defendant's intent to deceive the grand jury by his false testimony before it.

Judgment affirmed.

1. Perjury 🔑11(8)

To constitute perjury, matters falsely sworn to need not be directly and immediately material, but need only be so connected with facts directly in issue as to have a tendency to prove or disprove such facts by giving weight or probability to witness' testimony.

2. Perjury 🔑11(7)

False testimony of captain in sheriff's office before grand jury, investigating county officers' protection of vice, that witness did not write letter to assistant city police chief, stating that city police officers, one of whom had made vice arrest in county outside city, must stay out of county territory, was material to issue before grand jury as tending to show that witness was protecting persons in county in illicit activities and had special interest in preventing enforcement of vice laws in county, so as to constitute basis for perjury charge.

3. Perjury 🔑29(4)

There was no variance between indictment, charging captain in sheriff's office with perjury in falsely denying before grand jury that he wrote letter to assistant city police chief, advising city police officers to stay out of county territory, after visit by one of them to area in county outside city, and proof that letter was written after arrest made by such officer in that area.

4. Criminal Law 🔑402(1)

In prosecution of captain in sheriff's office for perjury in falsely denying before grand jury that he wrote letter to assistant city police chief, advising city police officers to stay out of county territory after one of them made arrest in county outside city, testimony of wife of arresting officer, to whom letter was given by police lieutenant, that witness placed letter in waste basket and burned contents thereof on following day, constituted sufficient proof of loss and destruction of letter to render secondary evidence of its contents, execution and delivery admissible. Code Civ.Proc. §§ 1855, 1937.

5. Names 🔑14

There is a presumption of identity of person from identity of name. Code Civ. Proc. § 1963, subd. 25.

6. Perjury 🔑33(1)

In prosecution of captain in sheriff's office for perjury in falsely testifying before grand jury that he did not write letter to assistant city police chief advising city police officers to stay out of county territory, evidence was sufficient to justify jury's finding that defendant wrote and signed such letter.

7. Perjury 🔑33(1)

To establish corpus delicti in perjury prosecution state must prove that defendant took oath that he would testify, declare, depose or certify truly before competent tribunal officer or person in case wherein an oath may be lawfully administered and that he willfully stated as true a material fact which he knew to be false, contrary to such oath.

8. Perjury 🔑33(1)

In perjury prosecution, evidence was sufficient to establish corpus delicti.

9. Perjury 🔑3

Intent to swear falsely is the specific criminal intent required to constitute perjury.

10. Perjury 🔑33(2)

In prosecution of captain in sheriff's office for perjury in falsely testifying before grand jury that he did not write letter to assistant city police chief, advising city police officers to stay out of county territory, after arrest made by city police officer in county outside city, evidence was sufficient to establish defendant's intent to deceive grand jury.

11. Criminal Law 🔑1035(6)

To complain on appeal of trial judge's or district attorney's misconduct in examination of veniremen, defendant must object to alleged misconduct and request trial judge to admonish the veniremen to disregard it.

12. Criminal Law 🔑1035(6)

A defendant, not objecting to trial judge's or district attorney's alleged misconduct during examination of veniremen, nor requesting trial court to admonish jury to disregard district attorney's alleged prejudicial remarks to veniremen, waived such alleged errors, which will not be considered on appeal from conviction.

13. Criminal Law 🔑1166½(6)

Where defendant's counsel exhaustively examined each prospective juror about his understanding of general rule acquiring proof of guilt beyond reasonable doubt and willingness to accept law as given him by trial judge, court did not commit prejudicial error in refusing defendant permission to ask veniremen whether they would follow instruction that they must believe beyond reasonable doubt that certain specified elements of crime of perjury existed before returning verdict of guilty thereof.

14. Criminal Law 🔑829(18)

In perjury prosecution, defendant was not denied defense by trial court's ruling, on voir dire examination of jury, that he would not give instruction that jurors must believe beyond reasonable doubt that defendant intended to falsify his testimony before grand jury, but would give general instruction that jury must be convinced beyond reasonable doubt of defendant's guilt before bringing in verdict of guilty as court's statement and conception of law on subject were correct and his subsequent instructions to jury in accordance with such rules were full, complete and accurate.

15. Criminal Law 🔑822(7)

In perjury prosecution, instruction to jury that a person intentionally doing that which law declares a crime acts with criminal intent, though he may not know that act is unlawful and has no bad motive, was not erroneous as instruction that jury might infer intent to commit perjury from mere fact that defendant made statement which later proved to be false, in view of instruction that person willfully stating as true something which he knows to be false, contrary to his oath, is guilty of perjury, and other instructions.

16. Criminal Law 🔑822(1)

Instructions to jury must be considered in their entirety.

17. Perjury 🔑3

To constitute perjury, there need be no specific intent to defraud.

18. Criminal Law 🔑829(3)

In perjury prosecution, trial court's refusal of defendant's requested instruction to jury that defendant's specific intent to falsify his testimony before grand jury was gist of offense and that jury must acquit him, unless convinced from evidence, beyond reasonable doubt, that he had particular intent to falsify testimony, was not error, in view of instructions fully covering refused instruction.

19. Criminal Law 🔑822(6)

In perjury prosecution, instructions, considered in their entirety, fully, fairly and accurately instructed jury on every element of crime charged and other rules of law necessary to afford defendant a fair, full and impartial trial, so as to warrant his acquittal, if jury had reasonable doubt as to truth of his alleged false testimony.

20. Criminal Law 🔑1144(14)

Where trial court clearly stated elements necessary to constitute crime charged in instructions to jury, it must be presumed to have understood that defendant was entitled to acquittal, in absence of sufficient proof of any one of such elements.

21. Criminal Law 🔑1023(8)

An order denying motion in arrest of judgment is not appealable.

◆

John J. Bradley and A. James Ayers, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of perjury after trial before a jury, defendant appeals. There is also an appeal from the order denying defendant's motion for a new trial and a purported appeal from the order denying his motion in arrest of judgment.

Facts: During the year 1946, Joseph F. Reed was Assistant Chief of Police in the Los Angeles Police Department. The administrative vice squad of the police department was in his command and Lieutenant Rudolph Wellpott was in charge of the squad. James Fisk was on the administrative vice squad, on the team apprehending bookmakers. Undersheriff Arthur Jewell held a position in the Sheriff's Office of Los Angeles County comparable to that of Assistant Chief Reed in the police department and the two dealt together in matters of jurisdiction of the sheriff and the police department.

Defendant was a captain in the sheriff's office assigned to the anti-subversive detail.

On August 30, 1946, police officer James Fisk went into county territory outside of the City of Los Angeles and there made a bookmaking arrest at 1709 East Florence Avenue.

A few days after August 30, 1946, Lieutenant Wellpott and Assistant Chief Reed were in the latter's office. Defendant walked into the office carrying a letter which he threw on the assistant chief's desk. This letter the assistant chief opened and read, then nodded his head at the defendant who turned and walked out. Chief Reed handed the letter to Lieutenant Wellpott and asked him to read it which he did. Lieutenant Wellpott was then told to take the letter to his office. There he gave it to Officer Fisk who read it, took it home, showed it to his wife and put it in a file with other papers belonging to him.

About a year after he received the letter Mrs. Fisk urged him to get rid of some of the papers which he had accumulated but he decided to retain this letter which he did until about a year later when he gave it to his wife to dispose of. This she did by burning it.

On or about December 12, 1950, the Grand Jury of Los Angeles County was regularly impanelled and undertook a general investigation of vice conditions and protection pay-offs in Los Angeles County. The secretary of the Grand Jury read to it a statement of the purposes of its investigation as follows: "The investigation before the Grand Jury was an investigation of County officers, particularly with respect to the pattern of vice protection in Los Angeles County, with particular inquiry into the giving and taking of bribes for the protection of vice in this County."

In addition, defendant in his activities and his relationship with a Mr. Contratto were also the subject of investigation by the Grand Jury. Defendant appeared before the Grand Jury as a witness and after being sworn was asked the following question:

> "Getting back to Joe Reed, the Chief of Police under Chief Horrall—I believe he is entitled to that name—he has informed me, sir, as well as Mr. Wellpott, whom you do not know, that he personally received a letter written by you, signed by you, on the Sheriff's stationery, advising—and I quote only in substance—the Los Angeles Police Department to stay out of the territory of the County, the incident growing out of a visit by Lieutenant Fisk down in the Florence Avenue area. Did you write such a letter?" Defendant replied, "No, sir."

The following questions and answers then ensued:

> "Q. I gave you that background because I have interrogated Joe Reed, obviously, and he distinctly remembers not only the letter but the manner of delivery. A. Yes.
>
> "Q. It is your testimony under oath that you never wrote such a letter? A. I don't recall writing such a letter; no, sir."

Various witnesses gave testimony showing the lack of authority of defendant to write such a letter and with reference to the operation of bookmaking establishments in the East Florence Avenue area of Los Angeles County. At the time of the trial witnesses testified that shortly after August 30, 1946, defendant had given Assistant Chief Reed a letter typewritten on the stationery of the sheriff's office of Los Angeles County which was addressed to Assistant Chief Joseph Reed, and which stated that administrative vice squad officers had gone into the county some distance beyond Los Angeles jurisdictional lines; that Sergeant Fisk had made a statement that it was not the last time he would go into the county, and that the sheriff's office was able to deal with such problems; that such a thing should not happen again. The Los Angeles police were to stay out of the county. At the bottom of the letter the name "Al Guasti" was handwritten.

[1,2] *Questions*: First: *Was defendant's denial of writing the letter material to any issue before the Grand Jury?*

Yes. The law is settled that the matters falsely sworn to need not be directly and immediately material. It is sufficient if it be so connected with the facts directly in issue as to have a tendency to prove or disprove such fact by giving weight or probability to the testimony of a witness testifying thereto. (People v. Barry, 63 Cal. 62, 64; People v. Phillips, 56 Cal.App. 291, 293 [2], 205 P. 40; People v. Dunstan, 59 Cal. App. 574, 582, 211 P. 813.)

Applying this rule to the present case it is apparent that the Grand Jury had before it an investigation of county officers respecting the pattern of vice protection in the county and the giving and taking of bribes for such protection. The inquiry concerned activities of the sheriff's staff and specifically those of defendant. Testimony was presented to the Grand Jury with respect to the bookmaking establishments in Los Angeles County and inquiry was being made as to why those conditions existed.

Testimony concerning the letter which defendant denied writing showed that it stated in substance that Sergeant Fisk, a city police officer, had gone into county territory and there made a vice arrest; that the officer had stated that it would not be the last time he would do so; that the letter stated such a thing should not happen again; that he must stay out of the county.

From this evidence the Grand Jury may have inferred that defendant did not want persons suspected of illegal activities in the county molested by law enforcement agencies, and such letter tended to show that the writer thereof was protecting persons in the county in their illicit activities. This is especially true in view of other evidence that defendant at the time the letter was written was in charge of the anti-subversive squad of the sheriff's office and was not concerned with jurisdictional matters concerning the anti-vice detail. The fact that he had come to protest anti-vice activities of the Los Angeles Police Department indicated he had some special interest in seeing that vice laws were not enforced.

As the Grand Jury was investigating whether or not county officers were protecting vice in county areas and was inquiring into defendant's activities the writing of the letter by defendant tended to show he did not desire vice laws enforced in the county, and he had a special interest in seeing they were not enforced. Such letter could have properly influenced the Grand Jury in determining whether or not vice was being protected in county areas, and whether or not it was being protected by defendant. It was therefore material to the inquiry which the Grand Jury was making.

[3] Second: *Was there a variance between the assignment of perjury and the proof thereof?*

No. Defendant contends there was a fatal variance between the allegation of perjury in the indictment, and the proof introduced at the trial in that the assignment of perjury charged him with falsely denying he had written a letter advising the Los Angeles police department to stay out of county territory, which incident grew out of a *visit* by Lieutenant Fisk to the Florence Avenue area whereas the proof showed that the incident grew out of an *arrest* made by Lieutenant Fisk in the Florence Avenue area.

This contention is without merit since the evidence disclosed that defendant wrote and delivered the letter shortly after Officer Fisk had been in the Florence Avenue area and made an arrest. Such excursion into county territory might well be referred to as a "visit" into county area. That an arrest was made during such visit does not place the identification of the letter outside the description of it given at the Grand Jury session and alleged in the indictment. (Cf. People v. Bradbury, 155 Cal. 808, 810, et seq., 103 P. 215.)

[4] Third: *Did the trial court err in admitting secondary evidence of the contents of the letter?*

No. Section 1855 of the Code of Civil Procedure provides in part as follows:

> "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:
>
> "1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made. * * *
>
> "In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents."

In the present case Mrs. Fisk testified she placed the letter in a waste basket and burned the contents of the waste basket the following day. Such evidence constituted sufficient proof of the loss and destruction of the letter pursuant to the provisions of section 1937 of the Code of Civil Procedure, which reads:

> "The original writing must be produced and proved, except as provided in sections eighteen hundred and fifty-five and nineteen hundred and nineteen. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in section eighteen hundred and fifty-five."

After having proved the destruction of the letter the People were authorized to prove its contents, execution and delivery. (See Deacon v. Bryans, 88 Cal.App. 322, 324, 263 P. 371.) Here the evidence disclosed that defendant entered Assistant Chief Reed's office, threw on his desk the letter, which was typewritten and contained therein at the end the handwritten name "Al Guasti".

[5] There is a presumption of identity of person from identity of name. (Sec. 1963, subd. 25, Code Civ.Proc.; In re Kennedy's Estate, 4 Cal.Unrep. 671, 675, 36 P. 1030.) In addition defendant delivered the letter in person to the Assistant Chief's office, watched him open, read it and nod to him.

[6] From the foregoing facts the jury was justified in drawing the inference that defendant had written and signed the letter.

[7, 8] Fourth: *Was there sufficient evidence to establish the corpus delicti?*

Yes. To establish the corpus delicti in the crime of perjury it must be proven defendant (a) took an oath that he would testify, declare, depose or certify truly before (b) a competent tribunal, officer or person, (c) that such oath was taken in a case in which an oath may be lawfully administered, and (d) that defendant wilfully and contrary to such oath stated as true a material matter which he knew to be false. (People v. Macken, 32 Cal.App.2d 31, 34 [1], 89 P.2d 173.)

In the present case there was evidence from which the jury may have inferred that each of the foregoing elements was present.

[9, 10] Fifth: *Was there substantial evidence to establish an intent on the part of defendant to deceive the Grand Jury?*

Yes. The intent to swear falsely is the "specific criminal intent" required in perjury trials. (People v. Rodley, 131 Cal. 240, 260 et seq., 63 P. 351; People v. Yecny, 53 Cal.App.2d 474, 478, 128 P.2d 146; cf. People v. Dixon, 99 Cal.App.2d 94, 96 et seq., 221 P.2d 198.)

In the present case defendant was asked whether he had written a described letter. He denied having written it and evidence was produced from which the jury could find he had written such letter. The letter tended to show defendant was interfering with the enforcement of the law in county territory. The Grand Jury before whom he was testifying was investigating the enforcement of the law in such area. Therefore the jury could properly believe that since it was something defendant had himself done he would not have forgotten it, and conclude that because defendant knew he had written such a letter he wilfully and knowingly denied having done so before the Grand Jury.

In addition the letter tended to establish defendant's connection with the protection of vice in county territory, the very matter which the Grand Jury was at the time investigating. Hence the jury may have believed that defendant in denying before the Grand Jury he had written such a letter was motivated by the desire to convince such body he had no connection with the protection of vice. Such motive for testifying may properly have been considered by the jury in determining whether or not defendant knew he was testifying falsely and whether or not he wilfully did so. (Cf. People v. O'Bryan, 165 Cal. 55, 59, 130 P. 1042; People v. Miller, 121 Cal. 343, 346, 53 P. 816; People v. Todd, 9 Cal.App.2d 237, 244, 49 P.2d 611; People v. Darcy, 59 Cal.App.2d 342, 348[4], 139 P.2d 118.)

Sixth: *Did the trial court err in adopting the theory that the "intent to swear falsely" is the "specific criminal intent" which must be shown to establish the crime of perjury?*

No. See People v. Rodley, supra; People v. Yecny, supra, and People v. Dixon, supra.

The statements in People v. Pustau, 39 Cal.App.2d 407, 417, 103 P.2d 224 and People v. Tolmachoff, 58 Cal.App.2d 815, 824, 138 P.2d 61, relative to the crime of perjury, that the false statements must be with the intent of deceiving and misleading the Grand Jury and "intent to deceive" it, are merely statements approving correct instructions which had been given in each case and do not state rules of law contrary to the rule announced in People v. Rodley, supra, and other cases hereinbefore cited.

[11, 12] Seventh: *Did the trial court and/or district attorney commit prejudicial error in rulings and objections made in the presence of the jury during the voir dire examination of jurors?*

Any alleged error of either the trial judge or district attorney during the examination of veniremen was waived by defendant. Before a defendant may complain on appeal of misconduct of the trial judge or district attorney in the examination of veniremen, he must (1) object to such alleged misconduct, and (2) request the trial judge to admonish the veniremen to disregard the alleged improper conduct. (People v. Miller, 177 Cal. 404, 408, 170 P. 817.)

In the present case defendant neither objected to the alleged misconduct of which he now complains nor did he request the trial court to admonish the jury to disregard the alleged prejudicial remarks. Therefore we will not consider the alleged errors.

[13] Eighth: *Did the trial court commit prejudicial error in restricting defendant's examination of the veniremen by refusing him permission to ask them if they would follow an instruction that they must believe beyond a reasonable doubt that certain elements of the crime of perjury which were specified existed before they could return a verdict of guilty?*

No. The record shows that each juror was exhaustively examined about his understanding of the general rule requiring proof of guilt beyond a reasonable doubt and his willingness to accept the law as given to him by the judge. This examination was ample and sufficient and fully covered the subject as to which defendant now objects.

[14] Ninth: *Was defendant denied his defense by the trial court's ruling on voir dire examination of the jury that he would not instruct it that they must believe beyond a reasonable doubt defendant's intent to falsify his testimony when he testified before the Grand Jury, but would give a general instruction that the jury must be convinced beyond a reasonable doubt of the guilt of defendant before they might bring in a guilty verdict?*

No. As heretofore demonstrated in answering questions Fifth and Sixth, the trial court's statement and conception of the law on this subject was correct and his subsequent instructions to the jury in accordance with such rules were full, complete and accurate.

[15, 16] Tenth: *Did the trial court err in instructing the jury as follows?*

> "In every crime or public offense there must exist a union or joint operaation of act and intent. To constitute criminal intent it is merely necessary that a person intend to do an act which, if committed, will constitute a crime. When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive."

No. Defendant's contention that a specific intent to swear falsely is a necessary element of perjury, and that the above instruction was erroneous because it told the jury it might infer the intent to commit perjury from the mere fact that defendant made a statement which later proved to be false is devoid of merit because instructions must be considered in their entirety (People v. Macken, 32 Cal.App.2d 31, 42, 89 P.2d 173), and when thus considered it is clear the jury was fully and fairly instructed, for in addition to the above instruction the court instructed the jury thus:

> "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent court, tribunal, grand jury, judge or officer or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury."

In this instruction the jury was told the act constituting the crime of perjury is the act of wilfully stating as true something which the person so stating knew to be false. The two instructions taken together constitute a correct statement of the law and the jury could not have been mislead by the instruction complained of into believing it might infer that defendant intended to commit the crime of perjury just because he made a statement which was later proven to be false.

In support of the foregoing instructions the trial court further instructed the jury thus:

> "An essential element of perjury is that the statement made under oath be wilfully by a person who knows or believes that the statement is false or is aware of his ignorance whether or not it is true. Hence, where there is no wilfulness and consequently no criminal intent, as where a statement is made under an honest mistake and in a belief that it is true, there is no perjury even though the statement be false.
>
> "The word 'wilfully,' as used in these instructions means the making of the alleged perjurious statement with the consciousness that it was false or with the consciousness that the maker thereof did not know that it was true, and with the intent that it should be received as a statement of what was true in fact.
>
> "The intent with which an act is done is manifested by the circumstances attending the act, the manner in which it is done, the means used, and the sound mind and discretion of the person committing the act. * * *"

It is thus evident the jury was not mislead by the questioned instruction.

[17] People v. Geibel, 93 Cal.App.2d 147, 208 P.2d 743, relied on by defendant, is not here in point. In the cited case it was held that in a forgery case it was error to give an instruction on general intent even though one was also given on the necessity of finding that there was a specific intent to defraud. In the instant case defendant is charged with perjury, and there need be no specific intent to defraud. (People v. Darcy, supra, 59 Cal.App.2d 348 [4] et seq., 139 P.2d 118.)

[18] Eleventh: *Did the trial court err in refusing defendant's request to give this instruction?*

> "You are instructed that the existence of a specific intent in the mind of Mr. Guasti to falsify his testimony at the time he answered the questions

> asked by the district attorney before the Grand Jury is the gist of the offense of perjury, and unless you are convinced from the evidence, beyond a reasonable doubt, that at the time Mr. Guasti answered the questions of the district attorney he had the particular intent to falsify his testimony, you must acquit the defendant."

No. The jury was instructed upon the presumption of innocence, reasonable doubt and burden of proof. The crime of perjury was defined. In the definition of perjury the jury was told that a person who *wilfully* and *contrary to his oath* states as true any material matter which *he knows* to be false, is guilty of perjury. Likewise it was instructed that the word "wilfully" as used in such definition meant "the making of the alleged perjurious statement with the consciousness that it was false or with the consciousness that the maker thereof did not know that it was true and *with the intent that it should be received as a statement of what was true in fact.*"

The jury was also instructed that an essential element of perjury is that the statement made under oath be made wilfully by a person *who knows or believes* that the statement is false or is aware of his ignorance whether or not it is true. Hence where "there is no wilfulness and consequently no criminal intent as where a statement is made under an honest mistake and in a belief that it is true, there is no perjury even though the statement be false."

These instructions fully covered the instructions offered by defendant which were refused by the court. Such instructions pointed out to the jury that it could not convict defendant even though he had testified falsely if he did not know his testimony was false and thus would not have the criminal intent to swear falsely.

[19] Twelfth: *Was the jury fully and fairly instructed so that if the jury had a reasonable doubt as to the truth of defendant's testimony they would have acquitted him?*

Yes. As heretofore pointed out, considering the instructions in their entirety and not singling out for consideration alone a particular instruction, the jury was fully, fairly and accurately instructed on each and every element of the crime of perjury and on the other essential rules of law necessary to afford defendant a fair, full and impartial trial.

[20] Thus the following rule stated by Mr. Presiding Justice Finch in People v. Ortiz, 63 Cal.App. 662, 669[9], 219 P. 1024, 1027, is pertinent: "Where the court has clearly stated the elements necessary to constitute the crime charged, the jury must be presumed to have understood that in the absence of sufficient proof of any one of those elements the defendant was entitled to an acquittal. * * *" (See also People v. Curtis, 36 Cal.App.2d 306, 322, 98 P.2d 228.)

The judgment and order denying a motion for a new trial are and each is affirmed.

[21] An order denying a motion in arrest of judgment is nonappealable. (People v. McNamara, 103 Cal.App.2d 729, 731 [1, 2], 230 P.2d 411; see also cases cited in 16 West's California Digest, 1951, Criminal Law, 🔑1023(8), p. 732.) Hence the purported appeal from the order denying defendant's motion in arrest of judgment is dismissed.

MOORE, P. J., and FOX, J., concur.

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110 Cal.App.2d 469

PEOPLE v. MORRIS et al.

Cr. 4747.

District Court of Appeal, Second District,
Division 3, California.
April 22, 1952.

The defendant was convicted in the Superior Court of Los Angeles County, Harold W. Schweitzer, J., of abortion and conspiracy to commit abortion, and from judgments and order denying motion for new trial, he appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained convictions.

Judgments and order affirmed.

1. Criminal Law ⇨317

Where prosecutrix testified in prosecution for abortion and conspiracy to commit an abortion that she had believed that she was pregnant, that she went to defendant and requested him to perform an abortion, and that he performed an operation on her sexual organs, jury could consider failure of defendant to testify or to introduce evidence on his own behalf as tending to indicate that he knew or believed that she was pregnant, and that he intended to procure an abortion.

2. Criminal Law ⇨317

Where it appears from evidence that defendant could reasonably be expected to explain or deny evidence presented against him, jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among inferences that may reasonably be drawn therefrom, those unfavorable to defendant are more probable.

3. Abortion ⇨6
Conspiracy ⇨43(12)

In prosecution for abortion and conspiracy to commit abortion, it was not necessary for prosecution to prove that prosecutrix was pregnant.

4. Abortion ⇨11

Evidence was sufficient to sustain conviction for abortion.

5. Conspiracy ⇨47

Evidence was sufficient to sustain conviction for conspiracy to commit an abortion.

6. Criminal Law ⇨511(2)

Corroborating evidence must tend to connect defendant with offense charged, and it may consist of inferences from circumstances surrounding the criminal transaction, and it need not establish the precise facts testified to by witness whose testimony it supports.

7. Criminal Law ⇨511(2)

Corroborating evidence is sufficient if it connects defendant with commission of crime in such a way as reasonably to satisfy trier of facts that witness whose testimony it supports is telling the truth.

8. Criminal Law ⇨511(3)

Evidence of inculpatory participation need not be direct nor extend to every fact and detail in order to constitute sufficient corroborating evidence.

9. Criminal Law ⇨511(3)

Circumstantial evidence is sufficient corroborating evidence, even though slight, if it tend to connect defendant with commission of the crime.

10. Criminal Law ⇨511(1)

It is not necessary that corroborative evidence prove that defendant is guilty of the offense.

11. Abortion ⇨11

In prosecution for abortion, evidence that defendant possessed instruments and drugs which could be used in performing an abortion was substantial corroboration of testimony of prosecutrix.

12. Abortion ⇨11

In prosecution for abortion, testimony of physician, who examined prosecutrix after operation, to effect that she had been pregnant, that traumatic injury to her cervix could have been caused by an instrument, and that injury was consistent with an abortion having been performed within the past 48 hours, was corroborative of testimony of prosecutrix.

13. Abortion ⇨11

In prosecution for abortion, several false statements of defendant indicating his consciousness of guilt were corroborative of testimony of prosecutrix.

14. Abortion ⇨11

In prosecution for abortion, evidence was sufficient to corroborate testimony of prosecutrix.

15. Conspiracy ⇨47

In prosecution for conspiracy to commit abortion, testimony of officer that defendant told him that defendant had been at office of codefendant when prosecutrix was there, corroborated testimony of prosecutrix.

16. Conspiracy ⇨47

In prosecution for conspiracy to commit abortion, testimony of manager of telephone company that telephone calls were made from telephone of codefendant to telephone of defendant on date when prosecutrix was in office of codefendant corroborated testimony of prosecutrix.

17. Conspiracy ⚷47

In prosecution for conspiracy to commit abortion, false statements made by defendant to officer, indicating defendant's consciousness of guilt, corroborated testimony of prosecutrix.

18. Conspiracy ⚷47

In prosecution for conspiracy to commit abortion, evidence was sufficient to corroborate testimony of prosecutrix regarding overt acts committed pursuant to conspiracy.

19. Criminal Law ⚷404(4)

In prosecution for abortion and conspiracy to commit abortion, instruments and drugs, which had been found in apartment of defendant, and which could be used in performing an abortion, were properly admitted as corroborating evidence.

20. Criminal Law ⚷1169(12)

Where there was strong incriminatory evidence against defendant in prosecution for abortion and conspiracy to commit abortion, alleged error of trial court in receiving in evidence purported accusatory statements made by prosecutrix in presence of defendant and defendant's response thereto did not justify a reversal.

21. Criminal Law ⚷824(5)

In prosecution for abortion and conspiracy to commit abortion, wherein physician gave expert testimony and his opinion on medical questions, court should have given instruction on weight to be given expert testimony, even though defendant did not request such an instruction. Pen. Code, § 1127b.

22. Criminal Law ⚷1186(4)

Where there was strong incriminating evidence against defendant in prosecution for abortion and conspiracy to commit abortion, and defendant failed to testify and explain or deny such evidence, error of trial court in failing to give, on its own motion, instruction regarding the weight to be given expert testimony, was not reversible error. Pen.Code, § 1127b; Const. art. 6, § 4½.

Everett W. Leighton and Lionel Richman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Dan Kaufmann, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants Morris and DeGaston were accused of the crimes of abortion and conspiracy to commit an abortion. During the trial by jury the information was dismissed as to Morris, and he was called as a witness by the plaintiff. DeGaston was convicted on both counts. He appeals from the judgments and the order denying his motion for a new trial.

Appellant contends that the evidence was insufficient; the corpus delicti as to each charge was not established; there was no corroboration of the testimony of the woman; and the court erred in receiving certain evidence and in giving an instruction. He did not testify and did not offer any evidence on his behalf.

Mrs. Malmgren, who resided in San Francisco, wanted an abortion performed upon herself. A friend in San Francisco telephoned to defendant Morris, an osteopath in Glendale, and asked if he would see a Mrs. Baker if she came to his office. The friend gave Morris' telephone number to Mrs. Malmgren and told her to use the name, Mrs. Baker. She testified as follows: She had missed two menstrual periods and believed she was pregnant, but otherwise she was in good health. She went to Glendale on February 7, 1951, called Morris by telephone about 12:30 p. m., and made an appointment to be in his office at 1:30 p. m. When she arrived at the office she introduced herself as Mrs. Baker, and told him that she had missed two menstrual periods, she believed she was pregnant, and she wanted something done about it. He said he could not do anything. While they were talking, Morris left the room several times. The telephone, in another room, rang several times while she was there. DeGaston arrived at Morris' office about 2 p. m. and Morris introduced him as "Dr. Paul." Morris left the room, and she told DeGaston the same thing she had told Morris regarding her condition. DeGaston said that he did not want to have anything to do with it. She said she had come from San Francisco because she could not find anyone there who would do anything about it, and if she could not find someone who would do something she would attempt to do something herself. DeGaston then said that he would examine her, and told her to come with him. They left Morris' office and entered a Packard automobile which DeGaston drove to an apartment house in Hollywood. After he had parked the automobile, he told her to follow him, within five or ten minutes, to room 402 of that house. She remained in the automobile as directed and then went to said room. DeGaston was there. They "arrived at a figure of $300," and she paid that amount to him. They had some drinks. A kitchen table, which was against the wall, was moved out by appellant, and he placed two chairs at one end of the table. She took her underclothing off and reclined upon the table—placing one foot on one chair and one foot on the other chair. Her head was upon a pillow. He gave her two pills and she swallowed them. She saw a hypodermic needle while he was filling it from a capsule which was labeled "Novocain." He gave her a shot of novocain in the region of her vaginal organs. While he was waiting he boiled something in a pan on the stove, but she did not see what was in the pan. After the boiling, he conducted the examination. She could not see what he was doing, but she felt pain where he was examining her. She did not see, hear or feel any instrument except that she saw and felt the needle and she felt paraphernalia of some sort inside her vagina. During the operation, which took about fifteen minutes, he asked how she was feeling. At the conclusion of the operation, about 3:30 p. m., he gave her a shot of penicillin, gave her a sanitary pad, told her to be comfortable, not to be active for a few days, and she probably would begin to menstruate in about six weeks. Then she lay upon the davenport in his apartment about two hours. After the examination he played the violin. They left the apartment about 6 p. m., and he took her in the Packard automobile to dinner and then to her hotel. She began to menstruate about six weeks after the examination.

Morris testified that Mrs. Malmgren came to his office about noon on said February 7th and introduced herself as Mrs. Baker; he called DeGaston by telephone twice on that day; DeGaston called him about noon on that day; after Mrs. Malmgren arrived at his office and told him that she was pregnant, he called DeGaston by telephone and told him to come over and get his patient; Morris knew DeGaston under the names of Hoisch and Marsh; DeGaston came to the office and Morris introduced him and said, "Here is your patient, Mrs. Baker."

The manager of the Glendale office of the telephone company testified, by referring to records of the company, that on said day telephone calls were made from Morris' telephone to DeGaston's telephone at 1:14 p. m. and 2:01 p. m.

Dr. Roberts, a physician, testified that on February 8th he examined the pelvis and vagina of Mrs. Malmgren; her uterus was enlarged approximately to the size of six or eight weeks pregnancy; there was an appearance of trauma in that the endocervix showed some scraping off of the soft surface layers of cells; that in his opinion the injury to the cervix occurred within the past 24 or 48 hours and the injury was consistent with an abortion or attempted abortion; that by disturbing the contents of the uterus with a curette, the patient will usually abort; sometimes when ergot is used the patient will abort; where the uterus has been emptied by curettement, without complications, the average time thereafter when menstruation occurs is about 28 days; novocain could be used to obliterate pain in an operation involving the cervix and uterus; an inter-uterine tenaculum is used ordinarily to grasp the cervix to facilitate working in the cervix or uterus.

A police officer testified that he had a conversation with appellant on the evening of February 8th in the police station and appellant stated as follows: he had occupied said room 402 since June or July, 1950; on said February 7th he was in bed in said room all day because he had a respiratory illness; he did not have any visitor on said day except his nurse who was there between 7:30 and 8:00 p. m. The officer asked him if he had gone to Morris' office in Glendale on said February 7th, and he said that he had gone there about 11 a. m. of that day to get vitamin shots. He also said as follows: he had not received any telephone call from Morris on said day; he was not accompanied by anyone when he left Morris' office; he did not see any woman at Morris' office on that day; the only visit he made to that office on said day was around 10 or 11 a. m.; he had never been licensed as a physician.

On February 8, 1951, about 9 p. m., said officer and other officers, accompanied by appellant, entered said apartment 402. The officers found articles therein as follows: ergot aseptic; novocain; and a curette and an inter-uterine tenaculum which were in a fabric zipper case. They also found three empty novocain tubes in the incinerator in the basement of the apartment house, which tubes were similar to the novocain tubes found in appellant's apartment. The officer (witness) saw a Packard automobile, which was registered in appellant's name, on a parking lot across the street from the apartment house.

On the next day, February 9th, the said officer, three other officers, appellant, and Mrs. Malmgren were in appellant's apartment. The officer (witness) asked appellant if he had seen Mrs. Malmgren before that time, and he said he had never seen her. The officer asked her if she had seen appellant before that time, and she said she had seen him in that apartment on February 7th. He also asked her (in appellant's presence): If appellant had come to Morris' office in the afternoon of February 7th; if she left Morris' office with appellant; if she and appellant traveled in a Packard automobile; if she told appellant, while on the way to the apartment, that she was pregnant and wished to have an abortion; if, as a result of the conversation relative to an abortion, she had paid him $300 for an abortion to be performed by him; and if she had placed herself upon a kitchen table in that apartment and placed her feet upon two chairs at the end of the table. She replied to each of those questions separately, as it was asked, by saying "Yes." The officer also asked her if, after she was in said position on the table, appellant placed instruments inside her body, and she replied that she was not sure because she could not see what was going on, but she felt something that felt like an instrument in her. Appellant did not say anything during that conversation between the officer and the woman. When the conversation with her was finished, the officer asked appellant what he had to say, and appellant remained mute for several moments and then said, "I don't think I better say anything to you gentlemen until I talk to my attorney."

[1-4] Appellant contends that the corpus delicti, as to the charge of abortion, was not established. He argues that the prosecution predicated its case upon the use of instruments, that the evidence does not show that instruments were used, or that defendant had knowledge or a belief that the woman was pregnant, or that appellant had a specific intent to cause an abortion. Instruments and drugs, namely, a curette, a tenaculum, and ergot aseptic, which could be used in performing an abortion, were found in appellant's apartment. She testified that he used a hypodermic needle in giving her a shot of novocain in the region of her vaginal organs; and that he gave her pills. Also, it could be inferred from all the evidence that he used instruments and drugs other than the needle and novocain. There was evidence that after he boiled something in a pan he conducted the examination; she felt pain and paraphernalia of some sort in her vagina; there was some scraping off of the surface of the endo-cervix; the injury to the cervix was consistent with an abortion having been performed. It could be inferred from all the evidence that he knew or believed that she was pregnant, and that he intended to procure a miscarriage. There was evidence that she told him that

she had missed two menstrual periods, that she believed she was pregnant, and that she came from San Francisco to have something done about it; and that he told her, after the operation, that she should not be active for a few days, and probably she would begin to menstruate in about six weeks. The fact as to what appellant knew or believed or intended was, of course, within his knowledge, and it appears that he could reasonably have been expected to explain or deny the evidence presented against him. Under such circumstances, the jury could have considered his failure to testify or to introduce evidence on his behalf as tending to indicate that he knew or believed that she was pregnant, and that he intended to procure a miscarriage. " '[I]f it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.' " People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17, 20. It was not necessary to prove that the woman was pregnant. People v. Ramsey, 83 Cal.App.2d 707, 717, 189 P.2d 802. The evidence was sufficient to establish that the crime of abortion had been committed.

[5] Appellant also contends that the corpus delicti, as to the charge of conspiracy to commit an abortion, was not established. He argues that there was no evidence that anyone other than the woman had the required specific intent to commit an abortion. That argument, as to lack of intent on the part of Morris and appellant, is based upon the evidence to the effect that, when the woman told them about her condition and requested that something be done, Morris said he could not do anything, and appellant said he did not want to have anything to do with it. The evidence shows, however, in addition to those statements, as follows: that Morris did telephone to appellant and tell him to come over and get his patient; that appellant, who was not a physician, went to Morris' office and was introduced by Morris as "Dr. Paul," and Morris said to him, "Here is your patient, Mrs. Baker"; appellant did not disaffirm the false designation of him as a physician or the false surname used in the introduction; he did not disaffirm the reference to her as his patient; he also made several false statements to the officers, including statements to the effect that he had not received a telephone call from Morris on said February 7th, he had been at home in bed all of that day, and he had not seen a woman at Morris' office when he was at that office on said day. The evidence was sufficient to establish that the crime of conspiracy to commit an abortion had been committed.

[6–14] Appellant contends that, as to both charges, there was no corroboration of the testimony of the woman. Corroborating evidence must "tend to connect the defendant with the offense", and it "may consist of * * * inferences from the circumstances surrounding the criminal transaction," and "it need not establish the precise facts testified to by the witness whose testimony it supports." People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720, 723. Corroborating evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the trier of the facts that the witness whose testimony it supports is telling the truth. See People v. Henderson, 34 Cal.2d 340, 342, 343, 209 P.2d 785, 786. "The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime." Ibid. It is not necessary that the corroborative evidence prove that the defendant is guilty of the offense. People v. Allen, 104 Cal.App.2d 402, 413, 231 P.2d 896. The nature and character of the corroborative evidence required by law are stated in People v. Malone, 82 Cal.App.2d 54, at page 61, 185 P.2d 870. The testimony of the woman was corroborated by the testimony of the officer relative to finding, in appellant's apartment, instruments and drugs which could be used in performing an abortion. Appellant's possession of such instruments and drugs is substantial corroboration of the woman's testimony. People v. Raffington, 98 Cal.App.2d 455, 461, 220 P.2d 967; see People v. Powell, 34 Cal.2d 196, 201, 208 P.2d 974. The testimony of Dr. Roberts, who examined the woman after the operation, to the effect that she was pregnant, that the traumatic injury to her cervix could have been caused by an instrument, and that the injury was consistent with an abortion having been performed within the past 48 hours, is corroborative of her testimony. The several false statements of appellant, indicating his consciousness of guilt, were corroborative evidence. See People v. Malone, supra, 82 Cal.App.2d 54, 64, 185 P.2d 870. Her testimony with reference to the charge of abortion was sufficiently corroborated.

[15–18] Also, her testimony as it relates to the charge of conspiracy was sufficiently corroborated. The testimony of the officer that appellant told him that he had been at Morris' office on February 7th, about 11 a. m., is corroborating evidence. The testimony of the manager of the telephone company, that calls were made on February 7th at 1:14 p. m. and 2:01 p. m. from Morris' telephone to appellant's telephone, is corroborating evidence. The false statements made to the officer, indicating appellant's consciousness of guilt, are corroborating evidence. "Circumstantial evidence suffices for the purpose of corroboration." People v. Griffin, 98 Cal.App.2d 1, 26, 219 P.2d 519, 534. The testimony of Morris that he telephoned to appellant on February 7th and told him to come over and get his patient is corroborated by the testimony of the manager of the telephone company. As above shown, there was sufficient evidence to corroborate the testimony of the woman regarding the overt acts committed pursuant to the conspiracy.

[19] Appellant also contends that the court erred in receiving the instruments and drugs in evidence. He argues to the effect that there was no evidence that the instruments or drugs were used. As above shown, the possession of said instruments and drugs is substantial corroborating evidence. The court did not err in receiving this evidence.

[20] Appellant contends further that the court erred in receiving the evidence as to the accusatory statements. He argues that since the officer did not ask for a reply from appellant until the lengthy and complex colloquy between him and the woman had been finished, it is apparent that the purpose in presenting such evidence was not to show the conduct of defendant in the face of accusatory statements but was to place before the jury the alleged fact that instruments had been used. It is not necessary to decide whether this contention is sustainable. Even if it be assumed that the court erred in receiving in evidence the purported accusatory statements and appellant's response thereto, the error does not justify a reversal in view of the strong incriminatory evidence against appellant. The matter of admissibility of accusatory statements is discussed in People v. Simmons, 28 Cal.2d 699, 711 to 721, 172 P.2d 18.

The contention that the evidence was insufficient to support the judgments is not sustainable.

[21, 22] Appellant also contends that the court erred in failing to instruct the jury regarding the weight to be given expert testimony. Dr. Roberts testified and gave his opinions on medical questions herein. Section 1127b of the Penal Code provides, in part: "When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows: Duly qualified experts may give their opinions * * *. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion if it shall be found by them to be unreasonable." The court should have given an instruction as required by said section, even though appellant did not request such an instruction. The jury was instructed that it was the sole judge of the effect and weight of the evidence, and of the credibility of witnesses. In view of

the instructions given, the strong incriminating evidence against appellant, and his failure to testify and explain or deny such evidence, it cannot be said that the error in failing to give the instruction was prejudicial. It appears that the error did not result in a miscarriage of justice. Article VI, section 4½, of the Constitution of California (which provides that no judgment shall be set aside on the ground of misdirection of the jury unless the error resulted in a miscarriage of justice) is applicable here.

The judgments, and the order denying the motion for a new trial, are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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110 Cal.App.2d 612

AGNEW v. CITY OF LOS ANGELES et al.

Civ. 18802.

District Court of Appeal, Second District,
Division 3, California.

April 29, 1952.

Rehearing Denied May 15, 1952.

Hearing Denied June 26, 1952.

R. W. Agnew brought action against the City of Los Angeles, a municipal corporation, and another, for a decree declaring certain sections of the Electrical Code of the city invalid. The Superior Court of Los Angeles County, Irvin Taplin, J., entered a judgment for plaintiff, and defendants appealed. The District Court of Appeal, Vallée, J., held that ordinances were invalid as violative of constitutional provision that a city may not make regulations in conflict with general laws of the state.

Affirmed.

1. Municipal Corporations 🔑592(1)

The last clause of constitutional provisions that any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws, is a limitation on the power of municipalities, from whatever source the power is derived. Const. art. 11, § 11.

2. Municipal Corporations 🔑592(2)

A local law is in conflict with general laws within meaning of constitutional provision that any city may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws, if the general law occupies the entire field, leaving no room for local regulations. Const. art. 11, § 11.

3. Licenses 🔑7(1)

City ordinances requiring every electrical contractor who desires a permit to register and pay a permit service fee of $100 annually to defray expenses of inspections and other services, and providing that before a permit may be issued applicant must furnish an approved surety bond in sum of $1,000, conflict with those sections of Business and Professions Code called the "Contractors' License Act," and therefore are void as violative of constitutional provision that any city may make and enforce within its limits all local, police, sanitary, and other regulations as are not in conflict with the general laws. Business and Professions Code, § 7000 et seq., 7026, 7028, 7071.5, 7072; Const. art. 11, § 11.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., James A. Doherty, Deputy City Atty., Los Angeles, for appellants.

R. W. Agnew, in pro. per.

VALLÉE, Justice.

Plaintiff brought this suit for a decree declaring that sections 93.64 and 93.65 of the Electrical Code of Los Angeles (Mun. Code, Art. 3, ch. 9, enacted November 12, 1948, effective January 1, 1949) are invalid, and to enjoin their enforcement. Plaintiff had a decree as prayed. Defendants appeal.

Section 93.64[1] provides that every person operating as an electrical contractor, who desires to obtain permits for electrical installations and wiring, shall register and pay "a permit service fee of $100.00 to defray expenses of miscellaneous inspections, reinspections and other services not specifically mentioned" in the Electrical Code. The fee is collected annually on and after January 1st for each calendar year. No permit may be issued to any licensed contractor who has not registered and paid the fee for the current year. Any person who has registered and paid the registration fee as provided in sections 93.561 [2] and 93.573,[3] and any dwelling owner qualified under section 93.568, is excepted.

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[1] "Sec. 93.64. Every person, firm or corporation operating as an electrical contractor, desiring to obtain permits from the City of Los Angeles for electrical

Section 93.65 [4] provides that before a permit for electrical installations or wiring may be issued to any person such person shall furnish an approved surety bond in the sum of $1,000 to the city, payable to persons damaged by reason of any violation of the Electrical Code.

Plaintiff is an electrical contractor duly licensed by the state pursuant to the provisions of the Business and Professions Code. Defendants threaten to prosecute him criminally should he fail to comply with sections 93.64 and 93.65. The court concluded that section 93.64 is invalid for the reason it is regulatory in nature and for the further reason it is arbitrary, unreasonable and uncertain. It concluded that section 93.65 is invalid for the reason the city has sought to impose conditions, regulations and restrictions which it has no power to impose on electrical contractors licensed pursuant to the Business and Professions Code.

[1, 2] "Any * * * city * * * may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Const. art. XI, § 11. The last clause of this section is a limitation on the

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installations and wiring shall register with the Electrical Division of the Department of Building and Safety and shall pay to the Board a permit service fee of $100.00 to defray expenses of miscellaneous inspections, reinspections and other services not specifically mentioned in this Article. [This "Article" is the Electrical Code.]

"The permit service fee shall be collected annually on or after January 1st for each calendar year, and no permits for electrical installations or wiring shall be issued to any licensed contractor who has not registered and paid the permit service fee for the current year as provided in this section.

"Exception: This section shall not apply to any person who has registered and paid the registration fee as provided in Sections 93.561 and 93.573 of this Code, nor to any dwelling owner qualified under Section 93.568 of this Code." The exception appended to section 93.64 was enacted February 7, 1949.

[2] "Sec. 93.561. No person shall engage in or carry on the business of electrical contracting or install, alter or repair any electrical wiring, unless such person shall have first registered at the office of the Board and obtained a certificate of registration so to do as provided in this Article."

[3] "Sec. 93.573. Every person, before being entitled to be registered or to obtain a certificate of registration as in this Article provided, shall pay to the Board of Building and Safety Commissioners a registration fee of $100. Any person engaged in the business of maintaining, repairing or installing electrical wiring, connections, fixtures or other electrical appliances within his own store, building or industrial plant shall, at the time of filing such application, pay to the Board of Building and Safety Commissioners a registration fee of $10.00."

[4] "Sec. 93.65. Before permits for electrical installations or wiring may be issued to any person, firm or corporation operating as an electrical contractor or contractors, said contractor or contractors shall furnish a surety bond executed to the City of Los Angeles. In form, said surety bond must be 'Joint and Several,' and in the sum of $1,000.00. This bond must be conditioned that the whole or any part thereof shall be paid to any person who has suffered damage by reason of the violation of any of the provisions of this Chapter. Such bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time by any person who has suffered damages as herein referred to, in his own name, until the whole penalty is exhausted. The sufficiency of the surety company in any such bond shall be approved by the Board of Safety Commissioners and every such bond shall be approved as to form by the City Attorney."

power of municipalities, from whatever source the power is derived. In re Sic, 73 Cal. 142, 148, 14 P. 405; In re Mingo, 190 Cal. 769, 773, 214 P. 850. A local ordinance is in conflict with general law if the general law occupies the entire field, leaving no room for local regulations. Mr. Chief Justice Gibson, writing for the court in Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515, stated that the general rule permitting the adoption of local regulations in the form of additional reasonable requirements not in conflict with general law is subject to the exception that the local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by the general law.

Defendants contend that sections 93.64 and 93.65 do not conflict with the Business and Professions Code. Plaintiff says they do. We have concluded they do.

The Business and Professions Code, Div. 3, ch. 9, sometimes called the "Contractors' License Act," creates a "Contractors' State License Board", referred to as the board, Bus. & Prof.Code, § 7000; defines those coming within the jurisdiction of the board, including electrical contractors, § 7026; prohibits any person from engaging in the business or acting in the capacity of a contractor without first having obtained a state license, and makes it a misdemeanor to do so, §§ 7028, 7030; provides for investigation and examination of applicants for license, § 7072;[5] requires the payment of an application fee, annual renewal fees, and penalties, § 7137; makes elaborate provision for investigation of the acts of contractors, accusations against them, causes for disciplinary action, hearings, review, discipline, prosecution of violations of any law, and renewal or reissuance of suspended or revoked licenses, §§ 155, 7090–7122; and vests broad powers in the board relative to the licensing and regulation of contractors. §§ 7000–7145.

Wilful or deliberate disregard and violation of the building laws of the state, or of any political subdivision thereof, constitutes a cause for disciplinary action. § 7110. Section 7071.5 provides that before reinstatement after disciplinary action the board may require the applicant to give a surety bond or make a cash deposit conditioned upon his compliance with the provisions of the Act. Every person injured by the unlawful acts or omissions of such contractor may maintain an action on the bond or a claim on the deposit.

The intent of the Legislature in adopting the general scheme for the licensing and regulation of contractors is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. It was clearly the intention of the Legislature to declare that the licensing and regulation of contractors by the state shall be the only licensing and regulation in the state. This does not limit the right of a city or county to protect life and property by the enforcement of local regulations as to character and quality of electrical installations. Bus. & Prof.Code, § 7110.

We are of the view that Horwith v. City of Fresno, 74 Cal.App.2d 443, 168 P.2d 767, City and County of San Francisco v. Boss, 83 Cal.App.2d 445, 189 P.2d 32, and Collins v. Priest, 95 Cal.App.2d 179, 212 P.2d 269, are determinative of the questions presented. A hearing was denied in each of those cases. Each of them held: (1) the licensing of contractors throughout the state is a matter of general and state-wide concern, and is not a municipal affair that concerns only the inhabitants of a chartered city and which is subject to local regulation; (2) the state, by the provisions of the Business and Professions Code to which we have referred, has adopted a broad and comprehensive plan for licensing contractors throughout the state, for examination as to their qualifications and fitness to engage in their various activities, for licensing only those who prove themselves qualified by satisfactorily passing examinations, and for punishing those who prove themselves incompetent or unfaithful to the trust imposed in them; (3) the general law has fully occupied the field; (4) a state license implies permission to the licensee to conduct his business at any place in the state, and this permission should not be circumscribed by local authorities; (5) a city ordinance is invalid if it attempts to impose additional requirements. See, also, In re Means, 14 Cal.2d 254, 93 P.2d 105, 123 A.L.R. 1378.

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[5] **The regulations of the board require a written examination. Calif.Admin.Code, Title 16, §§ 764–776.**

In the Horwith case, 74 Cal.App.2d 443, at page 448, 168 P.2d 767, at page 770, the court declared: "The state license implies permission to the licensee to conduct his business at any place within the State. This permission should not be circumscribed by local authorities. This does not limit the right of local governmental agencies to protect property and life through the enforcement of local regulations as to the quality and character of the installations. The right to enforce local ordinances is still in the hands of municipalities through the power of inspections and permits."

In the Boss case, 83 Cal.App.2d 445, 189 P.2d 32, 33, it was held that San Francisco could not recover unpaid license taxes for the fiscal years 1943–1946 from a painting contractor who had not obtained a certificate from the city to the effect that he was registered as a licensed contractor as required by a city ordinance. The ordinance provided that all amounts received from the issuance of these certificates "shall be used to defray the cost of making the investigations and reports and furnishing the information mentioned in Section 205 of this article." Section 205 provided that any contractor may apply to the superintendent of the Bureau of Building Inspection or to the city engineer for "all information necessary to enable said contractor to prepare for the execution of any contract for construction, alteration or improvement of any building, structure, street, road or way" and that such information shall be made available "in order to enable said contractor to prepare for the execution or performance of such contract; all without charge, and when in order to obtain said information, an inspection or investigation of the site on which said contract is to be performed is necessary, said inspection and investigation shall be made." The court held the ordinance invalid and that its purpose was regulation, not revenue. The same is true with respect to the ordinance provisions under consideration: their purpose is regulation.

The Electrical Code contains detailed specific fees for miscellaneous inspections, reinspections, and other services which are set forth in the margin.[6] The Code expressly requires the payment of a $2 fee for any electrical wiring for which a permit is required but for which no fee is provided. § 93.60.

Section 93.64 compels a state-licensed contractor to *register* with the electrical division of the Department of Building and Safety before he may obtain a permit for electrical installations and wiring in the city. As we have noted, no person may engage in or carry on the business of electrical contracting, or install, alter, or repair any electrical wiring in the city, without having first registered and obtained a certificate of registration. § 93.561. No person may do so after the certificate of registration issued to him has expired or has been revoked or suspended, without first registering and obtaining a new certificate. §§ 93.564, 93.582. An application for a certificate of registration must be made in writing to the Board of Building and Safety Commissioners. § 93.571. The Commissioners, prior to the issuance of the certificate of registration, shall briefly examine the applicant and pass upon his qualifications and experience. If he passes, the Commissioners shall, upon the payment of the registration fee and the filing and approval of the bond, issue a certificate of registration for one year. If the commissioners *for any reason* refuse to issue the certificate of registration, the applicant, within ten days, may appeal to the Commissioners for a public hearing. The determination of the Commissioners on such appeal is final and conclusive. § 93.574. A certificate of registration may be suspended or revoked for specified reasons. § 93.578.

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[6] No person shall do, install, alter, reconstruct, or repair any electrical wiring or cause or permit the same to be done without a permit from the Board of Building and Safety Commissioners, referred to as the Commissioners. § 93.35. No permit shall be issued to any person except one who holds a valid, unsuspended, unrevoked, and unexpired certificate to do electrical wiring, which certificate is issued by the Commissioners. §§ 93.36.1, 93.561. A comprehensive schedule of fees is provided for permits, installations, inspections, and reinspections. §§ 93.50–93.62, 93.66–93.69. A fee of $1.00 for issuing each permit, original or supplemental, and a fee for any additional electrical wiring. § 93.50. Fees for each outlet, each lighting fixture, for special incandescent lighting, for temporary and yard lighting, for gas tube lighting, signs marquees, fixed motors, for transformers, industrial, and commercial heating, and miscellaneous equipment, for all kinds of household electrical equipment, for giving incorrect address or wrong location requiring extra inspection trips. §§ 93.51–93.59. Fees for motion picture machine projectors, spotlights, stereopticon and effect machines, for changing, relocating or reinstalling an existing service or meter loop, for connecting existing electrical installation in a moved building, for busways, power ducts and similar equipment, for trolley collector ducts, feed rails, and plug-in devices. §§ 93.61–93.67. Fees for additional inspections whenever it is necessary to make more than two inspections of an installation: 3rd inspection—$1.50 additional; 4th inspection—$1.50 additional; 5th inspection—$2.50 additional; 6th inspection—$5.00 additional. § 93.68.

Sections 93.64 and 93.65 of the Los Angeles ordinance were enacted shortly after the decision in the Boss case, 83 Cal.App.2d 445, 189 P.2d 32. We think it apparent that they are an attempt, under the guise of regulating the quality and character of installations and the exercise of the power of inspections and permits, to do what the Horwith and Boss decisions say cannot be done. Prior to and since the Boss decision, section 93.573 quoted in footnote 3, supra, has provided that every person before being entitled to be registered, or to obtain a certificate of registration as provided in the Electrical Code, shall pay to the Board of Building and Safety Commissioners a registration fee of $100. In enacting section 93.64 all that the city did, in effect, was to change the words "registration fee" in section 93.573 to "permit service fee," and to add that the $100 shall be used to defray expenses. Prior to and since the Boss decision, section 93.572 of the ordinance has provided that every application for a certificate of registration shall be accompanied by a surety bond executed to the city. Section 93.65 is identical with section 93.572. When the Boss case was decided it became apparent that sections 93.572 and 93.573 were invalid. Sections 93.64 and 93.65 were then enacted in an effort to avoid the invalidity without repealing section 93.572 or 93.573. Our conclusion in this respect is fortified by the fact, stated by plaintiff and admitted by defendants, that the city does not require the payment of a catchall fee or the furnishing of a bond by any contractors except electrical contractors.

The answer alleges that since August 12, 1946 (the Horwith decision became final July 8, 1946) defendants have not required state-licensed contractors to pay the fee mentioned in section 93.573, and that they do not require state-licensed contractors to furnish the bond required by section 93.572. These allegations, of course, were deemed denied. Defendants offered no evidence to establish them. Assuming their truth, the fact remains that they have not been repealed; if valid, they are still the law, and their existence as law requires that they be taken as part of the Electrical Code and that sections 93.64 and 93.65 be construed with them.

The phrase in section 93.64—"other services not specifically mentioned in this Article,"—is indefinite, uncertain, and sufficiently broad to include services having no relation to the electrical division of the Department of Building and Safety or to the business of electrical contracting. The character of these services is not disclosed. Section 93.60 enacted August 26, 1949, specifically provides that "The fee for any electrical wiring for which a permit is required, but for which no fee is provided herein, shall be $2.00; * * *." Further, section 93.64 requires the payment of $100 annually whether or not any miscellaneous inspections, reinspections, or other services are made or performed. The section unites all electrical contractors in one body and compels each of them to pay for services supposedly rendered to them as a whole, no matter whether one or any of them receives the alleged service. Payment is required whether the permit is issued for one day or for one year. The language of section 93.64 is almost identical with that of the San Francisco ordinance denounced in City and County of San Francisco v. Boss, 83 Cal.App.2d 445, 189 P.2d 32.

To be lawful, a permit service fee, covering miscellaneous inspections, reinspections, and other services, should be imposed for the purpose of defraying the expenses incidental to the services in fact rendered and should be approximately commensurate with such expenses. Section 93.64 fixes the fee at $100 per calendar year or any fraction thereof. The fee is the same for one month or one day as for one year, although the work supposedly done may be only 1/12 or 1/365 as much as for a calendar year. Patently, the permit service fee is not to defray expenses of miscellaneous inspections, or reinspections, or other services. A similar ordinance was condemned in City of Tucson v. Stewart, 45 Ariz. 36, 40 P.2d 72, 76–77, 96 A.L.R. 1492.

Notwithstanding the state law which authorizes a contractor holding a state license to contract anywhere in the state, this ordinance limits his right to contract in Los Angeles unless he registers with the Electrical Division of the city, pays the city $100, furnishes the bond, and obtains a permit from the city. The provisions of the ordinance do not come within the category mentioned in the Horwith case, 74 Cal.App. 2d 443, 168 P.2d 767—regulations as to the quality and character of installations. They do not in any way provide for the quality or character of installations or for inspection of work done, but attempt to provide a means by which a contractor with a state license may be denied the right to contract or work in Los Angeles. The general law is complete in itself. It is not simply prohibitory. It is also permissive. It authorizes contractors licensed by the board to engage in their occupations anywhere in the state. It clearly appears that the general law and the attacked provisions of the Electrical Code,—the one permitting, the other prohibiting, the same act, except on more onerous terms—are in direct conflict with each other.

It is argued that the registration requirements of sections 93.560–93.584 of the Electrical Code can be validly applied to contractors not required to hold a state license. The argument is fallacious. It is unlawful for *any person* to engage in the business or act in the capacity of an electrical contractor without a state license, with exceptions not applicable here. Bus. & Prof.Code, § 7028.

The requirement of a bond is obviously a regulation of the business of electrical contracting. It nullifies the permission given a contractor by the general law to conduct his business at any place in the state. The general law requires a bond only as a condition for reinstatement. Bus. & Prof.Code, § 7071.5. A municipality may not impose a more stringent or additional requirement.

In Eastlick v. City of Los Angeles, 29 Cal.2d 661, 177 P.2d 558, 170 A.L.R. 225, the plaintiff filed a claim with the city, based on the Public Liability Act of 1923. Gen.Laws, Act 5619. The claim was sufficient if measured by the state law. It was insufficient if measured by the charter of Los Angeles. The city contended its charter provision requiring itemization of damages was merely supplementary to the general law—an additional requirement, not a contrary requirement—and that it was therefore valid. In holding the charter provision invalid the court declared, 29 Cal.2d at page 666, 177 P.2d at page 562: "[W]ith respect to the subjects covered, the 1931 statute [state law] occupies the entire field and it impliedly precludes control to that extent by municipal or local regulation. Thus, a municipality may not curtail or abridge the rights so granted by specifying, through charter provision, a shorter time limitation for the filing of such claims than the period fixed by the statute. [Citations.] If a municipality may not impose more onerous conditions affecting the filing period allowed a claimant under the general law, it would reasonably follow that it may not impose more onerous conditions affecting any other matter covered by the statute, such as the contents of the claim. So with the point here involved, the statute requires the claimant to specify only 'the extent of the injuries or damages received.' The charter's provision that the claim itemize the several elements of damage and set forth the total demand is manifestly a more burdensome condition of recital as to the matter of damages than the requirement of the statute. Such charter provision is necessarily inconsistent with the general form of claim presentation adopted by the Legislature for operation throughout the state. * * * But since the enactment of the claim statute of 1931, the provisions of that statute 'are exclusive' in regulating the presentation of claims arising under the Public Liability Act, and no city charter provisions relating to the presentation of claims, whether adopted before or after the effective date of the statute, are applicable within the field covered thereby."

Each city and county has the same legislative power under the constitution. Art. XI, § 11. If defendants' contention is sound, every contractor is subject to local legislative control although the Legislature has authorized a state-licensed contractor to engage in his occupation anywhere in the state. If Los Angeles can impose an omnibus permit service fee of $100 annually and require that a bond be given, every city in the state may impose a similar fee upon the same state-licensed contractor and require him to give a bond if he crosses its border.

Cases relied on by defendants such as In re Hoffman, 155 Cal. 114, 99 P. 517; In re Iverson, 199 Cal. 582, 250 P. 681, and National Milk Producers Ass'n v. City, etc., of San Francisco, 20 Cal.2d 101, 124 P.2d 25, are cases which uphold the generally recognized power of local authorities to enact additional local regulations. They have no application where the Legislature has occupied the field completely. See Pipoly v. Benson, 20 Cal.2d 366, 373–374, 125 P.2d 482, 147 A.L.R. 515.

[3] We conclude that sections 93.64 and 93.65 attempt to impose additional requirements in a field which is fully occupied by the general law, and are unconstitutional since they conflict with the provisions of the Business and Professions Code providing for licensing and regulating contractors, by attempting to legislate upon a subject intended to be fully covered by an act of the Legislature.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

110 Cal.App.2d 663

JENKINS v. JENKINS.

Civ. 18636.

District Court of Appeal, Second District,
Division 3, California.

April 30, 1952.

A wife brought an action against her husband for separate maintenance and defendant cross-complained for divorce. The Superior Court of Santa Barbara County, Hugh E. Brierly, J., rendered a judgment for plaintiff and defendant appealed. The District Court of Appeal, Shinn, P. J., held that trial court was not entitled under statute to assign to wife the use of defendant's joint tenancy interest in home and furniture to exclusion of defendant.

Affirmed in part and reversed in part.

1. Divorce 🔑200, 289

In granting divorce court may award support money to prevailing party and an allowance for support, maintenance and education of children during their minority. Civ.Code, § 139.

2. Divorce 🔑249(3)

Statute authorizing court in granting divorce to award support money to prevailing party and allowance for support, maintenance and education of children during their minority, does not give court authority to award to either party any separate property of the other, nor to require payment of any sum in lieu of an assignment or division of it. Civ.Code, § 139.

3. Divorce 🔑249(3)

Court may not award wife, in divorce action, exclusive possession of joint tenancy property. Civ.Code, § 139.

4. Husband and Wife 🔑298¾

In wife's separate maintenance action trial court was not entitled under statute to assign to wife the use of defendant's joint tenancy interest in home and furniture to exclusion of defendant. Civ.Code, §§ 137, 139, 143.

5. Husband and Wife 🔑297

In wife's separate maintenance action evidence justified finding that husband was guilty of cruelty.

6. Husband and Wife 🔑264

In wife's separate maintenance action evidence justified finding that 5/14 ownership of 28 head of cattle was community property.

W. P. Butcher, Santa Barbara, for appellant.

Canfield & Westwick, Santa Barbara, for respondent.

SHINN, Presiding Justice.

Plaintiff wife prevailed in her action for separate maintenance, in which defendant cross-complained for divorce. Defendant appeals.

Among the facts found were the following: The parties had lived together as husband and wife for more than 29 years and have a son, 15 years of age; defendant has been guilty of cruelty as charged; he owns property worth more than $100,000; that all the property in question is defendant's separate property with the following exceptions: a refrigerator and deep freeze owned as community property; 28 head of cattle of which an undivided 9/14 interest is defendant's separate property and 5/14 community property; a house and lot described as 206 East Camino Collegio, City of Santa Maria, County of Santa Barbara, and certain furniture and furnishings therein found to be owned by the parties in equal shares as joint tenants.

By the judgment title to the property was declared in accordance with the findings; plaintiff was awarded custody of the son, with certain privileges granted defendant, and $75 per month for support of herself until her death or remarriage; all the cattle were ordered to be sold, 9/14 of the net proceeds to be paid to defendant as his separate property, and 5/14 to be divided equally between the parties. The judgment also provided: "It Is Further Ordered, Adjudged and Decreed that Defendant and Cross-Complainant pay to Plaintiff and Cross-Defendant the sum of One Hundred Dollars ($100.00) per month as and for the support and maintenance of said minor child, commencing forthwith, and continuing each month hereafter during the minority of said minor child. It Is Further Ordered, Adjudged and Decreed that, in addition to said payments, and for so long as the home of the parties hereto, hereinafter referred to, is used by Plaintiff and Cross-Defendant for the maintenance of a home for said minor child, Defendant and Cross-Complainant furnish and permit Plaintiff and Cross-Defendant, and said minor child, the exclusive use of said home, and the exclusive use of the household furniture and furnishings therein. It Is Further Ordered, Adjudged and Decreed that during said period of time, to-wit, for so long as said home is used by plaintiff and Cross-Defendant for the maintenance of a home for said minor child, Plaintiff and Cross-Defendant have and receive any rentals from any of the rooms in said home, and Defendant and Cross-Complainant is ordered to permit Plaintiff and Cross-Defendant the exclusive use of said rentals during said period of time. It Is Further Ordered, Adjudged and Decreed that during said period of time Defendant and Cross-Complainant shall not occupy said home, or any part thereof, and said Defendant and Cross-Complainant is ordered to vacate said home forthwith. It Is Further Ordered, Adjudged and Decreed that, during said period of time, each of the parties hereto be and each is hereby, enjoined and restrained from commencing any action to partition said home property, and enjoined and restrained from making any conveyance of his or her interest therein, except subject to this judgment. It Is Further Ordered, Adjudged and Decreed that during said period of time each of the parties hereto pay one-half (½) of the taxes, assessments and fire insurance premiums assessed against or becoming due on said home property, together with one-half (½) of the reasonable cost of the necessary upkeep, maintenance and repair thereof."

Defendant urges the following grounds of appeal: (1) The judgment is uncertain, contradictory and not supported by the findings; (2) no authority of law exists for assignment to plaintiff of the use of defendant's joint tenancy interest in the home and furniture and excluding defendant therefrom; (3) there was insufficient evidence to justify the findings as to cruelty and a community interest in the cattle.

[1-4] Defendant's second contention is well founded. In granting a divorce the court may award support money to the prevailing party and an allowance for the support, maintenance and education of children during their minority. Civ.Code, § 139. This section does not give the court authority to award to either party any of the separate property of the other, nor to require the payment of any sum in lieu of an assignment or division of it. Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868; Fox v. Fox, 18 Cal.2d 645, 117 P.2d 325. The court may not award the wife, in a divorce action, exclusive possession of joint tenancy property. Barba v. Barba, 103 Cal.App.2d 395, 229 P.2d 465.

Section 137 of the Civil Code, as amended in 1917, provides that in an action for separate maintenance the court in granting permanent support and maintenance to the prevailing party and children "shall make the same disposition of the community property and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction." The legislature has not granted authority for an award of separate property, or an interest therein in lieu of support for the prevailing party or children, or as additional support, either in an action for divorce or for separate maintenance. No such authority can be inferred from section 143, Civil Code, which provides: "The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just." The assignment of the use of the joint tenancy property here was in addition to the monetary awards, and not as security for payment.

Plaintiff has cited no authority which supports the judgment in the instant respect. In Anderson v. Anderson, 124 Cal. 48, 56 P. 630, 57 P. 81, which plaintiff says is the only Supreme Court case found which supports an award of the use of the separate property of the husband to the wife and children, the point was not mentioned. In Prout v. Prout, 73 Cal.App.2d 715, 167 P.2d 1, 2, the court affirmed a judgment of divorce for cruelty which divided the community property residence by awarding equal shares to the parties, but allowed the wife the exclusive use of the whole. The ground of the affirmance was that since the trial court could have awarded the entire property to the wife, an award of a lesser interest was not unauthorized. The court regarded as surplusage a further provision of the decree that the use of the property was in lieu of maintenance and support of the child, but said: "It may be conceded that the award of the use of the home as a provision for the support of the child standing alone, would be erroneous. See Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868".

The claim of uncertainty in the decree relates to the provisions for the use of the home property, which must be reversed.

[5] The contention that the findings are, in certain respects, unsupported by the evidence is unfounded. There was abundant evidence of defendant's cruelty.

[6] The finding that 5/14 ownership of the cattle was community property is supported by evidence that defendant gave his personal attention and services to the management of that branch of his farming operations and that he kept no books of his operations. Even though the original cows had been purchased with his separate funds and pastured on his separate property, his services constituted a contribution

by the community to the profits. Estate of Gold, 170 Cal. 621, 623, 151 P. 12; Pereira v. Pereira, 156 Cal. 1, 7, 103 P. 488, 23 L.R.A.,N.S., 880. That the evidence on the subject was meagre was due to the failure of defendant to disclose the nature and extent of the business transacted which he, alone, could furnish. We think the finding was reasonable and just. However, we do not see why it should be necessary to sell the cattle in order to give plaintiff her share in money. The court, advised and assisted by learned counsel, should not find it difficult to ascertain the value of the wife's interest in the herd.

The judgment is affirmed insofar as it (1) grants plaintiff the right to live separate and apart from defendant and to receive support, (2) awards plaintiff the care, custody and control of the son, John Lee Jenkins, and (3) determines the ownership of real and personal property described therein. It is reversed insofar as it awards plaintiff and the minor son the exclusive use of the home property, and as to the amounts awarded plaintiff for her support and the support and maintenance of the minor son, which amounts shall be redetermined; plaintiff and respondent to recover costs on appeal.

PARKER WOOD and VALLÉE, JJ., concur.

110 Cal.App.2d 500

HARRISON et al. v. SHAMALIAN.

Civ. 4370.

District Court of Appeal, Fourth District, California.

April 23, 1952.

Action by Wallace F. Harrison and another, doing business, etc., against N. K. Shamalian to recover the reasonable value of building materials delivered to defendant, wherein defendant filed a cross-complaint for breach of alleged construction contract. The Superior Court of Fresno County, Edward L. Kellas, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained finding that plaintiffs had not contracted to furnish the labor or do the construction work and hence were not precluded under statute from maintaining the action by reason of fact that they were not licensed contractors.

Judgment affirmed.

Contracts 🔑175(3)
Licenses 🔑39.44

Evidence sustained trial court's finding that plaintiffs had orally agreed to supply materials for construction of certain walls but had not contracted to furnish the labor or construct such walls and hence plaintiffs were not responsible for any faulty construction and were not precluded under statute from maintaining action for the reasonable value of materials delivered by reason of fact that they were not licensed contractors. Business and Professions Code, §§ 7026, 7031.

Leo Koligian, Fresno, for appellant.

Chester E. Shepard, John E. Shepard, Selma, for respondents.

BARNARD, Presiding Justice.

This is an action to recover the reasonable value of goods, wares and merchandise alleged to have been delivered to the defendant at his request. In a separate cause of action it was alleged that $330 advanced to the defendant at his request was due to the plaintiffs. The answer denied all the material allegations of the complaint. A cross-complaint was also filed alleging that the plaintiffs had agreed to supply all material and labor necessary to construct certain outside and inside walls with steel windows for the agreed price of $1009.11; that the work had not been completed according to said contract; and that the defendant had been damaged in the sum of $1200.

The court found that the plaintiffs had delivered goods, wares and merchandise of the reasonable value of $694.87; that the defendant was not indebted to the plaintiffs in the sum of $330 for money advanced; that the plaintiffs had orally agreed to supply the materials in question but had not contracted to furnish the labor or to construct said walls; and that the plaintiffs were not responsible for any faulty construction since they had not entered into any construction contract. Judgment was entered in favor of the plaintiffs for $697.87, and denying the defendant any relief under his cross-complaint. The defendant has appealed from the judgment.

The appeal is based entirely on the contention that the respondents entered into a contract to furnish all of the necessary material and labor and to complete the walls in question at an agreed price; that the plaintiffs are contractors, as defined in section 7026 of the Business and Professions Code; that they were not licensed contractors at the time the work was performed; and that not being licensed they are prohibited from maintaining the action by the provisions of section 7031 of that code.

It is conceded that the respondents were not licensed as contractors. It appears from the evidence that they were in the business of manufacturing and selling pumice blocks for construction purposes that they also sold other materials, and that they had not previously undertaken any construction work, or agreed to do so. Being desirous of building a "block" house the appellant contacted the respondents for the purpose of obtaining information with respect to such material and the cost of construction. He furnished them with a blueprint and some days later they returned the blueprint, together with a written statement which reads:

> "Outside and inside walls as per blueprint, includes—blocks, steel windows, mortar, grout, steel reinforcing
> Labor $1009.11
> Does not include steel door frames.
> "Aug. 15th"

The evidence is conflicting with respect to the circumstances under which this written statement was furnished, and as to what was intended thereby. The appellant introduced evidence which, if believed, would support a finding that the respondents agreed to furnish both material and labor and construct these walls, as referred to in the written statement. The appellant also testified that he did not hire the mason who did the work; that the mason was hired and sent by the respondents; that the respondents supervised the construction work; and that he would like to have discharged the mason but had no authority to do so. However, he testified that his wife "keep the books and pays him" and that the mason came to him one Saturday and wanted his money. His wife testified that she kept the records, that she had a record of the time the mason put in but that she did not have his social security number and had not paid him anything or withheld his social security tax. Evidence was introduced by the respondents to the effect that they were asked to make an estimate as to the probable cost of the material and the labor, that they did so, that they recommended a mason to the appellant, that the mason and the appellant made their own agreement, that they knew nothing about what this arrangement was until some days later, and that they had had nothing to do with constructing the walls. The mason testified that he went to see the appellant and asked for the job; that they agreed upon a price of $2.50 an hour; that he made a deal with the appellant to this effect; that he went ahead and did the work; that he asked for money when the work was half done and the appellant told him to wait until it was finished; and that he asked for his pay when the work was completed, and the appellant refused to pay and told him to see "Harrison".

Nothing more than a conflict in the evidence appears. The appellant lays great emphasis upon the fact that the respondents advanced $298 to the mason. There was ample testimony that this money was loaned to the mason by the respondents because he needed money to live on and the appellant had refused to pay him. Apparently, the court adopted this view since it refused any relief to the respondents on their cause of action for money advanced at the request of the appellant.

The evidence supports the court's findings, and under the facts found the respondents are not barred from maintaining this action by the provisions of section 7031 of the Business and Professions Code.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

BROOKS et al. v. E. J. WILLIG TRUCK TRANSP. CO. et al. *

Civ. 14746.

District Court of Appeal, First District, Division 2, California.

April 23, 1952.

Hearing Granted June 19, 1952

Wrongful death action by Antoinette Brooks and Jeanette Brooks, by and through her guardian ad litem, Antoinette Brooks, against E. J. Willig Truck Transportation Company and another. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeals, Nourse, P. J., held that violations of the statutory duties to stop and give aid to deceased after he had been struck by named defendant's truck were causes of action separate from that alleged in the original complaint based upon negligent operation and control of such truck, and therefore since amended complaint setting forth violations of such statutory duties was filed more than one year after the accident, it was barred by the statute of limitations, and instruction to effect that verdict should be for plaintiff if violations of such duties were the proximate cause of pedestrian's death was improper.

Reversed.

1. Automobiles 🔑240(2)
Pleading 🔑52(2)

The violations of statutory duties to stop and render aid to one injured in motor vehicle accident constitutes causes of action separate from that arising from motorist's negligence in causing accident, and must be separately stated, and cannot, over objection, be proved under a complaint in one count based solely on negligence in the operation of a vehicle, even if negligence is alleged in general terms. Code Civ.Proc. § 427; Vehicle Code, §§ 480, 482.

2. Appeal and Error 🔑882(6)

A party is estopped from claiming on appeal that an issue was not in controversy only where it appears from record on appeal that issue was actually and intentionally tried by introduction of pertinent evidence, and that such party consciously participated or acquiesced in such trial as if issue had been made by the pleadings.

3. Judgment 🔑258

Evidence which is relevant to an issue actually raised by pleadings cannot be considered as authorizing determination of an issue not presented.

4. Appeal and Error 🔑882(6)

Truck driver's failure to stop and render aid to pedestrian who was struck and allegedly run over by the truck was material in action for wrongful death as an indication of driver's consciousness or responsibility for the accident, and therefore where driver's reference to subject was mostly for purpose of deploring and trying to explain failure to stop and render aid, and driver demurred to counts in complaint relating to his failure to stop and render aid and objected to certain evidence pertaining to such counts and opposed amendment to conform to proof to reinstate such counts, which had been struck on demurrer, driver did not acquiesce in trial of case as if issues raised by such counts were in controversy, and was not estopped from claiming on appeal that no such issues were in controversy. Code Civ.Proc. § 427; Vehicle Code, §§ 480, 482.

5. Pleading 🔑218(5)

A trial court at any time prior to final judgment may reconsider its ruling on a demurrer, even though no request to amend has been made.

6. Limitation of Actions 🔑127(2)

Unless an amended complaint sets forth an entirely different cause of action from original, amended complaint, for purposes of statute of limitations, must be deemed filed as of date of original complaint. Code Civ.Proc. § 340.

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* Subsequent opinion 255 P.2d 802.

7. Limitation of Actions ⚷127(2)

So long as recovery is sought in amended and original complaint upon the same general set of facts, a mere change in legal theory will not subject amended complaint to bar of statute of limitations. Code Civ.Proc. § 340.

8. Limitation of Actions ⚷127(14)

Where original complaint against truck driver for death of pedestrian alleged negligence in operation and control of truck, amended complaint based on violations of statutory duties to stop and render aid stated new causes of action, and, being filed more than one year after the accident, were barred by the statute of limitations. Code Civ.Proc. §§ 340, 427; Vehicle Code, §§ 480, 482.

9. Witnesses ⚷347

Generally a witness may not be impeached by proof that on a former hearing he omitted to state a fact unless it be shown that upon such occasion he was particularly asked to testify to the facts to which he later testified at the trial, but there may be situations in which such omission may be admissible as being inferentially inconsistent with the later testimony or because it reflects on witness' general credibility.

10. Witnesses ⚷347

In absence of evidence that witness, when making report to district attorney and when testifying at Navy investigation of sailor's accidental death and at truck driver's preliminary hearing in criminal proceedings, had been asked what reason truck driver, who allegedly ran into sailor, had given for his failure to stop, omission to relate driver's statement at such times was not ground for impeaching witness' testimony in wrongful death action against truck driver that truck driver had stated that he had not stopped because highway patrol would smell odor of alcohol on his breath and would crucify him, especially in view of the many and contradictory statements made by the truck driver to the witness, and the relatively minor importance of the point in question. Vehicle Code, § 755.

11. Automobiles ⚷247

In order to find that pedestrian, who was struck by truck was guilty of contributory negligence in that he was intoxicated at time he was on roadway, so as to bar recovery for his death, it was necessary to find that such negligence proximately contributed to pedestrian's death. Vehicle Code, § 565.

12. Automobiles ⚷217(3)

Section of Vehicle Code relating to crossing of roadways by pedestrians is not a prohibition against crossing other than at intersections. Vehicle Code, § 562.

13. Automobiles ⚷242(2, 8), 245(72)

In action for wrongful death of pedestrian sustained while crossing roadway, crossing by pedestrian at place other than at cross-walk was not negligence as matter of law, and pedestrian was presumed to have obeyed law and to have yielded right of way to truck which struck him, and fact that he was struck did not in itself show that he had failed to yield right of way to truck. Vehicle Code, § 562.

14. Automobiles ⚷246(58)

In action against truck driver for wrongful death of pedestrian, instruction to effect that negligence of pedestrian would only prevent recovery if such negligence were proximate cause of death related to doctrine of last clear chance and, though not well stated, was not improper.

15. Appeal and Error ⚷930(1)

Evidence on defendant's appeal would be viewed in light most favorable to plaintiff.

16. Automobiles ⚷227(5)

Where pedestrian was unaware of approaching danger and truck driver knew such fact and could have prevented accident by stopping or possibly by turning back to another lane, continuing of negligent lack of attention of pedestrian would not prevent application of doctrine of last clear chance.

17. Automobiles ⚷227(3)

Where evidence indicated that truck driver could have stopped truck after original impact with pedestrian in time to prevent all or some of wheels of truck and trailer from passing over pedestrian, doctrine of last clear chance was applicable as to injuries occurring after original impact.

18. Automobiles ⚷227(2)

Truck driver, after striking pedestrian, was under duty to use reasonable care not to cause additional harm to pedestrian.

19. Automobiles ⚷227(5)

Truck driver's liability for results of any negligence of his which may have taken place after pedestrian, who was struck by truck became helpless, could not be nullified by any contributory negligence of pedestrian.

20. Evidence ⚷219(1), 265(2)

Fact that truck driver drove away after striking pedestrian could be considered by jury as a circumstance showing consciousness of responsibility for accident where truck driver was aware he had struck pedestrian, but such fact alone could not be basis of verdict against truck driver.

21. Evidence ⚷263(1)

Truck driver's testimony as to his reasons for leaving scene of accident after striking pedestrian was admissible to rebut implication of guilt which arose from the flight itself.

22. Automobiles ⚷168(4)

The operator of a motor vehicle must use ordinary care to keep his vehicle under such control as will enable him to avoid collision with another person using proper care and caution.

Dana, Bledsoe & Smith and Morton B. Jackson, San Francisco, for appellants.

James C. Purcell, Michael Riordan, San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an action for the allegedly wrongful death of John Misher Brooks, who on January 16, 1947, after 11 o'clock p. m. being on foot on U. S. Highway 101 near its intersection with State route 37, met his death as the result of a collision with a truck and trailer owned by defendant E. J. Willig Truck Transportation Company and driven in its service by defendant Farnsworth. Plaintiffs, the wife and minor daughter of decedent, recovered and defendants appeal.

The original complaint, filed on March 14, 1947, was in one count, which alleged in substance that defendant was "negligent in the operation and control of said truck and trailer", that by reason of said negligence said truck and trailer ran into and over decedent and injured him in consequence of which he died. The first two trials resulted in disagreement of the jury. After the second trial plaintiffs on November 9, 1948, moved for leave to file an amended complaint on the ground that the second trial had brought out evidence indicating that decedent had not been immediately killed by the first impact with the truck and trailer, that the driver, knowing of the impact, failed immediately to stop as required by section 480, Vehicle Code and to render aid as required by section 482, Vehicle Code and that death was caused either by further injury caused by the truck and trailer dragging or crushing decedent when they could have been stopped or by want of medical care when decedent was left helpless in the highway or by his being struck by one or more other vehicles when he was left there in that condition, which evidence had been unknown to plaintiffs at the time of the filing of the original complaint. After obtaining leave, plaintiffs on December 27, 1948, filed a first amended complaint which added to the original one count three more counts alleging the three possibilities stated above, each new count expressly alleging violation of section 480 or sections 480 and 482 Vehicle Code. Defendants together with their answer to the first count, demurred to the other three counts arguing that the causes of action based on sections 480 and 482 Vehicle Code were wholly distinct and separate from the cause of action alleged in the original complaint and were barred by the statute of limitations. The demurrers were sustained without leave to amend. The matter proceeded to its third trial on the remaining first count.

From the evidence received at said third trial we note for the moment only the following undisputed facts. The intersection at which the accident happened is in open country, unlighted, level and macadamized. U. S. 101 is there a four lane highway, the two northbound lanes being divided from the southbound lanes by dividing islands. Defendant Farnsworth was driving the empty truck and trailer north on highway 101 in the most easterly (slow) lane. Some 200 to 250 feet in front of him he saw something moving from the most northerly dividing island eastward into the northbound lanes of the highway. Later this proved to have been decedent Brooks. Farnsworth applied his brakes somewhat and blew his horn. The moving object gave no indication that it noticed it. At 150 feet from the object Farnsworth braked again and passed over to the inside (fast) lane, but the pedestrian also moved to the inside lane and collided with the right front side of the truck. Farnsworth had at last braked as much as he could but when he felt the right front wheel going over Brooks' body he released his brakes and drove away letting all other wheels of the right side of truck and trailer pass over Brooks. When Farnsworth did so he did not know over which part of Brooks' body the right front wheel and other wheels passed. There was no other traffic near the place of the accident; there were no eyewitnesses except Farnsworth. Farnsworth did not report the accident. The next morning highway patrol officer Myron Smith, who was investigating the accident after Brooks' dead body had been found on the highway, stopped Farnsworth, then driving the truck and trailer south on 101. Farnsworth first denied knowledge of the accident but when Smith found traces of an impact and some damage caused by it on the right front of the truck he admitted the collision.

Over defendants' objection the testimony given at the second trial by Father Richard W. Powers, an army chaplain with the rank of major, was received in evidence. The fact that when Father Powers first found Brooks on the roadway he was not in the same place and position and not so badly mutilated as when others thereafter found the body while Father Powers had gone to call an ambulance had been the main ground for the amendment of the complaint. At the end of the taking of the evidence on the third trial plaintiffs moved to amend the complaint to conform to proof, the amendments being approximately to the same effect as the amendments eliminated by the sustaining of the demurrers. The court denied the motion on the ground that in the original complaint negligence was alleged in general terms and there had been no such interference by any third party or third element as to break the chain of causation.

Appellants assign thirteen errors of law allegedly committed by the trial court, twelve of which relate to instructions. We shall first treat the instruction the giving of which, we have concluded, necessitates reversal. It is plaintiffs' instruction 70, given by the court, relating to the duty of defendant Farnsworth to stop and render aid to Brooks in accordance with the standards set by sections 480 and 482, Vehicle Code, irrespective of who of the two bears the responsibility for the original collision and injuries and expressly declaring that if Farnsworth did not conform to those standards and if said negligence was the proximate cause of Brooks' death the verdict must be for plaintiffs. Appellants urge that no instruction on this subject should have been given because it was outside of the issues; the statutory duty to stop and render aid, imposed by the instruction, was wholly separate and apart from negligence in the operation of the truck and was barred by the statute, demurrers to counts added to the complaint in relation to said statutory duty had been sustained and the motion to amend to conform to proof to bring such counts in again had been denied.

[1–4] The violation of said statutory duty to stop and render aid, an affirmative duty which is expressly made independent from any negligence in the causing of the original accident, constitutes a separate cause of action which must be separately stated, § 427, Code Civ.Proc.; Summers v. Dominguez, 29 Cal.App.2d 308, 312–313, 84 P.2d 237, and cannot over objection be proved under a complaint in one count based solely on negligence in the *operation of a vehicle* even if said specific negligence is alleged in general terms. The trial court was mistaken when it denied the motion to amend to conform to proof by adding counts relating to the statutory duty, on the ground that the allegation of negligence in those general terms would also comprehend the failure to stop and render aid, so long as there was no intervention of a third party so independent as to break the chain of causation. Neither can it be said that defendants acquiesced in the introduction of the failure to stop and render aid as an issue in the case, and were therefore estopped from claiming on appeal that no such issue was in controversy. "[S]uch principle of estoppel operates only where it appears 'from the record on appeal * * that the issue was actually and intentionally tried by the introduction of pertinent evidence, and that the party against whom the estoppel is invoked consciously participated or acquiesced in such trial, as if the issue had been made by the pleadings * * *'. [citations] Furthermore, there is the added 'qualification that evidence which is relevant to an issue actually raised by the pleadings cannot be considered as authorizing the determination of an issue not presented.'" Miller v. Peters, 37 Cal.2d 89, 93, 230 P.2d 803, 806. Under these rules the appellants in this case are not estopped. Appellant Farnsworth's failure to stop and render aid was material as an indication of his consciousness of responsibility for the accident; appellants' reference to the subject was mostly for the purpose of deploring and trying to explain the failure to stop and render aid; that they did not consciously participate or acquiesce in the trial of their liability based on failure to comply with said statutory duty is shown by their demurrers to the counts relating to it, their objection to the introduction of the testimony of Major Powers and their opposition to the amendment to conform to proof.

[5–8] However, even if the failure to render aid was not in issue under the one count which was tried, it would probably have served no useful purpose to reverse because of the instruction to consider said statutory duty, if the demurrers to the counts which tried to introduce the said matter ought not to have been sustained or the amendment to conform to proof ought to have been permitted and if appellants were not prejudiced by the fact that the instruction was given notwithstanding the incorrect position taken by the trial court as to these points. (In this respect the rule must be taken into consideration that a trial court at any time prior to final judgment may reconsider its ruling on a demurrer, even though no request to amend has been made. Bank of America v. Superior Court, 20 Cal.2d 697, 702, 128 P.2d 357. Accordingly the parties have discussed at length the question whether the causes of action based on violation of the statutory duty to stop and render aid were barred by the statute of limitations, when on November 9, 1948, plaintiffs first moved to introduce them into the action by amendment. As under section 340, Code Civ.Proc. an action for death or injury tortiously caused must be commenced within a year, the statute at that date had run except if the amended complaint could be deemed filed as of the date of the original complaint. The modern rule in that respect, stated in Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 717–718, 128 P.2d 522, 524, 141 A.L.R. 1358, is that "Unless the amended complaint sets forth an entirely different cause of action from the original * * * the amended complaint, for the purposes of the statute of limitations, must be deemed filed as of the date of the original complaint" and that there is no entirely different cause of action "so long as recovery is sought in each complaint upon the same general set of facts. * * * A mere change in legal theory will not subject the amended complaint to the bar of the statute of limitations." It would seem that under this rule it could well be held that the amendments related back to the original complaint, if the tortiously caused death of Brooks in the night of January 16, 1947, on U. S. Highway 101 in connection with a collision with a truck driven by defendant Farnsworth is considered as the "general set of facts" on which both original complaint and amendments were based. The change from common law negligence to violation of the statutory affirmative duty to stop and render aid could be considered a mere change in legal theory. Under Rule 15(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., which provides for relating back "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,"—a rule which may well be the equivalent of the "same general set of facts" rule of the Wennerholm case—it was held that in a wrongful death action in which the complaint alleged the negligent causing of the death of a railroad employee struck by cars backed in an unlit railroad yard at night, because of failure to provide a proper lookout for such employee, to give him proper warning of the approach of the cars, to keep the head car properly lighted, and to warn him of an unprecedented and unexpected change in the manner of shifting cars, an amendment charging failure to keep a light on the rear of the locomotive used in yard service as prescribed by the rules of the Interstate Commerce Commission under the Federal Boiler Inspection Act, 45 U.S.C.A. § 22 et seq. related back, as both the original complaint based on negligence and the amendment based on the violation of a statutory duty "related to the same general conduct, transaction and occurrence which involved the death of the deceased." Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 65 S.Ct. 421, 424, 89 L.Ed. 465. However appellants argue forcefully that in California in a comparable situation the contrary position was taken in McKnight v. Gilzean, 29 Cal.App.2d 218, 84 P.2d 213. In that case the original action for personal injuries sustained in an automobile accident was brought against the driver and against two other defendants as employers of the driver, whereas the amended complaint, filed more than a year after the accident, added two causes of action based on the statutory liability of said other two defendants under section 402 of the Vehicle Code which section holds the owner of a motor vehicle liable for injury resulting from negligence in the operation of such motor vehicle by a person using or operating the same with the permission of the owner. It was held that the two added causes of action based upon statutory liability and requiring proof of additional facts were foreign to the basis upon which the original cause of action was founded and the sustaining of a demurrer and motion to strike was affirmed. The analogy is clear. Both in the case before us and in the McKnight case the amendment related to the same general injury as the original complaint (the identity of the injury is even stronger in the McKnight case), in both cases the amendment tried to replace a generally recognized common law liability alleged in the original complaint by a statutory liability not definitively recognized at common law (Caveat to Restatement Torts § 322; Prosser, Torts p. 192) and in both cases the new causes of action required proof of facts not alleged in the original complaint. We would have been inclined to hold that under the Wennerholm case, supra, neither the change in legal basis nor the necessity of proof of additional facts would prevent relating back of the amendment for the purpose of the statute if both related to the same general set of facts (injury) and that the McKnight case, being earlier in time, should be considered overruled by implication by the Wennerholm case, were it not that the McKnight case had just recently been followed in Burnett v. Boucher, 108 Cal.App.2d 37, 238 P.2d 1, and that the Supreme Court had denied a hearing. We must therefore accept the McKnight case as still representing the law and, as we do not see any valid distinction between the McKnight case and the case before us with respect to the relating back we feel constrained to hold that also in our case the causes of action based on violation of the statutory duty to stop and render aid were barred by the statute and could not be tried. The expression "the same general set of facts" from the Wennerholm case does not have so clear and undisputable a meaning that it would be impossible to hold that the allegation of another duty requiring proof of additional facts as basis of liability resulting from the same accident is not based on "the same general set of facts", although we would prefer a wider interpretation of "the same general set of facts", which would permit relating back whenever, as in the present case and the McKnight case, the original action has not been permitted to become stale, newly found evidence necessitates changes in the original allegations as to the same occurrence, and there is no showing that such amendment would unjustly prejudice the defense. When however it must be held that the statute had run on any cause of action based on the statutory duty to stop and render aid there can be no doubt that the instruction which permitted the jury to hold defendants responsible in case of violation of said duty, independent of any negligence in causing the original impact, was prejudicial error and must lead to reversal. It must nevertheless be noted that our holding that the statutory duty to stop and render aid is outside the issues of the case does not imply that defendants cannot be liable for possible further injury caused to Brooks by another vehicle when Brooks lay disabled on the roadway. If Brooks' helpless condition was caused by negligence of defendants, said negligence can be considered a concurrent proximate cause of his being run over again if such further accident was foreseeable. Hill v. Peres, 136 Cal.App. 132, 138, 28 P.2d 946.

As there must at any rate be a reversal we shall treat appellants' further assignments of error only in so far as this is useful as a directive to be followed on a new trial, without considering whether any possible error found would be prejudicial enough to require reversal or whether appellant might have induced or waived the error.

Appellants assign as prejudicial error the sustaining of objections to certain impeaching questions put by them to officer Myron Smith. Said witness testified at the trial that defendant Farnsworth had told him that he had had three beers during the day of the accident, and that, after the drinking and before the accident, he had slept in his truck, standing on a wide shoulder of the highway, that he had not slept because he had too much to drink, but that he knew that if he stopped and called the highway patrol (after the accident) "that they would smell the odor of alcohol on his breath and they would crucify him." Appellants' questions were intended to prove and they made offer of proof to the effect that the witness had not reported the last quoted statement of Farnsworth to the district attorney of Marin County when he reported to him the day after the accident nor did he report it when he was heard at a Navy investigation six days after the accident—decedent Brooks was in the Navy—although he there testified that Farnsworth had stated that he had slept three hours just prior to the accident and that therefore witness thought he was refreshed and fairly alert, nor at the preliminary hearing of a criminal action against Farnsworth, violation of § 480, Vehicle Code, where the witness volunteered the statement that he discussed with Farnsworth why he did not stop and that Farnsworth, who was very frightened when the witness was talking to him "stated that he did not know why; he was frightened." Cross-examination with respect to the first two instances of prior statements was ruled out by the court on the ground that Smith's omission to relate Farnsworth's statement did not contradict his testimony concerning it on his direct examination and because the subject matter was too remote; with respect to the statements at the preliminary hearing the court held that the evidence was barred by sec. 755, Vehicle Code.

[9, 10] In general a witness may not be impeached by proof that on a former hearing he omitted to state a fact unless it be shown that upon such occasion he was particularly asked to testify to the facts to which he later testified at the trial. (27 Cal.Jur. 154; People v. Casanova, 54 Cal. App. 439, 446, 202 P. 45, although there may be situations in which such omission may be admissible as being inferentially inconsistent with the later testimony or because it reflects on the witness' general credibility. With respect to the statements to the district attorney and at the Navy investigation there is no evidence or offer of proof

that the witness was particularly asked what reason defendant Farnsworth gave for his failure to stop and the court's ruling that questions in relation to the omission were not admissible as impeachment was correct certainly when the many and contradictory statements made by defendant Farnsworth to Officer Smith and the relatively minor importance of the point in question in the case then being investigated are taken into consideration.

With respect to the inadmissibility of the evidence from the preliminary hearing because of the provisions of sec. 755, Vehicle Code, which prohibits the admission as evidence in a civil action of the record of a conviction for a violation of the Vehicle Code or of testimony produced at the trial terminating in such conviction, appellants argue that such provision was evidently enacted solely for the benefit of the defendants in such criminal action and that therefore it had no application when defendants expressly waived its protection, and that moreover it applied only to admissibility as evidence of facts to be proved in the civil action not to use solely for the purpose of impeachment. Although there may well be merit in the arguments we need not decide the point. The exclusion of the evidence was justified as not good impeachment on the same grounds as given before with respect to the other two occasions of omission and then it is irrelevant whether another possibly erroneous ground for sustaining the objection was given. Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 564, 81 P.2d 533.

[11] Appellants urge that it was error to refuse to give their requested instruction No. 51 on the provision of sec. 565, Vehicle Code, making it unlawful for a pedestrian intoxicated to such an extent as to create a hazard to himself or others to walk or be upon any roadway. There was evidence that blood taken from the body of the deceased contained a percentage of alcohol which indicated intoxication passing beyond the stage of exhilaration into the stage of confusion, so that there was a sufficient evidentiary basis for such instruction. However another instruction proposed by defendants was given to the effect that Brooks was to be held negligent if he was intoxicated to an extent that caused him to conduct himself otherwise than would a person of ordinary prudence. Appellants contend that the latter instruction has not the same effect as the one refused, which would require the jury to presume that the deceased was guilty of negligence by virtue of the mere fact of his intoxication to the extent specified combined with his mere presence in the highway. Although this is true, the fact that under either rule to find contributory negligence proof is required that the negligence so found proximately contributed to the causation of Brooks' death Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 588, 177 P.2d 279, practically nullifies the distinction. Cumulation of the two instructions would lead to undesirable complexity but it will be possible to give one instruction based on the provision of the Vehicle Code, to which defendants are entitled.

[12, 13] Next appellants complain of the giving of plaintiffs' instruction No. 32, which added to the text of sec. 562, Vehicle Code, as to crossing at other than crosswalks, that accordingly the crossing of Brooks at the place where he was struck was not negligence as a matter of law, that he is presumed to have obeyed the law and to have yielded the right of way to the truck of defendants and that the fact that he was struck does not in itself show that he failed to yield the right of way. We find no error in the instruction. Section 562 is not a prohibition against crossing other than at intersections, Genola v. Barnett, 14 Cal.2d 217, 220, 93 P.2d 109. The stated presumption is applicable where the death of Brooks prevented plaintiffs from producing evidence as to what happened during the crossing, Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Hoppe v. Bradshaw, 42 Cal.App.2d 334, 340, 108 P.2d 947, and if the instruction taken separately might be considered to stress too strongly Brooks' lack of negligence in crossing, such would be fully compensated by several instructions given at the request of defendants concerning Brooks' duty when crossing the highway outside a cross-

walk and concerning the rebuttable character of the presumption.

[14] Neither do we find actual error in plaintiffs' instruction No. 10 to the effect that negligence of Brooks would only prevent recovery by plaintiffs if said negligence was the proximate cause of his death, not if the negligence was "so remote as to become a condition rather than a cause or a link in the chain of causation which brought about his death." Such language is used in some opinions in connection with the doctrines of contributory negligence and last clear chance. See Smith v. Los Angeles Ry., 105 Cal.App. 657, 663, 288 P. 690, quoted in Handley v. Lombardi, 122 Cal.App. 22, 28, 9 P.2d 867. Its theoretical character makes it unsuitable for the purpose of instruction but even with the further inappropriate addition "The law of this State refers to 'proximate cause' and to 'remote cause'" it does not misstate the law. In our case it can only apply to the doctrine of last clear chance and the circumstances contended to have existed after the first impact between the truck and Brooks. It is made superfluous by the many other and more easily understood instructions given on this subject.

[15–17] Appellants urge that it was error to instruct on the doctrine of last clear chance in general and on said doctrine specially applied to the period following the first impact because this theory did not find any substantial support in the evidence. If we view the evidence in the light most favorable to plaintiff, as for this purpose we must, Bonebrake v. McCormick, 35 Cal.2d 16, 19, 215 P.2d 728, there are elements on which a theory of last clear chance could be built both with respect to the occurrence prior to the first impact and to the period thereafter. Although Farnsworth testified at the trial that Brooks when moving east from the dividing island took only a few steps into the outer lane and then turned back abruptly to the first lane to which Farnsworth had turned to pass behind him and was hit immediately thereafter, although Farnsworth swerved to the left and braked as much as he could Officer Smith testified that Farnsworth's partly conflicting admissions to him contained also other statements of what happened: that Brooks moving east from the dividing island ran across both lanes, that Farnsworth observed Brooks at the right hand (east) edge of the roadway; that from there Brooks moved out into the middle of the easterly northbound lane (slow lane); that Farnsworth blew the horn and put on some more brake; that he observed that the man was not getting out of his way, that he moved his truck over into the inside lane and that truck and Brooks came together at the line separating the two northbound lanes. There was testimony from Farnsworth himself that neither when he braked for the first time when he saw Brooks running east from the island nor the second time did he try to bring his vehicle to a stop. Notwithstanding the blowing of the horn and the noise of the large unit moving and braking, Farnsworth did not see any indication that the moving object saw or heard it or paid any attention to it. Before he first saw it moving he was going 40 to 45 miles an hour and could have stopped before he reached the moving object. On this evidence it could be held that Brooks was unaware of the approaching danger, that Farnsworth knew this and could have prevented the accident by stopping or possibly by turning back to the slow lane. Under such circumstances the continuing of the negligent lack of attention of the victim would not prevent the application of the doctrine of last clear chance. Overacker v. Key System, 99 Cal.App.2d 281, 284, 221 P.2d 754; Galbraith v. Thompson, 108 Cal.App.2d 617, 239 P.2d 468. There is also an evidentiary basis for the theory that after the first impact Brooks was carried or dragged along over a considerable distance, possibly 200 feet, whereas Farnsworth could have stopped the truck in the meantime so as to prevent all or some of the wheels at the right side of the truck and trailer from passing over the victim. The extent of the transportation can be inferred from the fact that the place where according to Father Powers he found Brooks' body was some 80 feet north of the place where Brooks, according to some of Farnsworth's statements, crossed the roadway and the place where State

Highway Patrolman Johnson a little later found the body was some 200 feet north of said place of crossing. That Brooks may not have been killed by the first impact can be derived from testimony of Father Powers that when he found Brooks' body first after all the wheels of the right side of defendants' truck and trailer had passed over him he did not notice that Brooks was dead; he noticed that one of the legs was stripped of clothing and there was blood flowing down on that leg; Brooks was warm; Father Powers got down on his knees and gave conditional absolution as he had done when they found boys overseas; he had seen such boys mutilated far worse than Brooks was and still alive. That Brooks may have been carried along on the front of the truck could be inferred from the fact that Officer Smith found an imprint of cloth, a weave of cloth, on the right front fender of the truck and in the valley between the right front fender and the right side of the hood, but that searching underneath the truck he did not find any indication of the body or any part of it having been there; from Farnsworth's position in the driver's seat, he would be unable to see Brooks if Brooks were stretched in that valley. With respect to the possibility of stopping there is evidence that when the truck struck Brooks, its speed was about 15 to 20 miles an hour, the brakes still being applied full force; the lowest speed was not over 10 miles per hour which must have been at the moment when the front wheel went over Brooks as Farnsworth testified that at the moment he felt that happening he relaxed the brakes and drove away. At a speed of 15 to 20 miles per hour the empty truck and trailer could be stopped on level, dry macadam within the turn of a wheel, at a speed of 35 miles within 15 to 20 feet, according to Officer Smith. The distance between the front wheel and the next set of wheels of the truck was 17 feet, the overall length of the unit 60 feet.

[18, 19] Appellant also complains of other instructions given at plaintiffs' request, too long to be stated in detail, relating to the duty of care of Farnsworth after the first impact and stating that if Brooks was made helpless by the first impact he would in his helpless condition not be guilty of contributory negligence. Appellants' contention that such instruction should not have been given because of the instantaneous character of the event to which they relate seems incorrect in view of the evidence just discussed indicating the possibility of a longer transportation of Brooks' body. At any rate Farnsworth was under duty to use reasonable care not to cause additional harm of Brooks. Prosser on Torts, p. 194; Weitzman v. Nassau Electric R. Co., 33 App.Div. 585, 53 N.Y.S. 905, 909. It is also correct that Farnsworth's liability for the results of any negligence of his which may have taken place after Brooks became helpless can not be nullified by any contributory negligence of Brooks. The part of plaintiffs' instruction No. 26 which states that if the original impact made Brooks helpless "his previous negligence, * * * terminated right then and there, that is, at the moment he became helpless" might be misunderstood to negative any influence of said previous negligence, also with respect to any earlier negligence of Farnsworth and the formulation should be corrected to avoid the possibility of such misunderstanding.

Appellants complain of the giving of an instruction modified from plaintiffs' instruction No. 48 to the effect that the conduct of Farnsworth in continuing to drive away his truck from the scene of the collision notwithstanding his awareness of having struck Brooks may be considered as a circumstance showing consciousness of responsibility for the accident and that the weight of such circumstance is for the jury. It is argued that the instruction was especially prejudicial because the court had sustained an objection to a question of Farnsworth's attorney as to his reasons for leaving.

[20, 21] There can be no doubt that if Farnsworth's running away from the scene of the collision may be considered as indicating his consciousness of responsibility, he is entitled to testify that there was another not incriminating reason for his run-

ning away, irrespective of whether an instruction as to that inference is specifically given or the drawing of the inference left to the jury without such instruction. The inference is a natural one and in criminal cases the giving of an instruction on flight, closely related to the one under discussion is expressly directed by § 1127c, Penal Code. See for its application in a hit-run case People v. Moody, 93 Cal.App.2d 66, 71, 208 P.2d 692. The essential error is not the giving of the instruction but the sustaining of the objection to testimony of Farnsworth intended to explain the reason for his flight. The fact pointed out by the court that such evidence would relate to Farnsworth's state of mind after the accident is no valid objection. Evidence as to his state of mind at the time of the flight is not used to infer from it his state of mind at the earlier time of the accident, but is admissible to rebut the implication of guilt from the flight itself.

With respect to the instruction attacked, consideration must be given to the fact that defendants' instruction 30 was also given to the effect that the fact that Farnsworth drove away without stopping could alone not be the basis of a verdict against defendants. The two instructions together correctly state the law.

[22] Plaintiffs' instruction 12 given by the court contains among other things the rule that the operator of a motor vehicle must "keep his vehicle under such control as will enable him to avoid a collision with another person using proper care and caution." Such instruction has been justly criticised as being open to the construction of placing on the operator of a vehicle the absolute duty to avoid collisions. In a new trial its wording should be corrected, e. g., so as to read: the operator of a motor vehicle *must use ordinary care* to keep his vehicle under such control, etc. Anderson v. Freis, 61 Cal.App.2d 159, 165, 142 P.2d 330.

Appellants argue that many instructions, partly treated before in other respects, partly not mentioned before, related to matters of fact and invaded the province of the jury, were argumentative, repetitious and unduly emphasized the theories of plaintiffs compared to those of defendants. The instructions so attacked are too numerous and extensive to state or discuss them separately. A few general remarks must suffice. We did not find any instruction which actually stated the position of the court as to matters of fact. The instructions complained of as factual either pointed out inferences that could in general be drawn from certain facts leaving it to the jury to decide whether such facts existed and if so whether the inference should be drawn in this specific case or gave rules of law as applied to specific circumstances in case such circumstances were found to exist. Although it is often said in our authorities that it is better for courts to state rules of law in general terms than to draw the attention of the jury to particular facts by instructing on them specifically, see for instance Tower v. Humboldt Transit Co., 176 Cal. 602, 610, 169 P. 227; Stuart v. Preston, 2 Cal.App.2d 310, 322, 38 P.2d 155, nevertheless it is also pointed out that many general instructions are quite puzzling to the average juror and that application of such principles to the particular situation involved impresses itself better on his mind. Nickell v. Rosenfield, 82 Cal.App. 369, 377, 255 P. 760. Accordingly it has been held that the giving of a general instruction which covers the subject in an abstract way does not justify the refusal of a requested particular instruction correctly applying the law to a specific matter. Barnett v. Garrison, 93 Cal.App.2d 553, 558, 209 P.2d 426; 64 C.J. 890; 53 Am.Jur. 426. Hardly ever will the too specific character of an otherwise correct instruction alone be ground for reversal. It will be primarily for the trial judge to see to it that specific instructions requested do not over-emphasize one special aspect of the case, and especially that no rules or applications of rules favorable to one party are stressed to the detriment of the other party. The latter may to some exent have occurred here when the court first gave defendants' general instruction as to sudden peril, applicable to both parties (No. 9) and immediately thereafter plaintiffs' more extensive instruction No. 19 on the same subject applied solely in favor of deceased. Neither are the instructions free of undue repetition (e. g., those given at the request of plaintiffs as to the period following the first impact). The defects pointed out here should be avoided on the next trial.

The judgment is reversed.

GOODELL and DOOLING, JJ., concur.

110 Cal.App.2d 403

DOW v. RIVER FARMS CO. OF CALIFORNIA.

Civ. 15009.

District Court of Appeal, First District,
Division 1, California.
April 18, 1952.

Maxine B. Dow, as administratrix with the will annexed of the estate of Edgar Laurence Dow, alias, deceased, brought action against the River Farms Company of California, a corporation, to recover certain sum under corporation's resolution that certain sum be paid to president of corporation for his past services rendered. The Superior Court of the State of California, in and for the City and County of San Francisco, Franklin A. Griffin, J., found in favor of the defendants, and the plaintiff appealed. The District Court of Appeal, Peters, P. J., held that the resolution was a promise to make a gift and was unenforceable.

Judgment affirmed.

1. Contracts 🔑22(1)

To form binding contract, offer to contract must be accepted.

2. Corporations 🔑308(3)

If resolution of corporation's board of directors that cash payment be made to president of corporation for and in consideration of past services rendered, was intended to constitute offer to contract, letter written by the president and read to the board was a clear rejection of the offer and no contract was formed.

3. Corporations 🔑308(3)

Resolution of corporation's board of directors directing cash payment to president of corporation for and in consideration of his past services rendered, was a promise to make a gift, and president's letter which was read to the board declining to accept the offer, was a rejection of the gift.

4. Contracts 🔑76

At common law, generally a mere moral consideration unconnected with precedent perfect or imperfect legal consideration will not support subsequent promise to pay.

5. Bankruptcy 🔑434
Frauds, Statute of 🔑128
Limitation of Actions 🔑145(5)

If there was once past legal obligation, but remedy is barred, such as where debt is barred by statute of limitations or discharge in bankruptcy or statute of frauds, a subsequent promise to pay is enforceable.

6. Corporations 🔑308(11)

In action against corporation by administratrix of estate of deceased president of corporation to recover certain sum under resolution of corporation's board of directors directing cash payment to president for and in consideration of his past services rendered, resolution and president's letter of objection demonstrated that when services were rendered there was no expectation on president's part that he was to receive payment, or that corporation intended to pay, and supported finding to that effect.

7. Corporations 🔑308(3)

Where corporation's board of directors by resolution directed payment to president of corporation for and in consideration of past services rendered, but when services were rendered there was no expectation on president's part that he was to receive payment, or intent of corporation to pay, there never was past legal obligation, perfect or imperfect, and hence resolution was a promise to make gift and was unenforceable. Civ.Code, § 1606.

8. Corporations 🔑308(3)

Where corporation's board of directors by resolution directed payment to corporation's president for and in consideration of his past services rendered, and resolved that president be paid a certain sum per month for his services as president, and president by letter read to board rejected both payment for past services and salary, and parties by their actions treated promises as severable, such promises were severable and fact that president thereafter did accept salary for his services did not show that he accepted offer of payment for past services.

◆

W. P. Caubu, Robert E. Halsing, San Francisco, (Sullivan, Roche, Johnson & Farraher, San Francisco, of counsel), for appellants.

Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

PETERS, Presiding Justice.

Plaintiff, Maxine B. Dow, is the widow of Edgar Laurence Dow, and the administratrix of his estate. In her representative capacity, on December 6, 1949, she brought this action against the River Farms Company of California to recover from it the sum of $50,000, alleging that the corporation had promised and agreed but failed to pay that sum to her husband. The corporation admitted that it had offered to pay Dow $50,000, but averred in its answer that Dow rejected the offer, that the cause of action was barred by the statute of limitations, and that there was no consideration for the promise. The trial court found in favor of the defendant on all issues, and plaintiff appeals.

Edgar Laurence Dow, a retired dentist, in 1913 incorporated the respondent corporation. He became a stockholder, director, president and general manager of the company at its inception, and remained as such until the time of his death in 1930. His estate is still in the course of administration, and appellant, who is now a director and, as administratrix, a stockholder of the company, is the administratrix of his estate.

From 1913 to the end of 1917 Dr. Dow served as president and general manager of the company without compensation. Starting on January 1, 1918, and continuing until his death in 1930, he received a salary of $1,000 per month for these services.

On July 9, 1917, the then board of directors met. Dr. Dow presided. He was requested to leave the room. In his absence the directors discussed paying Dr. Dow for his past services. They then passed the following resolution:

> "Whereas, for the past four years and since the organization of this company, E. L. Dow has acted as the president thereof without compensation and has ungrudgingly and unselfishly devoted his time and attention to the affairs of this company and by his energy and efficient management has brought the company to a condition where it is this year about to provide a substantial return, and
>
> "Whereas, E. L. Dow has never requested nor has he ever indicated that he expected any payment for said services,
>
> "Now, Therefore, Be It Resolved, that it would be an injustice in view of the services rendered by Dr. Dow not to in some measure compensate him therefor, and
>
> "Be It Further Resolved, that whenever this company has no floating indebtedness or on or about January 1st, 1918, the Vice President and the Secretary be and they are hereby authorized and directed for and in the name of this company and as its act to make a cash payment to E. L. Dow of the sum of $50,000 for and in consideration of his past services rendered, and
>
> "Be It Further Resolved: That from and after January 1st, 1918 said E. L. Dow, as president of this company be paid the sum of $1,000 per month for his services as such."

After the resolution was passed Dr. Dow was recalled to the room. There is a conflict as to what then occurred. John F. Humburg, who, at the time of trial was one of the two directors then surviving, and who was then still a director, testified that Dr. Dow was greatly surprised and then stated: "I cannot accept it." Hiram Johnson, Jr., who is the other surviving director who was present at the July, 1917, meeting, and who is also still a director, testified that Dr. Dow did not then or thereafter refuse to accept the $50,000 mentioned in the resolution.

After the July 9, 1917, meeting, Dr. Dow prepared a letter addressed to the directors formally rejecting the $50,000 payment and tendering his resignation. There was a controversy at the trial, and much is said in the briefs, as to whether this letter was ever signed by Dr. Dow. The original had been lost. The copy was not signed. A copy of this letter was attached to the answer showing a signature, and appellant failed to file the affidavit required by section 448 of the Code of Civil Procedure within the time there provided. She did move for relief under section 473 of the Code of Civil Procedure at the commencement of the trial, and the trial court permitted the filing of the affidavit and motion for relief, but indicated that it was taking the matter under advisement. The record does not show whether the motion was ever passed upon. Regardless of these facts, however, director Humburg testified that in the August, 1917, meeting of the board, Dr. Dow read the letter to the board, that the matter was then discussed "and because he refused it we thought the thing was over, all that $50,000 bonus business. He refused it." Johnson while he denied hearing the letter read, admitted that he had seen, at that time, an unsigned copy of it. This conflict was resolved by the trial court in favor of respondent. Therefore, whether the letter was signed or not is not an important matter—it was read to and considered by the board.

The letter reads as follows:

"San Francisco, July 21, 1917.

"Directors
"River Farms Company of California,
"San Francisco, California.
"Dear Sirs:

> "I have carefully considered the very generous offer made by this board and expressed in a resolution passed at the last meeting in which you offered to pay me for services rendered this company the sum of $50,000.00 on or about January 1, 1918 and a salary of $1,000.00 a month from that date.
>
> "I wish to state that whatever services I may have rendered this company in the past has not been with any idea that I was to receive payment for the same. Some of your members have on several occasions during the past few years insisted that I should receive a salary. I believe that I have at all times consistently refused the same, as I probably realized better than any of you that this company was not in a condition to pay any salaries or any amounts that it could honestly avoid.
>
> "I believe that my greatest incentive to work and whatever efforts I may have made to solve the many problems and difficulties that we have met has been the apparently complete support and loyalty of all concerned, also the confidence that you have displayed in supporting any suggestion or plans that I have offered not only with your money but with your hearty cooperation. I think it is needless for me to say that without your complete cooperation and unity of purpose of action that the successful conclusion that is a fact today, could not have been realized. This support combined with my complete confidence in the value of the property when reclaimed and financed has made my work interesting.
>
> "It has been brought to my attention, however, that the action of this board at its last meeting was not satisfactory to some of the stockholders of this company.
>
> "In view of this fact, I feel that I can not accept your very generous offer and I must insist that at this meeting you rescind the resolution passed at your last meeting. I wish, however, to assure the members who were responsible for this offer that they have my sincere thanks and also that such action and intention on their part more than repays me for any services that I may have rendered this company. I believe that you will agree with me when I state that the affairs of this Corporation representing an investment in excess of $4,500,000.00 in an agricultural proposition presents many intricate problems and should be handled in a very careful and efficient

> manner, and as these duties must largely and logically fall or come on the President, this office should be filled by someone who has not only the confidence of a majority of this board, but the confidence and complete support of at least all the large stockholders.
>
> "I am forced to the conclusion that I have not this complete support and confidence that I feel is necessary for the best interests of the Company. I feel that it is best at this time to tender my resignation as President to take effect immediately if possible.
>
> "The association with you during the past few years, has been pleasant and the work has been interesting. I thank you for your confidence and the loyal manner that you have stood by me during the past four years.
>
> "Assuring you that I will at all times give all the assistance and advice if needed or requested to further the prosperity of this Company, I am,
>
> "Yours very truly,

"ELD:HH"

There is no reference in the minutes of the July or August, 1917, meetings to this letter, nor was there a formal rescission of any part of the July resolution, nor do the books of the company contain any further reference to this $50,000 item. There is nc evidence that Dr. Dow ever made a demand for the $50,000, and admittedly Mrs. Dow made no such demand until the filing of this suit. We do know that Dr. Dow continued to act as president of the board, and that starting January 1, 1918, and until his death in 1930, he received $1,000 a month for his services.

The complaint, in an attempt to avoid the statute of limitations, alleges that the corporation first became free of floating indebtedness in 1948. Much of the record is devoted to a discussion of this problem. The trial court found that the corporation became free of floating indebtedness more than four years prior to the commencement of this action, and that the action was therefore barred. In view of the conclusions we have reached, it is not necessary to pass upon this issue.

It is quite apparent that the resolution of July 9, 1917, contained two separate, distinct, and severable propositions. One was a promise to pay $50,000 for past services, the other was an offer to pay $1,000 a month for future services. Although Dr. Dow rejected the offer for future services by tendering his resignation, it is quite apparent that he was induced to withdraw that resignation, because he continued to act as president and received $1,000 a month therefor. By the actions of both parties—Dr. Dow and the corporation—it is clear that Dr. Dow accepted the offer, and no contention is made to the contrary.

[1, 2] But the portion of the resolution promising to pay the $50,000 for past services is in a different category. It probably was not intended to create any legal obligation at all. See, Southern Glass Co. v. Consolidated Inv. Corp., 1 Cal.App.2d 510, 36 P.2d 1077. But if it be assumed that it was intended to constitute an offer to contract, it was clearly rejected by Dr. Dow, and there is no evidence at all that after the rejection either Dow or the corporation believed that any agreement had been entered into. Certainly, there is no evidence of an acceptance, which is necessary. Hoge v. Lava Cap Gold Mining Corp., 55 Cal. App.2d 176, 130 P.2d 470.

[3] In our opinion, however, this portion of the resolution was not an offer to contract at all—it was simply a promise to make a gift. That gift was rejected by Dr. Dow. Even if it had not been rejected, it amounted to no more than a promise to make a gift, and, as such, was unenforceable. Such a promise is not supported by a legal consideration.

[4] It is a general principle of common law that a mere moral consideration unconnected with a precedent perfect or imperfect legal consideration, will not support a subsequent promise to pay. Although Lord Mansfield had announced in 1775, in Atkins v. Hill, 98 Eng.Rep. 1088, that a moral consideration was sufficient to support a subsequent promise to pay, in Wennall v. Adney (1802), 127 Eng.Rep. 137, and in Eastwood v. Kenyon (1840), 113 Eng. Rep. 482, this view was expressly repudiated. The American jurisdictions, generally, have consistently followed the rule that a mere moral obligation unconnected with a

past perfect or imperfect legal consideration, will not support a subsequent executory promise. (See annotations 8 A.L.R.2d 787; 79 A.L.R. 1346; 17 A.L.R. 1299.)

The California rule is embodied in section 1606 of the Civil Code. That section, which has been in our code since 1872, reads as follows: "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise." This section has been consistently interpreted in accordance with the common law rule. Thus, in Foltz v. First Trust & Savings Bank, 86 Cal.App.2d 59, 194 P.2d 135, X intervened to prevent Y from disinheriting her son, Z. Later Z inherited and promised to pay an annuity to X of $840 a year. The promise was held to be unenforceable, the court stating, 86 Cal.App.2d at page 62, 194 P.2d at page 137: "Under section 1606 of the Civil Code, a moral obligation is insufficient to support an express promise where there has not been a prior legal obligation founded on good and valuable consideration."

In Estate of McConnell, 6 Cal.2d 493, 58 P.2d 639, X and Y had been partners for many years. X had devoted more time to the partnership affairs than had Y because of the latter's sickness. The partnership was dissolved, each sharing equally. Thereafter X gave Y occasional beneficial business advice. Several years later Y gave X a $5,000 note in payment for these past services. There was no evidence that when these services were rendered Y expected to pay for them, or that X expected to be paid. The promise was held to be unenforceable, the court stating, 6 Cal.2d at page 498, 58 P.2d at page 642: "It is true that in some states a moral, as distinguished from a legal consideration, will under some circumstances be sufficient to form a valid and binding contract (citing a Minn. case [Rask v. Norman, 141 Minn. 198, 169 N.W. 704, 17 A.L.R. 1299]), but such has never been the rule in this state. California cases have construed said code section [§ 1606, Civ. Code] to mean that 'a moral obligation is sufficient to support an express promise, where a good and valuable consideration has once existed.' [Citing seven cases and two encyclopedias.]" (See cases collected 6 Cal.Jur. p. 181, § 124.)

The case of Medberry v. Olcovich, 15 Cal.App.2d 263, 59 P.2d 551, 60 P.2d 281, is not contrary to these cases. There two boys were riding in an automobile when one of them was hurt. The father of the boy who was uninjured, and who was driving, promised the father of the injured boy to pay for medical and hospital expenses. The promisor knew that the promisee was unable to pay such expenses. In reliance on the promise, the promisee incurred substantial expenses and the promisor knew about it. Even though the boy who was driving and his father were not legally responsible under the facts, the court held the promise to pay was enforceable. Obviously, the case is one of estoppel—reliance and change of position by the promisee upon the promise of the promisor.

[5] If there was once a past legal obligation, but the remedy is barred, such as where the debt is barred by the statute of limitations or a discharge in bankruptcy, a subsequent promise to pay is enforceable, Fidelity, etc., Co. v. Thompson, 128 Cal. 506, 61 P. 94; or where the original obligation is barred by the statute of frauds the subsequent promise to pay is enforceable. Coulter v. Howard, 203 Cal. 17, 262 P. 751.

There is a modern trend in the authorities in some states to the effect that where services are rendered under circumstances where the person rendering them reasonably may expect to be paid, and the person receiving them should expect to pay, a subsequent promise to pay is enforceable. See cases collected 8 A.L.R.2d 798. But even under this rule, if there was no expectation of payment by either party when the services were rendered, the promise is a mere promise to make a gift and not enforceable. See Old American Life Ins. Co. v. Biggers, 10 Cir., 172 F.2d 495, 8 A.L.R.2d 781; Marnon v. Vaughan Motor Co., 184 Or. 103, 194 P.2d 992.

Appellant places her main reliance on Carrington v. Smithers, 26 Cal.App. 460, 147 P. 225, which involved a subsequent written promise to pay a broker after valuable services had been performed by the broker. There the evidence demonstrated that the services were performed and received with the expectation that payment should be made. Thus, there was an implied contract to pay for them which perhaps could not be enforced by reason of the statute of frauds. There was at least a past imperfect obligation to pay. See, also, Walsh v. Parker, 41 Cal.App.2d 435, 106 P.2d 925.

[6, 7] In the instant case the trial court found that when the services were rendered there was no expectation of payment. That finding is amply supported by the resolution and by Dr. Dow's letter. They demonstrate that when the services were rendered there was no expectation on Dr. Dow's part that he was to receive payment, or that the corporation intended to pay. There never was a past legal obligation, perfect or imperfect. The promise amounted to no more than a promise to make a gift and is unenforceable.

[8] Appellant argues that the resolution is indivisible, and that Dr. Dow could not accept the offer for future payment without accepting the offer for past services. The promises were obviously severable, and the parties, by their actions, so treated them.

The judgment appealed from is affirmed.

BRAY, and FRED B. WOOD, JJ., concur.

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110 Cal.App.2d 427

PIXLEY et al. v. FIRST FEDERAL SAVINGS & LOAN ASS'N OF SANTA MONICA.

Civ. 18751.

District Court of Appeal, Second District, Division 1, California.

April 21, 1952.

Rehearing Denied May 12, 1952.

Hearing Denied June 19, 1952.

John W. Pixley and another sued First Federal Savings and Loan Association of Santa Monica, to recover for breach of a contract to convey a residential property. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., rendered judgment in favor of plaintiffs, and defendant appealed. The District Court of Appeal, Hanson, J. pro tem., held, inter alia, that defendant had been guilty of "bad faith" entitling plaintiffs to statutory damages equal to the difference between the price to be paid and the value of the estate agreed to be conveyed, at the time of the breach.

Affirmed.

1. Corporations 🔑426(11)

Fact that vendor's escrow instructions had been signed only by corporate vendor's secretary rather than by both its secretary and its vice president was not good defense to purchaser's suit for breach of contract to convey, where both secretary and vice president had signed grant deed on behalf of corporate vendor, in strict accord with resolution of board of directors, and vice president had given deed to escrow officer to be placed in escrow when opened.

2. Corporations 🔑426(11)

Letter, written by vice president of corporate vendor to purchasers, in which it was conceded that property had been sold through escrow, was sufficient ratification of escrow instructions signed only by secretary of corporation, if vice president's signature were in fact necessary to make vendor's escrow instructions effective.

3. Vendor and Purchaser 🔑31

Where creditor under trust deed failed to ascertain whether there had been building material deposited, or work done, upon premises which might give mechanics' liens subsequently filed priority over lien of trust deed, and such mechanics' liens were in fact filed against property more than year later, and subsequently, after buying in property at trust deed foreclosure sale, creditor contracted to convey good title to property evidenced by policy of title insurance, alleged mutual mistake with regard to effect of trust deed foreclosure upon mechanics' liens would be no defense to purchaser's suit for breach of contract to convey, especially in view of fact that vendor failed to show that any of mechanics' liens were superior to its own trust deed lien.

4. Vendor and Purchaser ⚷351(1)

The term "bad faith", as used in statute allowing damages equal to difference between price agreed to be paid and value of estate agreed to be conveyed when "bad faith" is shown, does not require showing of fraud, but only of a deliberate refusal to perform without just cause or excuse. Civ.Code, § 3306.

See publication Words and Phrases, for other judicial constructions and definitions of "Bad Faith".

5. Vendor and Purchaser ⚷350

In purchasers' suit for damages for breach of contract to convey residential property, evidence sustained trial court's finding that vendor had been guilty of bad faith entitling purchasers to statutory damages equal to difference between price agreed to be paid and value of estate agreed to be conveyed, at time of breach. Civ. Code, § 3306.

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Samuel J. Crawford and Robert D. Ogle, by Joseph T. Enright, Santa Monica, for appellant.

Scudder & Forde, Pacific Palisades, and Morris W. Young, Los Angeles, for respondents.

HANSON, Justice pro tem.

This is a suit for damages for breach of a contract to convey a residential property.

The defendant savings and loan association, the appellant, contended in the lower court, as it likewise contends here, (1) that its escrow instructions—which together with the instructions signed by plaintiffs comprised the written contract between the parties—were not binding upon it as they were signed in its behalf only by its secretary and not by its secretary and its vice president; (2) that there was a mutual mistake of law and fact which voided the contract; and (3) that the trial court erred in finding the defendant was guilty of bad faith in refusing to convey and in its allowance of damages based on that theory.

The defendant in 1946 made a construction loan to one Grosbach in the sum of $8,000 and as security took back a trust deed on the property here involved. The defendant did not inspect the property prior to recording the deed to ascertain whether any building material had been deposited, or work done, upon the premises which might give mechanics' liens subsequently filed a priority over the lien of the trust deed. Evidently this failure was due to the inadvertence of some one or more employees of the defendant charged with such duty. More than a year later four mechanics' liens were filed against the property; one, in August, 1947, and three in January, 1948, but at the trial no evidence was offered to show that any of these mechanics' liens were entitled to priority over defendant's trust deed and for want of such evidence the court found they had no priority.

In October, 1948, the defendant caused notice of default under the terms of its trust deed to be filed, but the trustee's sale was not had until July 19, 1949, at which time the defendant bid in the property for the sum of $8,378.55.

Prior to the trust deed sale the plaintiffs had several conferences with one Kibbe, vice president of the defendant, in which they sought to purchase the property. At a conference had on July 11, 1949, the parties orally agreed, subject to the approval of the defendant's board of directors, that plaintiffs should not bid at the trustee's sale, but that the defendant should purchase the property upon said sale, and resell it to plaintiffs at a price totaling the balance due on defendant's trust deed, plus interest, foreclosure expenses, buyers' and seller's escrow expenses, title policy costs, and a $500 profit to defendant, and thereupon it would deliver a good title evidenced by a policy of title insurance. In these conferences there never was any discussion concerning mechanics' liens.

On July 22nd Kibbe having received the trustee's deed along with its bill for fees and expenditures prepared a memorandum listing the sum of $9,244.05 as being the amount payable by the plaintiffs. The items aggregating this sum were the bid price of $8,378.55; interest thereon $12.12; policy of title insurance $45; internal revenue stamps and recording $12.45; taxes $295.93; agreed profit for defendant $500. He next procured from the board of directors a resolution which recited it was "Resolved, that the officers are hereby directed to sell" the lot involved "for $9,244.05. Vance C. Kibbe, Vice President and Carl D. Gibbons, Secretary, are authorized to execute the necessary papers to complete this sale." Thereupon, Kibbe and Gibbons executed the corporation's grant deed of the property to the plaintiffs as grantees, "subject to general and special taxes for 1949–50; covenants, conditions, restrictions, reservations, easements, rights and rights of way of record." Kibbe thereupon telephoned the plaintiffs that he had procured the necessary resolution from the board of directors to sell the property for $9,244.05 and requested that they come to defendant's office on July 25th with that sum prepared to enter into an escrow. Kibbe further stated that defendant's escrow officer would prepare the escrow instructions and handle the transaction as he would have to be out of town. All this was orally agreed to by the plaintiffs. Before leaving for out of town Kibbe handed the grant deed and his price computation memorandum to the escrow officer. On July 25th the escrow officer prepared both the seller's and the buyers' escrow instructions. She then caused the plaintiffs to sign the buyers' instructions and secretary Gibbons to sign the seller's instructions in behalf of the corporation. Likewise she accepted the sum of $9,244.05 from the plaintiffs and placed that sum along with the defendant's deed into escrow. At that time she stated to plaintiffs that Mr. Kibbe would sign on the line she had provided for his signature as soon as he returned. This signature was never placed on the instructions. Immediately thereafter the escrow officer forwarded the defendant's deed to the Title Insurance and Trust Company along with an order requesting it to issue a title policy in favor of plaintiffs but instructing it to hold the deed for further orders. Upon receiving the usual preliminary title report the escrow officer advised the plaintiffs she was deferring action until Mr. Kibbe's return as the report showed mechanics' liens of record. On his return Kibbe advised the plaintiffs he would have defendant's attorney clear the record. However, about a month later, Kibbe upon learning that the title company would not insure the title clear of the mechanics' liens, evidently had a change of heart and so wrote plaintiffs a letter wherein he conceded the property had been sold to the plaintiffs, but by it he sought to vary the terms of the escrow by asserting that the final amount payable was not "$9,244.05 as provided for in the escrow instructions," but such additional amount as the defendant might be obligated to pay to clear the title. This contention, as set forth in the letter, was based on the alleged terms of the prior oral agreement. The plaintiffs having refused to agree to this variation the defendant conveyed the property to a third person returning to the plaintiffs their deposit of $9,244.05 which was given and accepted without prejudice to the plaintiffs' rights.

[1, 2] The initial contention urged upon us is that there was no binding written contract for want of the signature of Kibbe, in his capacity as vice president of the defendant. One difficulty with the contention is that it is not shown that such a signature was requisite, unless it may be implied that the resolution of the board of directors required such a signature to make the seller's escrow instructions effective. The mere fact that the escrow officer provided signature lines for two officers to sign rather than one could not affect the authority the secretary had to bind the corporation. But assuming for the sake of argument, that the defendant was not bound by the seller's instructions signed by the secretary in its behalf and in its name, for want of the signature of its vice president Kibbe, it nevertheless appears that both Kibbe and Gibbons signed the grant deed in behalf of the defendant in strict accord with the resolution and that Kibbe gave the deed to the escrow officer to be placed in the escrow when opened. Moreover, Kibbe's letter to the plaintiffs which conceded that the property had been sold through escrow was a sufficient ratification of the escrow instructions which were not signed by him.

Schader v. White, 173 Cal. 441, 445, 160 P. 557; Wood v. Davis, 82 Ill. 311.

[3] Second. Appellant contends that the appellant and the respondents assumed at all times that the foreclosure of the trust deed would extinguish all the mechanics' liens recorded against the property and, hence because of this mistake of fact or of law the contract was voidable at the instance of the appellant. Assuming for the sake of argument that appellant and the respondents both assumed that the lien of appellant's trust deed was a first lien prior to the subsequent mechanics' liens which were filed, that fact was legally immaterial. In the first place the respondents were entitled to assume that the trust deed having been filed prior to the mechanics' liens was a prior lien as it appeared of record to be. If that was true the respondents were entitled to receive a title policy insuring such a title in their favor along with a conveyance both measured accordingly. The obligation to convey such a title, properly insured, rested upon the appellant despite the expense it might be put to in procuring it. In short, if the appellant under *such circumstances* failed to procure a policy of that character the fault would rest wholly with it. A further difficulty with appellant's position is that it assumed—rightly or wrongly—that the mechanics' liens in whole or in part were prior to its own lien and on that assumption declined to proceed to establish the fact that its lien was the prior lien and procure a title policy insuring the title accordingly. The truth of the matter is that appellant, in the trial below, wholly failed to show that any of the mechanics' liens were superior to its own trust deed lien and on that basis the trial court rightly found the liens were not superior. Accordingly, the first trust deed on the evidence was the superior lien as assumed by the appellant and the respondents. That being true there was no mistake of fact or of law on the part of any of the parties to the lawsuit.

[4, 5] Third. The final contention of appellant is that the court erred in finding that it was guilty of "bad faith" and as a consequence allowing statutory damages equal to the "difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach * * *" as provided in Civil Code, sec. 3306, where bad faith is shown. The phrase "bad faith" as used in the statute mentioned does not under our cases require a showing of fraud as appellant contends. The contract of sale in this case did not fail for want of title or as a consequence of a defect in the title of appellant. For aught that appears appellant held a perfect title of record, subject only to assessments and taxes, presumptively not assailable by the mechanics' liens of record owing to the foreclosure of appellant's first trust deed.

If, as appellant contends, the parties dealt with one another on the assumption that the trust deed was the superior lien of record and its foreclosure would vest a title in appellant not subject to other liens of record, the assumption was not shown to be incorrect. The title company declined to insure the title not on the theory that subsequent liens of record were prior, but that through extrinsic evidence they might be shown to be entitled to priority. Accordingly, it was incumbent upon appellant to satisfy the title company as to the true fact based upon acceptable affidavits, releases or by a decree quieting the title. By its contract appellant had not only agreed to convey the premises free of all liens except current taxes, but it had also agreed to procure a title policy of like tenor. Unless and until it did so it was in default and if it ultimately failed, it breached its contract. There is nothing in the record to indicate that the appellant could not have fulfilled its obligation had it chosen to do so. In short, it is plain that the title company would have insured appellant's title if appellant had taken the necessary steps to safeguard the company. Accordingly, upon the facts appellant was guilty of "bad faith" within the meaning of that phrase as it is used in Civil Code, sec. 3306. Bad faith is shown where there is a "deliberate refusal to perform" (Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 518, 55 P.2d 859, 863) or a refusal to convey, "where through his own negligence he has put it out of his power to fulfill the obligations of his contract" (Johnson v. Schimpf, 197 Cal. 43, 48, 239 P. 401, 402) or "without just cause or excuse, he refuses to perform". Engasser v. Jones, 88 Cal.App.2d 171, 177, 198 P.2d 546, 549.

For the reasons stated the judgment should be and it is affirmed.

WHITE, P. J., and DORAN, J., concur.

110 Cal.App.2d 506

TRELUT v. KAZARIAN et al.

ACE SERVICE, Inc. v. H. C. SHAW CO. et al.

Civ. 4362.

District Court of Appeal, Fourth District, California.

April 24, 1952.

Rehearing Denied May 14, 1952.

Hearing Denied June 19, 1952.

Action by Gladys Erma Trelut, individually and as administratrix of the estate of Alphonse Francis Trelut, and another against Azad George Kazarian and another for the accidental death of Alphonse Francis Trelut, sustained in an intersection collision with a truck being driven by named defendant and owned by unnamed defendant, and unnamed defendant cross-complained against the estate of deceased and his employer for damage to its truck. The Superior Court, Fresno County, Milo Popovich, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Mussell, J., held, inter alia, that the given instruction relating to an independent or efficient intervening cause was not applicable, but that such instruction was not prejudicial to defendants in view of other instructions relating to negligence and contributory negligence.

Affirmed.

1. Appeal and Error 🔑1066

An instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify a reversal unless it has misled jury to prejudice of appellant.

2. Trial 🔑295(1)

In determining whether jury was properly instructed, instructions must be considered as a whole.

3. Death 🔑58(1)

Deceased driver of automobile involved in right angle intersection collision would be presumed to have exercised due care for his own safety and protection, and such presumption was to be weighed by jury in action arising from such collision as against any evidence offered in contradiction to it.

4. Automobiles 🔑245(80, 90)

In action against truck driver for damages resulting from right angle intersection collision in which automobile driver was killed, whether automobile driver was negligent, and if so, whether his negligence contributed directly to his death, were questions of fact for jury.

5. Trial 🔑296(3)

In action arising out of right angle intersection collision between truck and automobile, instruction relating to independent or efficient intervening cause was inapplicable, but such instruction was not prejudicial to defendants, in view of other instructions relating to negligence and contributory negligence.

6. New Trial 🔑41(3)

Generally, the determination as to whether an erroneous instruction was prejudicial and justifies granting of new trial is one which is left to trial court's discretion.

7. Death 🔑99(1)

Award of $45,000 for accidental death was not excessive.

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Dearing, Jertberg & Avery, Ray W. Hays and James N. Hays, Fresno, for appellants.

Chargin & Briscoe, Stockton, and Chester O. Hansen, Fresno, for respondents.

MUSSELL, Justice.

The accident occurred about 3:30 p. m. on April 27, 1949, at the intersection of Chesnut and South Avenues, about five miles southwest of Fresno. Chesnut Avenue runs north and south, and South Avenue runs east and west. Each road had an oil surface about 16 feet in width and neither road had a white line. There were no stop signs at this intersection and because of trees on the northeast corner, neither driver could see 100 feet along the other road from a point 100 feet back from the intersection.

At the time in question the defendants' truck was proceeding west on South Avenue at a speed of 25 to 30 miles per hour or more, and the Ford car was traveling south on Chesnut. The driver of the truck was accompanied by another employee of Ace Service, and Trelut had another man in his car. Kazarian did not see the other car until just before the impact and he did not apply his brake or vary his course. The point of impact was about six feet west of the center of the intersection. The left front of the Ford car hit the truck behind the right front wheel with sufficient force to bend in the frame of the truck about four inches where it hit. The truck weighed 8,000 pounds and the Ford 3,266 pounds. After the impact both vehicles went about 51 feet in a southwest direction and came to rest on the south side of South Avenue, with the rear end of the truck on a tree stump and its front axle on top of the left front of the automobile. There were some marks made by the truck at the point of impact, but there were no marks from the edge of the oiled surface of the road to the place where the vehicles came to rest. There was a heavy brake or tire mark made by the Ford about six feet long running north from the point of impact, with a lighter skid mark extending eight or ten feet farther to the north. The course of these marks indicated that the driver of the Ford had veered a little to his right just before the impact. Both of the occupants of the Ford car were killed.

The plaintiffs are the widow and the adult son of the driver of the Ford car. The complaint alleged that Trelut's death was proximately caused by the negligence of the defendants. The answer of the defendants denied that they were negligent and alleged contributory negligence on the part of the deceased. Ace Service, Inc. also filed a cross-complaint against the estate of the deceased and his employer for the damage to its truck, alleging that such damage was proximately caused by the negligence of the deceased. A jury returned a verdict in favor of the plaintiffs for $52,314, and against the cross-complainant. A judgment on the verdict was entered, and a motion for a new trial was denied on the condition that the plaintiffs waive the excess amount over $45,000. This was done and the defendants have appealed from the judgment as thus modified.

The main ground of the appeal is that the jury was improperly instructed, to the prejudice of appellants, by the giving of an inapplicable instruction relating to the doctrine of an intervening cause. After properly instructing the jury on negligence and contributory negligence, the court gave three correct instructions on the proximate cause, and then gave, at the request of the plaintiffs, the following instruction:

> "When it appears that the conduct of two or more persons, acting independently and at different times, created or contributed to the circumstances out of which injury resulted, the question of proximate or remote cause requires the jury to consider thoughtfully the relationship between the conduct of the one person, whom, for convenience, I shall call the original actor; the conduct of another, whom I shall call the secondary actor, and the sequence of events leading to the injury.
>
> "It is not enough merely to say that the accident would not have happened had it not been for what was done or was not done by one of the parties. It may or may not be that the effect which ordinarily would have been expected to flow from certain conduct was changed by what we call an efficient intervening cause.
>
> "Of course, the first question to be answered is whether either of the parties was negligent. If either party was

not negligent, then he may not be held liable even if his conduct was a proximate cause of the accident. If the original actor was not negligent but the secondary actor was, the question narrows down to whether that secondary conduct was a proximate cause of the injury. There remains, of course, the question of contributory negligence. If the original actor was negligent, then you have to consider whether the effect of that negligence was broken, or changed from a normal course, by an efficient intervening cause. Was the conduct of the secondary actor such an efficient intervening cause, which displaced the original conduct in proximate relationship to the injury? Or was that later conduct merely a concurring cause. This is the test: If the original actor foresaw, or by exercising ordinary care would have foreseen, the probability of the conduct of the secondary actor and the probability that the original conduct plus the secondary conduct would result in injury to a third person, then the conduct of both the original and secondary actors was a proximate cause of that injury. But if the probable result was not thus foreseen or foreseeable, and if the immediate cause of the injury was the conduct of the secondary actor, then it may not be held that the conduct of the original actor was a proximate cause."

The appellants contend that this instruction was confusing and misleading; that it permitted the jury to regard the deceased as the original actor and told the jury that it might find that the plaintiffs were not barred by any contributory negligence on the part of the deceased, since it might find that the negligence of the truck driver had intervened and became the proximate cause; that this instruction had no application under the factual situation in this case since only two actors were involved, the drivers of the vehicles, and any negligence on the part of either driver would necessarily continue to the time of the accident; and that any second negligence here involved was contributory and concurrent and not of such a different time and nature as to constitute an efficient intervening cause.

The respondents contend that the instruction was not misleading because the jury was elsewhere instructed with respect to contributory negligence; that it was an instruction on the law of proximate cause and not of contributory negligence; that it was concerned solely with the conduct of the defendants and had no application to the conduct of the plaintiffs, and that it was not prejudicially erroneous. It is further argued that the evidence justified the giving of an instruction on intervening cause since the man riding with the driver of the truck testified that just before the impact he reached in his rear pocket for a handkerchief and it might be inferred that this act may have interfered with the driver's vision, and since the jury might have considered that another cause of the accident was the negligence of the State Highway Department in failing to install stop signs at this blind intersection.

In discussing proximate cause and the question as to an intervening cause the court, in Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 536, 31 L.R.A.,N.S., 559, pointed out that "the proximate causation is not always arrested by the intervention of an independent concurring cause" and that "the original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result." It then said that the true rule "is that the independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission."

In Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.2d 781, 782, it is said:

> "The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of

> a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury."

In Springer v. Sodestrom, 54 Cal.App.2d 704, 129 P.2d 499, where two negligent acts of a different nature were involved, the court pointed out that although the question of whether or not an intervening act of negligence breaks the chain of causation is one of fact, the intervening act of negligence will not be regarded as having this effect where the original negligence continues and exists up to the time of the injury, but the two concurring acts of negligence will be held to be the proximate cause of the injury.

Only one actor was here charged by plaintiff with negligence causing the injury. Such negligence, if any, continued up to the time of the injury and there was no evidence of, or any claim made, that there was any independent or intervening cause of such injury by a third party. While the evidence might support a finding of negligence and of contributory negligence, it would not support a finding that there was an independent or efficient intervening cause. The instruction was not applicable to the facts and should not have been given. See History and type of factual situations for which the instruction was designed, B.A.J.I.1950 Supp.

[1] The jury was not instructed that it *must* consider whether an "efficient intervening cause" existed to break or change the effect of the negligence of the original actor, and the question as to whether the instruction in its entirety was or was not applicable was left to the jury. It was instructed that "when it appears" that certain facts exist, then the therein stated rule was applicable. It clearly appears that the conduct of two or more persons "acting independently and at different times" was not involved and that there were no facts established justifying the application of the rule announced. It seems apparent, then, that since the instruction was not applicable, the jury properly disregarded it. The principal question is whether the giving of it was so prejudicial as to constitute reversible error. An instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify a reversal unless it has misled the jury to the prejudice of the appellant. Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855. Citing In re Estate of Budan, 156 Cal. 230, 234, 104 P. 442; Lawrence v. Southern Pacific Co., 189 Cal. 434, 444, 208 P. 966; O'Meara v. Haiden, 204 Cal. 354, 369, 268 P. 334, 60 A.L.R. 1381; 24 Cal.Jur. 830; 10 Cal.Jur. 10-Yr.Supp. 700–702.

As was said in Sortino v. Loneoak, 66 Cal.App.2d 876, 883, 153 P.2d 428, 432:

> "It is not reversible error for the court to instruct the jury upon a principle of law, even though there may be an entire absence of evidence on that particular subject, unless it also appears that the jury was misled and prejudiced thereby. * * * "It has been uniformly held that 'An instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify a reversal unless it has misled the jury to the prejudice of the appellant.' Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855, 857; Marston v. Pickwick Stages, Inc., 78 Cal. App. 526, 248 P. 930; Gambrel v. Duensing, 127 Cal.App. 593, 606, 16 P.2d 284; 2 Cal.Jur. 1026, sec. 611; 24 Cal. Jur. 830, sec. 95. In the Marston case, supra, it is said at page 533 of 78 Cal. App., at page 933 of 248 P., quoting with approval from People v. Cochran, 61 Cal. 548: 'If an instruction in a case is asked which refers to facts which there is no evidence to prove, it is not error to refuse to give it, and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury was misled by it to the prejudice of the defendant.'"

[2] In determining whether the jury was properly instructed as to the law, the instructions taken as a whole must be considered. Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, 652, 158 P. 119. It is also the established rule that all instructions of the court are to be considered and construed

as a whole to determine whether they contain reversible error. Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 871, 113 P.2d 244.

It is argued that the appellants were entitled to have the issue of contributory negligence passed upon directly and without reference to an intervening cause. However, four specific instructions were given in which contributory negligence was clearly defined and its application to the conduct of the driver of the Ford car was correctly stated. In addition thereto, it appears from the record that the prospective jurors, on voir dire examination, were informed many times by counsel for appellants, in effect, that if the driver of the Ford car was guilty of any negligence, however slight, which contributed directly to his injury and resulting death, his widow and adult son could not recover. The jurors were asked if they would follow an instruction to that effect. The rule was stated many times and the jury was fully informed as to the doctrine of contributory negligence and its application to the facts in the instant case. It is to be noted that contributory negligence and its application to the evidence is not specifically discussed in the questioned instruction and that question was expressly excluded therefrom by the following sentence: "There remains of course, the question of contributory negligence." The question was then adequately covered by the four separate specific instructions given on the subject.

[3] The evidence is sufficient to sustain the implied finding of the jury that the driver of the Ford car was free from negligence contributing directly to his injury and death. The deceased driver of the Ford car was presumed to have exercised due care for his own safety and protection. This presumption was to be weighed by the jury as against any evidence offered in contradiction to it and it was for the jury to determine whether it was overcome by such evidence. Duehren v. Stewart, 39 Cal.App.2d 201, 208, 102 P.2d 784.

[4] The testimony indicates that the defendants' truck was traveling at least 25 miles per hour at the time of the impact and that the driver did not see the Ford car until just before the impact; that he did not change his course or apply his brakes. From the evidence as to the respective weights of the truck and Ford car, the point of impact and the distance traveled by both vehicles after the impact, the jury could infer that the speed of the truck was greater than 25 miles per hour. The evidence indicates that the driver of the Ford car applied his brakes before the impact. Defendant Kazarian estimated the speed of the Ford at around 50 miles per hour. However, on cross-examination, he stated that he did not see it at any time before the impact. There was no other direct testimony that the Ford was traveling in excess of 15 miles per hour at the time it entered the intersection. Whether the driver of the Ford car was negligent and if so, whether his negligence, if any, contributed directly to his injury, were questions of fact for the jury.

[5, 6] While in our opinion the questioned instruction was not applicable in the instant case and should not have been given, we cannot hold as a matter of law that the jury was manifestly misled by it to the prejudice of the defendants. It may also be observed that as a general proposition the determination as to whether an erroneous instruction was prejudicial and justifies the granting of a new trial is one which is left to the trial court's discretion. Parker v. Womack, 37 Cal.2d 116, 123, 230 P.2d 823.

In the instant case a motion for a new trial was made on the ground, among others, that there had been an "* * * error in law occurring at the trial" and the motion was denied by the trial court.

[7] Appellants also argue as a ground for reversal that the damages allowed were excessive. Under the facts shown, we cannot hold as a matter of law that the award indicates passion or prejudice on the part of the jury or that it was excessive. Holder v. Key System, 88 Cal.App.2d 925, 940–941, 200 P.2d 98.

Judgment affirmed.

GRIFFIN, J., concurs.

BARNARD, P. J., dissents.

Rehearing denied; BARNARD, P. J., dissenting.

Hearing denied; SCHAUER, J., dissenting.

110 Cal.App.2d 556

ABRAMS v. GUSTON.

Civ. 18755.

District Court of Appeal, Second District, Division 2, California.

April 28, 1952.

Rehearing Denied May 14, 1952.

Action by John McClelland Abrams against Gosta B. Guston to recover commission for services rendered in connection with sale of defendant's mining mill and equipment and lease of realty upon which mill was located. The Superior Court of Los Angeles County, Raymond McIntosh, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, McComb, J., held that fact that plaintiff did not have a real estate broker's license precluded recovery.

Judgment reversed.

1. Brokers ⚿42

Fact that plaintiff did not have a real estate broker's license precluded recovery of compensation for services rendered in connection with sale of defendant's mining mill and equipment and lease of realty on which mill was located, where sale of realty and personal property located thereon constituted one entire transaction and plaintiff participated in preparation of option given purchaser. Business and Professions Code, § 10136.

2. Brokers ⚿3

One who participated in preparation of option given purchaser of another's mining mill and equipment and lease of realty on which mill was located was not a middle man, but acted as a "broker" required by statute to have a real estate broker's license. Business and Professions Code, § 10136.

See publication Words and Phrases, for other judicial constructions and definitions of "Broker".

3. Brokers ⚿3

If a broker takes any part in the negotiations, no matter how slight, he is not a middle man, but a "broker" required by statute to have a broker's license. Business and Professions Code, § 10136.

4. Brokers ⚿42

Where mining mill and equipment were of value to purchaser only if he obtained lease of realty upon which mill was located, sale of the realty and personal property located thereon constituted one entire transaction and one who participated in transaction as a broker without being licensed as a real estate broker was not entitled to commission even on sale of the personal property. Business and Professions Code, § 10136.

* * *

Monta W. Shirley and George W. Nilsson, Los Angeles, for appellant.

Burke Mathes, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in an action to recover a commission for services rendered in connection with the sale of a mining mill and equipment and lease of the realty upon which the mill was located, defendant appeals.

Facts: Defendant owned a large mining mill together with a 20 year lease on the realty upon which the mill was situated near Barstow, California. He desired to dispose of these and talked with plaintiff, who was his friend, relative to the disposition of the property. The mill consisted of a very large building in which was installed machinery suitable for grinding ore at the rate of approximately 1,500 tons a month of rotary mud alone.

Plaintiff consulted with defendant and negotiated on defendant's behalf with numerous people for the sale of the mill. At various times defendant promised to pay plaintiff a commission in the event of the sale of the property. Finally it was disposed of to Mr. Carder for the sum of $35,000.

Plaintiff participated in the drawing of an option on the property which was given to Mr. Carder. The transaction thereafter was ultimately consummated between defendant and Mr. Carder without plaintiff's assistance. It was stipulated that plaintiff did not have a license as a real estate broker.

The trial court gave judgment in favor of plaintiff in the sum of $2,340, predicated upon the services which he had rendered to defendant in connection with the sale of the property.

Question: Was plaintiff barred from recovery for his services for the reason that he did not have a real estate broker's license in the State of California?

[1] *Yes.* Section 10136 of the Business and Professions Code reads: "No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

Since plaintiff is seeking to recover for services rendered as a real estate broker, he was required to have a real estate broker's license in the State of California, which it is conceded he did not have. Therefore there was a total failure of proof on an essential element in his cause of action which barred him from recovering.

[2, 3] There is no merit in the contention that plaintiff was not a broker but merely a middle man and adviser to defendant, for it is conceded that he participated in the preparation of an option which was given to Mr. Carder. The law is established that if a broker takes any part in the negotiations, no matter how slight, he is not a middle man but is a broker. (Rhode v Bartholomew, 94 Cal.App.2d 272, 280 [7], 210 P.2d 768.)

Likewise without merit is plaintiff's claim that he was entitled to a commission for the sale of the personal property even though he might not be entitled to a commission for the sale of the realty.

[4] In the present case the sale of the realty and the personal property located thereon constituted one complete and entire transaction, it being evident that the mill and machinery located on the leased property were of value to the purchaser only if he obtained the lease upon the property too. Therefore the transaction was not a severable one as in Marks v. McCarty, 33 Cal.2d 814, 824, 205 P.2d 1025, in which case the real estate and the personal property were each given a separate sales price in the escrow.

The instant case is similar on its facts to those in Democa v. Barasch, 212 Cal. 293, 297, 298 P. 17, wherein it was held that the sale of the realty and personalty could not be segregated, and that it was a real estate transaction.

The judgment is reversed.

MOORE, P. J., and FOX, J., concur.

110 Cal.App.2d 453

In re PEOPLE on Behalf of J. M. O. et al.

Civ. 14881, 15048.

District Court of Appeal, First District,
Division 2, California.
April 22, 1952.

Custody proceedings by the People on behalf of two minor children. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., awarded the custody of the children to the mother and the father appealed. The District Court of Appeal, Dooling, J., held that where the evidence supported the findings of the trial court that the mother created the conditions which made it necessary to declare the children wards of the Court, the order awarding custody of the children to the mother was an abuse of discretion.

Reversed.

1. Parent and Child 🔑2(4)

In custody proceedings, where evidence supported findings of Juvenile Court that mother created conditions which made it necessary to declare children wards of Juvenile Court, order awarding custody of children to mother was an abuse of discretion. Welfare and Institutions Code, § 735.

2. Parent and Child ⚷2(4)
Witnesses ⚷275(2)

In custody proceedings, where evidence established that mother had subjected daughter to pelvic examinations due to mother's belief that father had engaged in unwholesome practices with daughter, and mother stated that she would not indulge in any similar practices in the future, refusal of trial court to allow any cross-examination of mother concerning her then present attitudes and beliefs about the father's conduct towards the daughter, was prejudicial error.

3. Parent and Child ⚷2(4)

The question in custody proceedings is the present fitness of the parents at the time of the hearing.

◆

Sullivan, Roche, Johnson & Farraher, San Francisco, for appellant.

John A. Grennan, for respondent.

DOOLING, Justice.

By an order made in the Juvenile Court on November 14, 1950, after proceedings regularly had therein, the two children, one of each sex, of appellant father and respondent mother were declared wards of the Juvenile Court and the custody of said children was awarded to the mother with the right in the father to have said children on alternate week-ends and during a part of the summer vacation. An appeal was taken from that part of the order only which awarded custody to the mother and the order declaring the children wards of the court has become final. Pending this appeal by order of the Juvenile Court a paternal aunt has had custody of the little girl and the mother has had custody of the little boy. Welfare & Institutions Code, sec. 580.

In making the order appealed from the Juvenile Court adopted the findings of the referee. The referee's findings so adopted recite:

> "That said parents are involved in prolonged, embittered litigation over custody of said persons as a result of which said persons live in constant turmoil and are continually subjected to scenes of unwholesome emotional outbursts and actual physical violence involving said parents, the maternal grandparents and aides of said mother; that said mother is an emotionally disturbed person who has regularly subjected ——— (the little girl) to pelvic examinations which have created an undesirable, (un)wholesome concern in said ——— threatening her normal adjustment and development * * *."

The record is replete with evidence supporting these findings and bare of evidence to the contrary and makes perfectly clear that the scenes of emotional outbursts and physical violence therein referred to were all instigated by the mother, her parents and their friends. The repeated pelvic examinations so found were due to the mother's belief (unfounded in any fact according to the findings of several superior judges, including the judge of the Juvenile Court, who have successively heard various phases of the litigation between the parents) that the father had engaged in unwholesome practices with his daughter. We do not, for obvious reasons, enlarge upon this unfounded obsession of the mother.

Section 735, Welfare & Institutions Code, requires the court to make a finding of the facts in declaring a child a ward of the Juvenile Court. It further provides: "The court shall thereupon make such order or orders, *in accordance with such findings,* as may be necessary for the care of such ward of the juvenile court." (Emphasis ours.)

[1] No extended elaboration is necessary to demonstrate that the quoted findings furnish no support for the custody order actually made. It is obviously not "in accordance with such findings," to requote sec. 735, Welf. & Inst. Code. The very person who has created the conditions which are found by the court to make it necessary to declare the children wards of the Juvenile Court is by the same order awarded their custody. The abuse of discretion is readily apparent both from the evidence and the findings.

The trial court apparently acted upon the mother's affirmative answers (though he made no finding on this subject) to his own leading questions that if given the custody of the children she would put out of her mind her settled belief that the father had abused the person of his daughter "and at least conduct yourself with a feeling that: 'Well, maybe I have been wrong, and I certainly shall not indulge in any of those practices in the future'."

[2] Counsel for appellant sought to cross-examine the mother as to her then present attitude and beliefs about the father's conduct toward his daughter. The trial court refused to allow any cross-examination on this subject. Counsel for appellant then made an offer of proof that by his cross-examination of the mother he wished to show: "that her present belief and conviction at the present time as of this day is that the charges she has made against her husband * * * in the past as to * * * mistreatment of these two children, as to acts of perversion and degeneracy * * * that she is at the present time of the firm belief and conviction that those charges are true."

In view of all the sordid charges groundlessly made by the mother of the children against their father and the unfortunate reaction of her belief in their truth upon the children counsel for appellant should have been allowed the reasonable opportunity by cross-examination to test the probability of her being able to keep her promise to the court that she would act in the future as if she no longer believed them true. In our opinion it was prejudicial error not to allow this.

[3] Almost one and one-half years have elapsed since the order of November 14, 1950 was made. The question in custody proceedings is the *present* fitness of the parents at the time of the hearing. Prouty v. Prouty, 16 Cal.2d 190, 194, 105 P.2d 295. Upon the lodging of the remittitur in the trial court a new hearing should be held allowing the fullest latitude to both parents to develop all relevant facts as to the present fitness of each parent to have the children's custody.

There is also an appeal from a subsequent order denying a change of custody pending the appeal. In view of our conclusion that the custody order of November 14, 1950 should be reversed and a new hearing on the subject held the appeal from this subsequent order will be dismissed.

The order of November 14, 1950 insofar as it awards the custody of the children is reversed. The appeal from the subsequent order is dismissed.

NOURSE, P. J., and GOODELL, J., concur.

PROVIDENCE BAPTIST CHURCH OF SAN FRANCISCO et al. v. SUPERIOR COURT, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.*

No. 15179.

District Court of Appeal, First District,
Division 1, California.

April 25, 1952.

As Corrected May 5, 1952.

Hearing Granted June 19, 1952.

Proceeding to prohibit the Superior Court, in and for the City and County of San Francisco, from proceeding through a referee to hold election relating to discharge of pastor of church. The District Court of Appeal, Fred B. Wood, J., held that the Superior Court did not have jurisdiction to order a referee appointed by the court to conduct and to hold an election at which there would be submitted to all members of the church the question as to whether services of the pastor thereof would be dispensed with.

Peremptory writ of prohibition issued.

1. Religious Societies 🔑27(3)

The Superior Court had no jurisdiction to order and, through a referee appointed by that court, to conduct and hold an election at which there should be submitted to all members in good standing of a church, the question as to whether serv-

* Subsequent opinion 251 P.2d 10.

ices of its pastor should be dispensed with, since the calling and holding of such an election was a purely ecclesiastical function, and not a function of the civil courts.

2. Religious Societies ⚷27(3)

A secular court has no jurisdiction to make and enforce a judgment directing the manner in which the officers, boards, and congregation of a church shall proceed in the matter of hearing and disposing of charges against the pastor.

3. Religious Societies ⚷27(3)

Judicial aid or interference is denied in a controversy over a pastorate when no civil or property rights are involved, but when civil or property rights are involved there is a justiciable controversy.

4. Religious Societies ⚷27(3)

The statute which provides that the court may determine the person entitled to office of director of a corporation or may order new election to be held or appointment to be made, and direct such other relief as may be just and proper is not applicable to proceedings for selecting or discharging a pastor or retention of a strictly ecclesiastical officer of a church. Corporation Code, §§ 2236, 2238, 9002.

5. Religious Societies ⚷4

A church does not lose its ecclesiastical function and the attributes of that function when it incorporates, and does not lose its right to be governed by its own particular form of ecclesiastical government, since incorporation operates merely to create a legal entity to hold and administer the properties of the church.

◆

Edward D. Mabson, San Francisco, for petitioner.

Joseph E. Isaacs, Alan H. Critcher, San Francisco, for respondent.

FRED B. WOOD, Justice.

[1] The petitioner applied for a writ of prohibition restraining the respondent court from taking any further proceedings in a certain action pending therein against petitioner F. B. Banks as defendant. Findings of fact, conclusions of law, and an interlocutory decree had been entered determining the membership of the board of trustees of the petitioning corporation and declaring that the trustees are entitled to the possession of the property and money of the corporation, that Banks claims no interest in the real property, that some moneys of the church had been deposited in a bank but neither the defendant nor any other officer had given an account to the members of the church, that a referee be appointed to take an account between the church and the defendant, that certain resolutions of the trustees and of the congregation purportedly removing Banks as pastor were ineffective, that Banks still was the pastor, and that a fair election could not be conducted by Banks or the other officers of the church; and appointing a referee to conduct an election of the members to determine whether or not Banks shall be retained as pastor. An alternative writ was issued limited to the question of the jurisdiction of the respondent court to conduct such an election. Therefore, the sole question is whether or not the respondent superior court has jurisdiction to order and, through a referee appointed by that court, to conduct and hold an election at which there shall be submitted to all members in good standing of the Providence Baptist Church of San Francisco, the question "shall the services of F. B. Banks, pastor of Providence Baptist Church of San Francisco, be dispensed with."

This question must be answered in the negative. The calling and holding of such an election is a purely ecclesiastical function, not a function of the civil courts.

> "The only basis for the court's interference in an ecclesiastical controversy is that some property or civil right is involved. Civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline (White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 136; Ferraria v. Vasconcellos, 31 Ill. 25), or properly interfere with that part of church management which concerns the spiritual welfare and discipline of the

members, but only when rights of property are involved (Prickett v. Wells, 117 Mo. 502, 24 S.W. 52; State [Livingston, Prosecutor] v. Trinity Church, 45 N.J.L. 230). The jurisdiction of a civil court to adjudge any ecclesiastical matter must result as a mere incident to the determination of some property right. Nance v. Busby, 91 Tenn. 303, 18 S.W. 874, 15 L.R.A. 801. In this state the same rule pertains. In Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 P. 841, the court holds that the division and apportionment of the property of the church is a matter for the civil courts, and that an ecclesiastical decree upon that subject is not binding upon legal tribunals, but that the decree of the presbytery, dissolving the original church into two new and independent organizations, is conclusive on all parties, and must be so treated by the civil courts in determining the property rights of the parties." Church of Christ of Long Beach v. Harper, 83 Cal.App. 41, 46–47, 256 P. 476, 478.

[2, 3] It follows that a secular court has no jurisdiction to make and enforce a judgment directing the manner in which the officers, boards, and congregation of a church shall proceed in the matter of hearing and disposing of charges against the pastor. Maxwell v. Brougher, 99 Cal. App.2d 824, 826–827, 222 P.2d 910. Of course, a person's status as pastor, or not, is appropriate for judicial inquiry, when the trustees of a church claim he has lost one of the minimum qualifications for the position of pastor, has organized a new and different church, and is conducting services for the new church in the edifice dedicated and belonging to the old church, for property rights over which the secular courts have jurisdiction are then involved. Dyer v. Superior Court, 94 Cal.App. 260, 271 P. 113. The Maxwell and Dyer cases are in line with the authorities elsewhere. Judicial aid or interference is denied in a controversy over a pastorate when no civil or property rights (such as the right to a salary or to the use of a parsonage) are involved. State v. Bibb Street Church, 84 Ala. 23, 4 So. 40; Union Church of Africans v. Sanders, 1 Houst., Del., 100, 63 Am.Dec. 187; Rector, etc. of St. James Church v. Huntington, 82 Hun 125, 31 N.Y.S. 91; Travers v. Abbey, 104 Tenn. 665, 58 S.W. 247, 51 L.R.A. 260. When civil or property rights are involved, it becomes a justiciable controversy. Runkel v. Winemiller, 1799, 4 Har. & McH., Md., 429, 1 Am.Dec. 411, which involved the use of a parsonage, an annual salary of eighty pounds, and eighteen cords of wood a year.

No decision has been brought to our attention, nor have we found any, which sanctions the holding of a church election by a secular court to select or discharge a pastor, whether civil or property rights be involved or not. Respondents cite Kniskern v. The Lutheran Churches of St. John and St. Peter (N.Y.), 1 Sandf.Ch. 439, and People ex rel. Fleming v. Hart, 36 N.Y.St.Rep. 874, 13 N.Y.S. 903. But the elections there involved were for the selection of vestrymen, not the choosing of a pastor. In the Kniskern case, the court was confronted with the problem of ascertaining and declaring the purposes for which certain property and funds had been given in trust (the propagation of certain doctrines) and to prevent the diversion thereof to uses destructive to those purposes. The vestrymen were the trustees and as such were deemed subject to the jurisdiction of the court. The Hart case was a quo warranto proceeding in which the election of certain vestrymen was declared illegal and the court appointed a referee to supervise an election to fill the vacancies. The reviewing court stated that under ordinary circumstances such would not be done but deemed the facts of the case peculiar, as justifying the action taken. Whether the Kniskern and the Hart cases would be regarded in New York as furnishing sound precedents today, need not be ascertained for the purpose of a decision in the case now before us. Neither of these two New York cases is persuasive of the view that in our state a civil court has jurisdiction to conduct a church election to decide whether or not a pastor shall be discharged solely an ecclesiastical function.

Respondents place some reliance upon Zion Methodist Episcopal Church v. Hillery, 51 Cal. 155. That case involved a controversy as to who were the trustees of the church corporation. As trustees they were charged with the management of the church properties, hence not strictly or solely ecclesiastical officers of the church. Also, we derive from the decision no suggestion that a secular court could or should undertake the supervision of an election for the selection or discharge of such trustees, certainly no sanction for a secular court to conduct an election for the discharge or retention of a pastor.

[4, 5] Respondents also invoke section 2238 of the Corporations Code, claiming it is made applicable to a religious corporation by the provisions of section 9002 of that code. Section 2238, concerning members of the board of directors of a corporation, declares that "the court may determine the person entitled to the office of director or may order a new election to be held or appointment to be made, and direct such other relief as may be just and proper." That, at most, bears upon the selection of a member of the board of directors or trustees of a church corporation in an action brought by shareholders or members, pursuant to section 2236 of the code, to determine the validity of the selection of a corporation director. Section 2238 has nothing to do with the selection, discharge, or retention of a strictly ecclesiastical officer of a church, such as its pastor. We must bear in mind that a church does not lose its ecclesiastical function, and the attributes of that function, when it incorporates. It does not, by incorporating, lose its right to be governed by its own particular form of ecclesiastical government. Incorporation operates merely to create a legal entity to hold and administer the properties of the church. Wheelock v. First Presbyterian Church, 119 Cal. 477, 485–486, 51 P. 841.

Respondents also argue that the trustees of the church corporation have not authorized the appearance of the corporation as a petitioner in this proceeding. That question is not presented for determination herein. Neither the return to the alternative writ of prohibition nor the general demurrer to the petition for the writ presents that question. Besides, there can be no doubt of the right of the other petitioner, pastor F. B. Banks (the defendant in the action pending in the respondent court) to appear herein and invoke the processes of this court.

A peremptory writ should issue prohibiting the respondent court from proceeding to hold the election provided for in the interlocutory decree heretofore rendered by that court in the action now pending therein, an action entitled Providence Baptist Church of San Francisco, a non-profit corporation, et al., plaintiffs, v. F. B. Banks, defendant, and numbered 401059 upon the files of respondent court.

It is ordered that a peremptory writ of prohibition issue restraining the respondent court from proceeding to hold the election described.

PETERS, P. J., and BRAY, J., concur.

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110 Cal.App.2d 534

CASH v. CASH.

Civ. 14952.

District Court of Appeal, First District, Division 1, California.

April 28, 1952.

Action by a wife for divorce. From a judgment of the Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., granting plaintiff an interlocutory divorce decree dividing the parties' community property, determining the respective parties' separate property, and providing for payments to the wife for a limited period, she appealed. The District Court of Appeal, Peters, P. J., held that the trial court made a just division of the community property, but that the evidence did not support the court's finding that the spouses' joint bank account was the husband's separate property.

Judgment modified and affirmed as modified with directions.

1. Divorce 🔑252

The Superior Court made just division of spouses' community property by awarding wife granted divorce on ground of husband's cruelty property valued at $7,650 and husband property worth $5,850, with additional award to wife of $1,950 in periodic payments, so as to preclude disturbance of award by appellate court, the evidence of husband's cruelty being weak. Civ.Code, §§ 146, 148.

2. Divorce 🔑286

Appellate courts seldom exercise their statutory power to revise trial court's award of over 50 per cent of divorce spouses' community property to wife granted divorce on ground of cruelty, the amount of award in excess of 50 per cent resting largely in trial court's discretion. Civ. Code, §§ 146, 148.

3. Husband and Wife 🔑49½(4)

A husband's deposit of money known by him to be his separate property in joint tenancy bank account with his wife constituted gift to her.

4. Husband and Wife 🔑14(3)

While parol evidence is admissible to show spouses' agreement that what appears to be joint tenancy property is separate property of either spouse or community property of both at least while both are still alive, and contest is between them, there must be some relevant evidence of agreement between them for such rule to apply.

5. Husband and Wife 🔑14(3)

Opening of joint tenancy bank account by husband and wife creates rebuttable presumption that money therein is joint tenancy property, and such presumption must prevail in absence of rebutting testimony by either of them.

6. Husband and Wife 🔑14(3)

In wife's divorce action, evidence was insufficient to support Superior Court's finding that parties' joint tenancy bank account was husband's separate property, though husband testified that originally most moneys going into account were his separate property, such testimony being insufficient to prove spouses' agreement that account was to remain his separate property and to rebut presumption that it was intended to be joint tenancy account.

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L. L. James, Carl E. Day, San Francisco, for appellant.

Mancuso, Herron & Winn, San Francisco, for respondent.

PETERS, Presiding Justice.

Daisy E. Cash, plaintiff and appellant, brought this action for a divorce against Norman V. Cash, defendant and respondent. The trial court granted an interlocutory decree of divorce to Daisy on the ground of cruelty, divided between the parties what it found to be the community property, determined certain property to be the separate property of the respective parties, and provided for payments to the wife for a limited period. Daisy appeals, contending that the evidence does not support the finding that a certain bank account was the separate property of Norman, and that the division of community property was unfair.

These parties were married in Colorado in 1926, came to San Francisco in 1941, and separated in 1950. There are no children of the marriage. The evidence as to cruelty on the part of the husband is weak, but is sufficient to support the finding. The husband has not appealed. The main controversy between the parties at the trial, and on this appeal, is over the division of the property.

The trial court found the following to be community property, and awarded it as follows:

1. The residence of the parties valued at $11,000 was awarded to the wife subject to a $5,000 lien payable in two years in favor of the husband. The husband was required to pay the taxes and insurance during this two-year period, and the wife was required to assume the other expenses of upkeep and maintenance.

2. The furniture in the house belonging to the parties, and valued at $1,200 was

awarded to the wife. Certain tools and personal effects of the husband were found to be his separate property, and certain other designated property to be the separate property of the wife.

3. A commercial bank account totalling $900 was divided equally between the parties.

4. An automobile valued at $400 was awarded to the husband.

5. A $2,000 insurance policy on the life of the husband was awarded to him, and a $1,000 insurance policy on the life of the wife was awarded to her.

The court also awarded to the wife counsel fees, and $125 per month for six months, and $100 a month for the next twelve months "for her rehabilitation in consideration of the disposition of all the community property."

The court specifically found that a designated joint savings account in the amount of approximately $4,600 was the separate property of the husband.

[1] So far as the property found to be community is concerned, there is no dispute over the nature of that property. Appellant, however, does claim that the trial court did not make a just division of that property. There is no merit to this contention. So far as the property for which specific values were fixed is concerned, the wife was awarded property valued at $7,650, while the husband was awarded $5,850—a division roughly of 5/9 to the wife, and 4/9 to the husband. The cash values of the life policies do not appear. In addition, the wife was awarded $1,950 in periodic payments "in consideration of the disposition of all the community property." Thus, substantially over fifty per cent of the community property was awarded to the wife. While the divorce was granted because of the cruelty of the husband, the evidence relating thereto was weak. At the conclusion of the trial, the court stated that the evidence produced on the issue was "not very strong, not very forceful" and that "there is no evidence of any grievous misconduct on the part of the defendant."

[2] Under such circumstances, the division of the property made by the trial court will not be disturbed. While it is true that, under section 146 of the Civil Code, where the divorce is granted on the grounds of cruelty, the trial court must award more than fifty per cent of the community property to the innocent party, and that under section 148 of that code the division of property is subject to revision by the appellate court without the necessity of finding an abuse of discretion, it is equally true that the appellate courts seldom exercise this power. In Gonsalves v. Gonsalves, 92 Cal.App.2d 334, at page 341, 206 P.2d 1127, at page 1132, this court summarized the rule as follows:

> "There was no abuse of discretion by the lower court in awarding plaintiff 60 per cent and defendant 40 per cent of the community property. Moreover, we do not feel that the circumstances of the case justify us in exercising the power given under section 148 of the Civil Code to revise in any particular the award made by the trial court.
>
> "While section 146 of the Civil Code requires that in cases of divorce on the ground of extreme cruelty, the court must award the innocent party more than one-half of the community property [citing two cases], and section 148 grants to an appellate court the power to revise the award for 'any apparent degree of error, though not amounting to an abuse of discretion' [citing a case], it is clearly settled that the question of the amount of the award to be made in excess of the 50 per cent rests largely in the discretion of the trial court." See, also, Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714; Crouch v. Crouch, 63 Cal.App.2d 747, 147 P.2d 678; Price v. Price, 71 Cal.App.2d 734, 163 P.2d 501; Tompkins v. Tompkins, 83 Cal.App.2d 71, 187 P.2d 840.

There is a much more serious question presented as to the sufficiency of the evidence to sustain the finding that the joint bank account was in fact the separate property of the husband. The account in question is in the West Portal branch of the American Trust Company. This account was opened on April 29, 1942. The bank book reads "Norman V. Cash and/or Mrs.

Daisy Cash As Joint Tenants—Payable To Either Or To The Survivor." The balance in the account as on February 4, 1950, was $4,563.41.

There is no doubt that a substantial number of the deposits in this account came from what was originally the separate property of the husband. Appellant recognizes that at least $1,000 of the total sum came from money inherited by respondent from his relatives. She claims, however, that the balance came from his earnings. Respondent claims that a much larger portion was inherited by him, but he admits that certain substantial deposits came from his earnings in this state after marriage. Some of the deposits are unexplained. In 1947 the parties withdrew some $3,400 from this account to make the last payment on their home, which was admittedly community property. Appellant testified that when she came from Colorado to San Francisco in 1941, and before the account was opened, she had a conversation with her husband to the effect "that what he had was mine and that what I had was his and whatever we had was together, it was to be ours for our old age and our security." Respondent denied this conversation. He also testified as to what happened when the joint savings account was opened. He stated that the major portion of the original $1,978 deposit came from the proceeds of the sale of certain Colorado property which had been paid for partially by money borrowed by him from his father, and partially by money taken from his earnings after marriage; that he told his wife to deposit it in a joint account; that she went to the bank with his approval and so deposited the money; that he signed the bank card at home and knew that they were opening a joint account and that either party could draw out the money; that he intended if anything happened to him that she should get the money, and vice versa; that he never stated to his wife that the money received from the sale of the Colorado property was his separate property or was going to remain his separate property; that when he received money from his father "I considered that money my money"; that he told his wife to go out to the bank and open up a joint savings account, and that he knew what he was doing when he signed the card.

[3–5] This is all of the evidence on this issue. It falls far short of proving an agreement by words or conduct that the money was to remain the separate property of the husband. He knowingly deposited his separate property in the joint tenancy account. The form of the account created a joint tenancy. That constituted a gift to his wife. While it is true that, as between husband and wife, at least while both are still alive, and the contest is between them, parol evidence is admissible to show an agreement that they intended that what appears to be joint tenancy property was to be the separate property of either or the community property of both, for this rule to apply there must be some relevant evidence of an agreement between the parties. The opening of a joint tenancy bank account by husband and wife creates a rebuttable presumption that the money therein is joint tenancy property. Either may rebut this presumption, but in the absence of rebutting testimony the presumption must prevail. These principles are well settled. Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708; Wallace v. Riley, 23 Cal.App.2d 654, 74 P.2d 807; Copprell v. Copprell, 87 Cal.App.2d 4, 195 P.2d 868.

[6] In the instant case there is no evidence at all that the parties intended that the joint account should be other than what it purports to be. It is true that respondent testified that originally most of the moneys going into the account were his separate property, but that falls far short of proving an agreement that it was to remain his separate property. Evidence as to the source of the funds standing alone, cannot rebut the presumption that the account was intended to be what it states it is—a joint tenancy account. In the instant case, neither the actions nor the words of the parties rebuts the presumption. That being so, the presumption must prevail. The finding contrary to it is unsupported.

There is no need for a retrial. The trial court is ordered to amend its findings, conclusions and judgment to provide that the joint savings account is held in joint tenancy by the parties and is divided equally between them. As so modified, the judgment is affirmed, appellant to recover her costs on this appeal.

BRAY and FRED B. WOOD, JJ., concur.

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110 Cal.App.2d 631

COPELAND v. RABING et al.

Civ. 7994.

District Court of Appeal, Third District, California.
April 29, 1952.

As Modified May 6, 1952.

Proceeding by Esther Copeland, formerly known as Esther Rabing, against C. H. Rabing, and his wife, to determine plaintiff's interest in farm land to be that of owner and defendants' to be that of security holders, to set aside plaintiff's deed of such land to defendants, and for an accounting of farm operations on such lands. The Superior Court, Sutter County, Solano, J., entered judgment nonsuiting plaintiff except for accounting demanded, and found that defendants owed plaintiff $2,939.52 at time challenged deed was delivered. Plaintiff appealed from that part of judgment of nonsuit that denied her claim to title based upon existence of confidential relationship between herself and named defendant and upon alleged fraudulent conduct of named defendant in misrepresenting value of and income from farm land involved. The District Court of Appeal, Van Dyke, J., held that evidence upon issue of existence of fraud and confidential relationship was for jury.

Reversed.

See also, 104 Cal.App.2d 98, 230 P.2d 649.

1. Trial 🔑159

A nonsuit may not be granted if, disregarding all unfavorable evidence and inferences, and viewing evidence most favorably to plaintiff, there is any substantial evidence, including inferences therefrom, which would support a finding for plaintiff.

2. Trial 🔑165

On defendant's motion for nonsuit, where evidence is fairly susceptible of two constructions or more than one inference may be reasonably made from evidence, view most favorable to plaintiff must be taken and contradictory evidence must be disregarded.

3. Trial 🔑165

Rule that fraud is never presumed has no pertinency on appeal where propriety of granting motion for nonsuit is question which is involved, but would apply upon submission of case to jury.

4. Deeds 🔑78

In proceeding to determine plaintiff's interest in farm land to be that of owner and defendants' to be that of security holders, to set aside plaintiff's deed of such land to defendants on ground of fraud of one defendant, and for accounting of farm operations, evidence upon issues of existence of fraud, confidential relationship between plaintiff and alleged fraudulent defendant were for jury. Civ.Code, § 2235.

5. Deeds 🔑196(2)

In proceeding to set aside plaintiff's deed of land to defendants on ground of fraud of one defendant, presumption of fraud on part of such defendant would arise upon showing that, when plaintiff conveyed her interest to defendants, she stood in confidential relations with alleged fraudulent defendant. Civ.Code, § 2235.

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R. H. Schwab, Carl Kuchman, Sacramento, for appellant.

W. W. Jacka (of Jacka & Frasse), San Jose, for respondent.

VAN DYKE, Justice.

Under date of April 1, 1946, there was conveyed to C. H. Rabing, Ella M. Rabing, his wife, Charles Alexander Rabing, a son of the first two named, and Esther Rabing, the son's wife, in joint tenancy, certain real property in Sutter County. At the same time the grantees executed to their common grantor a promissory note for $51,000, being the balance of the purchase money for the land after the payment to the grantor of

$9,000. This note bound the makers to pay the principal sum in installments consisting of one-third of the gross returns of sale of all crops produced upon the property, with a provision that the minimum annual payment be not less than $5,000 plus interest on the unpaid balance. The performance of these obligations was secured by a crop mortgage upon all the crops to be grown during the existence of the indebtedness, and by a deed of trust upon the real property. The son, Charles Alexander Rabing, and his wife, plaintiff herein, moved upon the property and the joint owners began the operation of the ranch. On May 26th following Charles Alexander Rabing died and the record title by operation of law vested in his surviving joint tenants. On October 30, 1947 plaintiff herein, who in the meantime had married one Copeland, for a consideration of $1,000 conveyed her interest in the property to her cotenants, C. H. Rabing and Ella M. Rabing. More than two years thereafter and on December 23, 1949 she brought this action against her grantees, seeking, first, to have it decreed that by the deed of April 1, 1946, conveying the property to the four joint tenants, the defendants C. H. and Ella M. Rabing took only a security interest for money advanced and obligations undertaken in the purchase of the property; second, that it be further decreed that her deed of October 30, 1947, purporting to convey her interest in the property to the defendants was null and void and that the same be canceled and set aside as having been obtained by fraud; third, that she, plaintiff, be decreed to be the owner of the property free of any claim of the defendants excepting the mortgagee's interest for any funds advanced in the purchase of the property and unrepaid, or any payments advanced in the matter of the note installments and unrepaid; and, finally, that C. H. Rabing be required to account to plaintiff for all farming operations during the period between the taking of the first deed and the beginning of the action herein. The complaint contained three counts, the third being the action for accounting. By the first count plaintiff alleged that when the property was purchased, her then husband and she paid down the sum of $9,000 and executed the note and security instruments for the balance of the $60,000 purchase price; that the defendants had advanced to her and her husband $8,250 of the down payment and had executed the note and the security instruments as co-obligors with an accompanying oral agreement that, to secure repayment to the defendants for the advance and for any payments which they might thereafter have to make, the property should be conveyed to the four in joint tenancy; that the deed was taken and the accompanying note and security instruments were executed in accordance with that understanding; that on October 30, 1947, after the death of the son, the defendants repudiated the plaintiff's claim as owner and their status as mortgagees; that since July 15, 1947, defendants had occupied the property, asserting complete title thereto; that the first advance of $8,250 made by the defendants had been repaid by October 1, 1946 and that the accruing installments of principal and the accruing interest upon the promissory note had been discharged from moneys received through farming the property without any further contributions made or required of defendants, and that defendants had no interest other than that of their original status of security holders. By the second count it was additionally alleged that, after the death of his son, defendant C. H. Rabing entered into an oral agreement of trust with plaintiff whereby he agreed to serve her as trustee in the farming of the land and the application of the gross returns in the discharge of advances, plaintiff to receive the net proceeds thereafter; that he entered upon his duties as such trustee and farmed the property for plaintiff; that he was a man of wide and varied business experience possessing knowledge and expert skill with relation to the value of real property, including that involved in the action; that plaintiff was without experience in such matters and ignorant of the worth of the property and placed great trust and confidence in Rabing, looking exclusively to him for advice and guidance; that on October 30, 1947, at the time she conveyed the property to the Rabings, he had represented to her that the property was greatly depreciated in value; that her ownership was valueless; that there were no moneys payable to her out of receipts from the property, but that on the contrary she was indebted to him because of advances he had had to make in excess of farming proceeds; that she was in debt for taxes upon the property and upon the proceeds therefrom; that he thereupon offered to give her $1,000 if she would deed her interest over to him and his wife and that, relying upon these representations and because of her trust and confidence in him and her ignorance of values and of the situation, she executed the deed conveying the property to Rabing and wife as joint tenants. She alleged these representations to have been false and knowingly made for the purpose of obtaining her property interests; that the property, instead of being depreciated, was worth $60,000; that the $8,250 advance had been repaid from farm income; that the principal obligation on the note had been reduced by $25,000 and that by November 30, 1947 Rabing had in his hands as her trustee additional sums approximating $30,000.

The cause was tried and as to the first two counts, those involving title to the property, plaintiff was nonsuited on motion of defendants at the close of her evidence in support of the allegations of those two counts. As to the third count, however, the court found that after the death of the son on May 26, 1946 the defendant C. H. Rabing received sums of money as profits from the sale of produce grown upon the property; that by the time the challenged deed passed between plaintiff and defendants, and treating plaintiff as one-third owner in joint tenancy of the property, defendant C. H. Rabing had received from the farming operations net profits in such sum that there was owing from him to plaintiff the sum of $2,939.52. Treating her conveyance as valid, the court decreed that she recover said sum from defendants. As to this third cause of action, an accounting was taken with the result above stated, and it appeared therefrom that during the period between the death of the son and the date of plaintiff's deed to defendants the Rabings had been repaid the original advance of $8,250 and there had been paid upon the balance of the purchase price, evidenced by the promissory note, about $19,000. Plaintiff has not appealed from the judgment in the accounting action nor from that part of the judgment based on the order nonsuiting her as to the first count wherein she sought a decree that defendants had originally only a security interest. She has appealed from that part of the judgment based on the order nonsuiting her as to the second count.

[1–3] A nonsuit may not be granted if, disregarding all unfavorable evidence and inferences, and viewing the evidence most favorably to the plaintiff, there is any substantial evidence, including inferences from evidence, which would support a finding for plaintiff. Seckel v. Allen, 67 Cal. App.2d 146, 150, 153 P.2d 394. If the evidence is fairly susceptible of two constructions or if one of several inferences may reasonably be made the reviewing court must take the view most favorable to the plaintiff, and contradictory evidence, if given, must be disregarded. The plaintiff is entitled to the benefit of every piece of evidence which tends to sustain her averments and such evidence must be weighed in the light most favorable to plaintiff's claim. Seckel v. Allen, supra, and cases cited. We find respondents in their brief urging the following: That there is a presumption that one is innocent of fraud which approximates in strength the presumption of innocence of crime; that it is the duty of the court or jury to draw from proved facts the inference favorable to fair dealing rather than the inference of corrupt practice; that it was incumbent on plaintiff to produce competent evidence to the court at the time of trial sufficient to overcome the presumption of innocence; that if evidence introduced could be interpreted in one of two ways, either innocently or as indicating fraud, it was the trial court's duty to find in favor of fair dealing and innocent conduct; that the plaintiff had not met this burden of proof. These rules of law find their application in the trial court when a decision is made on the merits. They have no application to a motion for nonsuit and they have no application here. "That fraud is never presumed * * *, of course, is the law. However, the rule has no pertinency when a motion for a nonsuit in an action based on a claim of fraud is the question involved. If defendants would make use of the rule they should have waited until the cause was submitted to the jury and then have argued for and against presumptions." Seckel v. Allen, supra, 67 Cal.App.2d at pages 149, 150, 153 P.2d at page 396. Applying the appropriate rules, we find the record contains the following evidence: With respect to the second count of the complaint which alleges fraud in the procuring of the deed from plaintiff to the defendants in October of 1947, it was testified that, after the death of his son, defendant C. H. Rabing told plaintiff that he felt the son would have liked to have the ranch run just as it had been while he lived; that defendants and plaintiff would go ahead as the son had been doing; that plaintiff would stay on the property and do the book work; that thereafter she stayed on the ranch and worked until she left to remarry; that her second marriage was not successful and that Rabing offered to buy her out; that after some preliminary negotiations plaintiff and Rabing met in a hotel in Marysville, where he told her that he wanted a lot of money to cover income taxes and moneys that were due, which she was unable to supply; that the ranch was losing money and that it took everything he could make and find to run the place; that he wasn't getting his money out and he wanted to sell the place in order to do that because it was taking everything he could borrow to run it; that she believed him, but had refused the first offer of $500 because she thought the ranch was certainly worth more than that; that he then said that he wasn't making any money, he was still trying to get his money out of it and every year had been putting more and more into it so he wanted to sell and get out from under; that he would give her $1,000 for her interest; that she figured he had to get his money out somehow and that whatever he sold the ranch for would probably only be what he had put into it; that the ranch was still worth $60,000; that while preliminary negotiations had been had between attorneys representing each side, yet at the hotel in Marysville Rabing told plaintiff they didn't need to have any attorneys because he knew what he was doing, that attorneys were too high and were not needed, that he would meet her the next morning at the title company and in the meantime he would try and borrow $1,000 somewhere. The next morning Rabing took her over to the title company in Yuba City where she signed the challenged deed.

[4] There is much more if the rule of favorable consideration above stated is applied to all of the testimony, but what we have stated is amply sufficient to necessitate the reversal of the judgment of nonsuit appealed from as to the second cause of action based on fraud. This of course is not to say that Rabing was guilty of any fraud. It is simply to say that whether or not he was, had, under the circumstances, to be determined by a decision upon the merits, and that is all that is involved in this appeal. For though the judgment on the accounting suit disclosed that the ranch operations had been profitable, that Rabing had been repaid his initial advance, and that the mortgage had been materially reduced, yet, according to the testimony of plaintiff, which must here be taken as true, he made representations, the materiality of which could not be questioned, contrary to the facts, as a result of which for $1,000 he obtained her interest in the property, having at that time either in his possession, or due from crops then sold, funds aggregating approximately three times that much, which belonged to her.

[5] We have said nothing concerning the presumption of fraud which would arise immediately if it were shown by the evidence that when plaintiff deeded her interest to the defendants she stood in confidential relations with Rabing. "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Civ.Code, § 2235. The evidence we have recited concerning the relationships between the plaintiff and the defendant C. H. Rabing, if it does not necessitate, certainly affords ample support for an inference that

confidential relationships did obtain between the two, and the existence of such a relationship alone was enough to necessitate trial on the merits on the question of fraud. In re Estate of Kromrey, 98 Cal.App.2d 639, 646, 220 P.2d 805.

That part of the judgment appealed from is reversed.

PEEK, J., and SCHOTTKY, J. pro tem., concur.

110 Cal.App.2d 645

PIPES et al. v. HILDERBRAND et al.

Civ. 4395.

District Court of Appeal, Fourth District, California.

April 29, 1952.

Mandamus proceeding by L. B. Pipes and others against A. L. Hilderbrand, Commissioner of Finance of the City of Fresno, and another to compel Fresno City Commissioner of Finance to execute a warrant for payment of money. The District Court of Appeal, Mussell, J., held that the Commission of the City of Fresno acted within the powers of the municipality in appropriating public funds for the construction of hangars at its air terminal and its action in entering into contracts for the construction and lease of the hangers was not ultra vires.

Writ granted.

1. Municipal Corporations 🔑718

The conduct and maintenance of an airport by the City of Fresno is a public enterprise. Government Code, §§ 50470, 50478.

2. Municipal Corporations 🔑328

The commission of the City of Fresno was acting within the powers of the municipality in entering into contract for construction of hangars on its airport property. Government Code, §§ 50470, 50478.

3. Municipal Corporations 🔑718

The action of commission of the City of Fresno in entering into a lease of hangars to be constructed on its airport property to a corporation for manufacturing, modifying, modernizing and assembling aircraft or aircraft component parts was not ultra vires. Government Code, §§ 50470, 50478.

4. Municipal Corporations 🔑718

Purposes stated in lease of hangars to be constructed on City of Fresno's airport property to wit, manufacturing, modifying, modernizing, and assembling aircraft or aircraft component parts were public purposes when they were a part of the development, maintenance and operation of the airport.

5. Municipal Corporations 🔑63(1)

Whether the performance of an act or accomplishment of a specific purpose constitute a "public purpose" for which municipal funds may be lawfully disbursed, and method by which such action is to be performed or purpose accomplished, rest in the judgment of city council, and judicial branch will not assume to substitute its judgment for that of the governing body unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Purpose".

6. Constitutional Law 🔑67

Courts have no general authority of supervision over exercise of discretion reposed in the people or other departments of government.

7. Mandamus 🔑190

In mandamus proceeding, where city commissioner of finance appeared and made a defense in proceedings in good faith and a writ was issued compelling city commissioner of finance to execute a warrant for payment of money, costs were awarded to petitioners, to be paid by the city. Code Civ.Proc. § 1095.

Rowell, Lamberson & Thomas, Milo E. Rowell, Richard Z. Lamberson and Breckinridge Thomas, Fresno, for petitioners.

Docker & Docker, Fresno, for respondent A. L. Hilderbrand.

C. M. Ozias, City Atty., Fresno, for respondent City of Fresno.

MUSSELL, Justice.

Petitioners (general contractors) seek a writ of mandate to compel respondent A. L. Hilderbrand, as Commissioner of Finance of the City of Fresno, to forthwith draw his purchase order and warrant for the first installment payment on a contract for the erection of two prefabricated all metal aircraft hangar buildings at the Fresno Air Terminal for the City of Fresno. The contract, in writing, was executed by petitioners and the City on the 27th of March, 1952, and except as herein noted, the regularity and legality of the proceedings prior to its execution are not questioned. On April 1, 1952, the City and North American Aviation, Incorporated, entered into an agreement in writing wherein the City leased a portion of its airport and the two hangars to be erected thereon by petitioners to North American Aviation, Incorporated, for a term of 40 months from the completion of the buildings, with an option to extend the lease by annual extensions for 6 additional years. The lessee agreed to pay in advance a rental of $80,000 for the first 40 months of the lease and $20,000 each year thereafter. The lessee was given the right to use the demised premises for the purposes of manufacturing, modifying, modernizing and assembling aircraft or aircraft component parts and for any other lawful purposes consistent with lessee's business operations, including the construction of a paved ramp area of approximately 7,000 square feet. It was further agreed that the lessee, in its use of the premises should conform to and abide by the rules and regulations of the Civil Aeronautics Administration and of the Fresno Air Terminal. The lessee also agreed to restore the premises at the end of the lease to their condition at the time of the commencement of the lease, with certain named exceptions. The contract with petitioner, and the lease to North American Aviation, Incorporated, were approved by the City on March 27, 1952, and the Commissioner of Public Works was authorized to execute the lease for and in behalf of the City. Petitioner delivered structural steel at the Air Terminal on April 1, 1952, in accordance with the terms of the contract, and demanded payment of the first installment as therein promised. The City Commissioners authorized the respondent Commissioner of Finance to draw a warrant for the payment of the installment due. He, however, questioned the authority of the City to construct and lease the buildings, and refused to issue a purchase order and his warrant on the City Treasury for payment of the installment. These proceedings were then commenced.

[1-4] As stated in respondents' points and authorities, the questions on which this proceeding must be determined are whether the Commission of the City of Fresno acted within the powers of the municipality in appropriating public funds for the construction of the buildings in question and in entering into contracts for the construction and lease thereof or whether such actions were ultra vires. The State of California has authorized the acquisition and maintenance of airports by municipalities and the erection and maintenance of hangars, places for flying, take-off, landing and storage of aircraft thereon. Government Code, Sec. 50470. The conduct and maintenance of an airport by the City of Fresno is a public enterprise. Krenwinkle v. City of Los Angeles, 4 Cal.2d 611, 614, 51 P.2d 1098. Specific authority for the leasing of its property, for airport purposes or purposes incidental to aircraft, including manufacture of aircraft, airplane engines, aircraft equipment, parts and accessories and the construction and maintenance of hangars is contained in the provisions of section 50478 of the Government Code. The Fresno City Charter, Article 1, section 1, provides, among other things, that the city may acquire and lease real and personal property and provide, construct, regulate, and maintain all things in the nature of public works and improvements. Since

the acquisition and maintenance of airports and hangars by municipalities is a public enterprise it seems clear to us that the City of Fresno was acting within its powers in entering into the contract for construction of hangars on its airport property. It is equally clear that the city may lawfully lease such hangars to a private person or corporation for the purposes stated in the lease, to wit, manufacturing, modifying, modernizing, and assembling aircraft or aircraft component parts. Such purposes are "public purposes" when, as here shown, they are a part of the development, maintenance and operation of the airport. It appears from the record before us that North American Aviation, Incorporated, now has a plant at the Fresno Air Terminal which it leases from the City and in which approximately 400 persons are employed; that by the erection and lease of the two hangars involved, the facilities for aircraft assembly operations and aircraft modification and manufacture at the air terminal will be materially increased; that at the termination of the lease the hangars will be returned to the City and will increase and develop the capacity of the Air Terminal for aircraft and airport purposes; that the buildings to be erected will be used in part for the manufacture of airplanes or aircraft and parts thereof for the United States Government in its national defense program and that the lessee will use the airport facilities of the terminal jointly with the general public. It should be here noted that the respondent City by its answer admits all the allegations contained in the petition for writ of mandate herein and asks that the writ issue.

Respondent Hilderbrand argues that the City may not appropriate public funds for the express purpose of erecting buildings to be leased to North American Aviation, Incorporated, and that such an appropriation is an extension of credit to or in aid of a private corporation. A similar argument was advanced, and by the court rejected, in the case of City of Oakland v. Williams, 206 Cal. 315, 274 P. 328. In that case the board of port commissioners of the City of Oakland had contracted to construct a warehouse at a cost of $400,000, and lease it to Rosenberg Bros. & Co., a private corporation extensively engaged in packing, processing and shipping dried fruits and related products in large shipments to domestic and foreign ports. The proceeding was in mandamus to compel the City Auditor to attach his certificate to the lease and contract. The main point presented was that the lease attempted to authorize the use of public funds for a private purpose in violation of Article I, Section 14 of the State Constitution. The court stated that the erection of the warehouse and the letting of it for the purposes set forth in the lease must have some relation to and connection with, or be promotive of the accomplishment of the development, improvement and upbuilding of the harbor in order to receive judicial approval, and held that the lease contract authorized an improvement and conveniences consistent with the scheme of developing and improving the city harbor; that the Rosenberg transaction constituted but a single unit in a comprehensive harbor development plan, and was not executed with the primary purpose of promoting the business success of the corporation, although such a result might be an incident of such purpose. There is no showing here that the City did not enter into the contract and lease as a part of a comprehensive plan to develop its air terminal.

[5, 6] Respondent argues that the Oakland case, supra, is not controlling authority on the instant question because the lessee therein was required by the lease to route its goods by an adjacent wharf terminal and to guarantee the amount of tonnage to be shipped through such terminal. However, the lease before us provides for the joint use of the Air Terminal facilities by the lessor and lessee, and such use will no doubt materially aid in the development of the terminal for public use. In the instant case it is apparent that the object of the City of Fresno in contracting for the construction and lease of the two hangars at its Air Terminal was not to promote the private business of North American, Incorporated, but to develop the terminal and its facilities, which is clearly a public purpose. As was said in City of Roseville

v. Tulley, 55 Cal.App.2d 601, 608, 131 P.2d 395, 400:

> "The question as to whether the performance of an act or the accomplishment of a specific purpose constitutes a 'public purpose,' and the method by which such action is to be performed or purpose accomplished, rests in the judgment of the city council, and the judicial branch will not assume to substitute its judgment for that of the governing body unless the latter's exercise of judgment or discretion *'is shown to have been unquestionably abused.'* (Citing City of Oakland v. Williams, supra.) * * * '* * * Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 569 (31 S.Ct. 259, 55 L.Ed. 328 [339]); German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 34 S.Ct. 612, (58 L.Ed. 1011, L.R.A.1915C, 1189).'"

[7] No abuse of discretion is shown by the record herein. It appearing to this court that the construction contract with petitioners and the lease agreement with North American, Incorporated, are valid subsisting agreements between the parties thereto, and no sufficient legal cause having been shown why respondent A. L. Hilderbrand, as Commissioner of Finance of the City of Fresno, should not issue a warrant in payment of the first installment on said contract, it is therefore ordered that a writ of mandate issue as prayed for in the petition herein. Petition for allowance of attorneys' fees in this proceeding denied. The record shows that respondent Hilderbrand appeared and made defense in the proceedings in good faith. Petitioners are awarded costs, to be paid by the respondent City. Sec. 1095, Code Civ.Proc.; Union Trust Co. v. Superior Court; 13 Cal.2d 541, 543, 90 P.2d 582.

BARNARD, P. J., and GRIFFIN, J., concur.

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110 Cal.App.2d 492

PEOPLE v. NORRED.

Cr. 2758.

District Court of Appeal, First District,
Division 2, California.
April 23, 1952.

Rehearing Denied May 8, 1952.

Hearing Denied May 22, 1952.

Defendant was convicted of commission of lewd and lascivious acts upon an 8½ year old child and a 5 year old child. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment of conviction on both counts and entered order denying a new trial. The defendant appealed. The District Court of Appeal, Goodell, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Witnesses ⟹40(2)

Where complaining witnesses, 8½ and 5 years old, were asked by trial judge before being sworn the usual questions regarding their church and school attendance, their knowledge of God, obligation to tell truth, and the consequences of telling an untruth, permitting such witnesses to testify in prosecution for commission of lewd and lascivious acts with children was matter within the discretion of the trial judge. Pen.Code, §§ 288, 288a; Code Civ.Proc. § 1880.

2. Witnesses ⟹245, 330(1)

In prosecution for commission of lewd and lascivious acts upon children 8½ and 5 years old, where defendant was attempting to impeach a witness concerning her identification of him at trial by showing that at preliminary examination several weeks earlier she had not been definite in her identification of him, objections to repetitious questions which had been answered before and to questions which did not constitute proper impeachment were properly sustained. Pen.Code, §§ 288, 288a.

3. Criminal Law ⟹706

In prosecution for commission of lewd and lascivious acts upon children 8½ and 5 years old, record did not show misconduct on part of prosecuting attorney regarding coaching of 5 year old witness. Pen.Code, §§ 288, 288a.

4. Criminal Law ⟹338(8)

In prosecution for commission of lewd and lascivious acts upon children 8½ and

5 years old, upon issue of unfriendly relationships between father of a complaining witness and defendant, questions regarding quarrels and discord within complaining witness' household were improper. Pen.Code, §§ 288, 288a.

5. Criminal Law ⚷641

In prosecution for commission of lewd and lascivious acts upon children 8½ and 5 years old, record did not sustain claim of defendant that public defender was afraid to assert defendant's right because of fear of court and assistant district attorney. Pen.Code, §§ 288, 288a.

6. Criminal Law ⚷1130(2)

Upon appeal from conviction for commission of lewd and lascivious acts upon children 8½ and 5 years old, where defendant specified adverse rulings by simply asserting that trial court erred in sustaining, or overruling, this or that objection and followed such assertion by a transcript reference, such contentions would not be discussed in detail in opinion, although examination of record would be made in each instance.

7. Criminal Law ⚷382

In prosecutioin for commission of lewd and lascivious acts upon children 8½ and 5 years old, evidence concerning complaining witness' father's hostility toward defendant before crime, time of day complaining witness was taken to District Attorney's office and witness' father telephoned second witness' mother, employment and unemployment of defendant and witness' father, relationship between complaining witness' father and third witness, and defendant's arrest on second complaint while free on bail following arrest on first complaint was not material. Pen. Code, §§ 288, 288a.

8. Witnesses ⚷351

In prosecution for commission of lewd and lascivious acts upon children 8½ and 5 years old, objections to questions designed to show that witness did not have a good reputation in and around cafe were properly sustained for want of proper foundation. Pen.Code, §§ 288, 288a.

9. Infants ⚷20

In prosecution for commission of lewd and lascivious acts upon children 8½ and 5 years old, evidence sustained conviction. Pen.Code, §§ 288, 288a, 476a.

10. Criminal Law ⚷785(6)

In prosecution for commission of lewd and lascivious acts, where complaining witnesses were 8½ and 5 years old, the trial court properly instructed the jury to regard with caution the testimony of such witnesses. Pen.Code, §§ 288, 288a.

11. Witnesses ⚷246(1)

In prosecution for commission of lewd and lascivious acts upon children 8½ and 5 years old, trial judge's examination of older complaining witness regarding intimate details of offense was not error, but was within his discretion. Pen.Code, §§ 288, 288a.

12. Criminal Law ⚷698(1)

In prosecution for commission of lewd and lascivious acts upon children 8½ and 5 years old, trial judge's examination of younger complaining witness when she hesitated in giving answers and examination of mother of such witness on collateral matter was not error in absence of objection or assignment by defendant's counsel. Pen.Code, §§ 288, 288a.

13. Criminal Law ⚷859

In prosecution for commission of lewd and lascivious acts upon children 8½ and 5 years old, where trial judge, at jury's request, read the testimony of first complaining witness, reading testimony of second complaining witness, after receiving affirmative answer from jury to his inquiry whether they wanted testimony of such witness also read, did not constitute error or misconduct on part of trial judge.

◆

Henry Norred in pro. per. Represa, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

GOODELL, Justice.

Two amended informations were filed against appellant, each accusing him of a violation of § 288 Penal Code and alleging a prior conviction under § 288a and another under § 476a Penal Code. Each information related to a different child. Appellant pleaded not guilty to each charge but admitted the prior felony convictions. The cases were consolidated and tried together before a jury. The court appointed the public defender who represented the defendant throughout the trial, but does not represent him on this appeal. The appeal is taken from the judgment of conviction on both counts and from the order denying a new trial.

The principal witness was M. K., an 8½ year old girl, who is named in one information as the victim of the lewd conduct. She described the acts and named the defendant as the man who committed them. She testified also to the acts charged in the other information, which relates to one L. G., a 5 year old girl, since both offenses were committed in the presence of both girls. L. G. also testified respecting appellant's conduct with the older girl, which she witnessed.

M. K. lived with her father and mother in an upper flat in San Francisco. The defendant had roomed and boarded with that family but had moved to the lower flat in the same building. On the afternoon of Sunday, December 24, 1950, the 5 year old girl with her father, mother and two brothers drove over from their home in Marin City to visit the K. family. While there the two girls and the brothers of the younger girl were invited downstairs to look at the television. The women members of the family in the lower flat had gone to the country for Christmas. The four children watched the television for a while and then the boys left. After they had gone appellant, according to the testimony, took the two girls into a room in the rear of the flat, where the offenses were committed.

An adult witness, B. R., testified that one day, while she was in a neighborhood tavern, appellant, whom she knew from former meetings in the same place, made some very incriminating, but outspoken, statements to her (not necessary to be repeated herein) about himself and an 8 year old girl. She testified, further, that a week or two later appellant came into the same place with a girl and said to the witness: "This is the little girl I was telling you about". After he bought the girl a coke they left, but returned shortly, at which time the girl had a lot of pencils and a sack of candy with her. The next time she saw the girl was on Sunday, February 11, 1951, in the same tavern, when the girl was with her father who said "I want you to meet my little daughter". The witness told the father that she had seen her before, in the same place "with that fellow called Hank who was supposed to be the uncle to the little girl." The witness tried to engage the girl in conversation, and finally asked her if Hank had ever hurt her, to which she replied "no, no, no". They left and in 15 or 20 minutes the father returned and told the witness "You are right, my little girl confessed everything. What you said was true * * * It wasn't only my daughter". The witness testified that then "I grabbed him by the collar, * * * I said, 'Listen, if you don't do anything about this I will see that I will do it'." That same evening the father took the case to the police, and appellant was arrested.

When the girl's father was under cross-examination he was asked where he first learned of these offenses and he related the Sunday afternoon episode just discussed, thereby corroborating B. R.'s testimony in part at least.

The defendant did not take the stand. The testimony of both girls therefore is uncontradicted and the testimony of B. R. with respect to appellant's unusual statements to her is likewise uncontradicted. For these reasons the case is in no respect a close or doubtful one.

As appellant has written his own briefs, his points are not as well presented as they might be. The reporter's transcript has been carefully examined and we have grouped as best we could the numerous points in his briefs.

[1, 2] The appellant argues that the 5 year old girl should not have been permitted to testify. Section 1880 Code Civ. Proc. provides: "The following persons

cannot be witnesses: * * * 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." Both girls before being sworn were asked by the judge the usual questions as to their church and school attendance, their knowledge of God, the obligation to tell the truth and the consequences of telling an untruth. The judge was satisfied that each was qualified, which was a matter within his discretion. People v. Morcumb, 28 Cal.App.2d 465, 467, 82 P.2d 714 and cases cited. Appellant directs his attack to the qualification of the younger of the two girls. During her cross-examination she was closely questioned with respect to her identification of the defendant. At the trial she definitely identified him. Several weeks earlier at the preliminary examination she had not been definite in her identification, and her testimony then given was read to her at some length at the trial. She then admitted that she "didn't know who he was the other time" and the prosecuting attorney twice admitted frankly that "she didn't know the last time." In view of the extent to which the court permitted the defense to go in confronting the girl with her earlier testimony and the prosecution's repeated concessions that the identification had not been made *by this witness* at the preliminary examination, there was no error in the court's rulings sustaining objections to several repetitious questions on the ground that they had been asked and answered, or in sustaining objections to certain other questions as not proper impeachment. The defense was permitted to get before the jury a full and fair picture of the girl's testimony on identification at the earlier hearing, for whatever it might have been worth. At the trial, defense counsel asked her "Do you know him now when you see him?" and she answered "yes" and indicated the defendant. Apparently the jury was satisfied with her identification then, although it had been made perfectly clear to them that she had not identified him at the preliminary hearing.

[3] Appellant attacks the conduct of the prosecuting attorney on the ground that the 5 year old girl had been coached, and argues at great length and cites numerous cases relating to the obligation of a prosecuting officer to conduct his case with fairness to the defendant. There is nothing in this record to form any solid foundation for such an attack, and there is no need to discuss the many cases cited by appellant. It must be remembered, over and above what has just been said, that the testimony of the 5 year old girl, given, as it was in much the same way that any 5 year old child would be expected to give it, was corroborated by the older girl and was not denied by the defendant. There is no misconduct or error shown by this record in connection with the 5 year old girl's testimony.

[4] The defense asked a number of questions of the father of the 8½ year old girl designed to show that he was unfriendly to the defendant. The court allowed ample lee-way in this inquiry, but did sustain objections to questions asked of the father, and ot other witnesses as well, with respect to quarrels and discord within the household. For instance, the father was asked "You say that you were on 9th and Howard. Isn't it a fact that Mr. Norred came up to you and your wife and you were having an argument there on the corner?" An objection was sustained, and, of course, properly so. One ot the occupants of the lower flat was asked: "And during the time they had lived there did you have occasion to hear arguments up stairs?" to which an objection was sustained. The same witness was then asked "Did you ever see the K * * *s fight while they were there?" to which an objection was sustained, the court remarking "We are not trying the domestic relations of the K * * * s in this proceeding." She was then asked "Did the mother-in-law of Mr. K * * * tell you that she had been struck with an iron?" to which an objection was sustained, the court remarking "Why, it wouldn't have been even admissible if Mr. K * * * were on trial, it would have been complete

hearsay * * *." It is not necessary to prolong the discussion of these objections. The court's remark that the domestic relations of the family were not on trial said everything that need be said with respect to all this line of questioning.

[5] It is pointed out by appellant that the chambers of the judge, the office of the district attorney, and that of the public defender are close together at the Juvenile Court and "that it is the belief of the appellant from the timidness of the public defender that he was afraid to assert his rights fearing later rebukes from the court and assistant district attorney." The record in this case shows no evidence whatever of any timidity of the public defender; it shows a persistent assertiveness on his part, so much so that the court in several instances admonished him rather sharply. The assistant public defender who was assigned to this case was no novice but an experienced trial lawyer and the transcript supplies no basis whatever for appellant's criticism of his trial counsel.

[6] Appellant, writing his own brief, presents a number of other points, none of which would be raised by an attorney because of a foreknowledge of their futility in any appellate court. He specifies a score or more of adverse rulings, using the simple method of asserting that the court erred in sustaining (or overruling) this or that objection, followed by a transcript reference, and leaving the rest to this court. Needless to say these numerous contentions when so presented cannot be discussed in any detail within reasonable limits of time and space. However, an examination of the record has been made in each instance.

[7] The questions were on wholly immaterial points and their subject-matter may be grouped as follows: (a) the alleged family discord already discussed; (b) the claimed hostility to appellant of the older girl's father *before* the commission of the offenses, as bearing on his motive in causing appellant's arrest *after learning of appellant's offense against his own daughter;* (c) the time of day when the older girl was taken to the District Attorney's office; (b) the time of day or night when K telephoned to the mother of the younger girl after appellant's first arrest; (e) the time within the 6 months period preceding the offenses, during which appellant on the one hand, and K on the other, were employed or unemployed; (f) the frequency with which K had seen the witness B. R. preceding the offenses; how well he knew her; her condition of sobriety at various times, including February 11, 1951, and her reputation in the neighborhood; (g) K's efforts looking to appellant's arrest on the second complaint after he had been released on bail on the first charge—the argument being that appellant could not adequately prepare his defense while in jail.

The question before the jury, after all, was whether these lewd and lascivious acts had been committed, and if so whether defendant committed them. As relevant or material to those issues it will be seen at a glance that none of the foregoing matters could have had any possible materiality or probative value.

[8] The wife of the owner of the tavern was asked a series of questions by defense counsel which the latter claimed were designed to develop that the witness B. R. did not have a good reputation *in and around the cafe;* "whether or not she is a truthful person", and "whether or not she is a person who lies" and objections were sustained for want of proper foundation. The rulings were correct.

[9] Appellant argues that "A question of law authorizing the appellate court to set aside a conviction is presented where the evidence is inherently improbable." He does not point out how or why the evidence is inherently improbable. Appellant did not contradict the testimony of the two girls. Their testimony presents an extremely sordid picture, but there is nothing improbable about it.

Appellant makes the unusual argument that there was no evidence to show a violation of § 288 on either count, while admitting that "there was testimony of the appellant allegedly violating section 288a P.C." The uncontradicted testimony shows a violation of both sections as to each child.

[10] "Appellant further urges" to quote his brief, "that the court should have admonished the jury to regard with caution the testimony of the two complaining witnesses, one age 5, the other 8½. That in neglecting to do so the appellant was deprived of a fair and impartial trial." The court gave the following instruction: "However, a charge such as that made against the defendant in each of these cases is one which, generally speaking, is easily made, and, once made, is difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution."

[11, 12] Appellant complains "that the trial judge, on every opportunity, came to the aid of the prosecution and took over the examining of the witnesses for him on direct examination." Instances are cited from the preliminary examination and from the trial itself. Two of the instances at the trial were in that part of the direct examination of the older girl which dealt directly with the intimate details of the offense and the judge saw fit to ask the embarrassing questions himself, and we think his discretion was properly exercised in so doing. Two other instances were during the cross-examination of the younger girl, while she was being questioned about watching the television, and was apparently hesitant in giving her answers. The last instance was while the mother of the younger girl was being questioned on a collateral matter. In none of these instances did appellant's counsel make any objection or assignment.

[13] Finally it is claimed that the court erred in reading to the jury more of the testimony than had been requested. The jury returned into court and asked that the testimony of the older girl be read. After that had been done the judge inquired whether they wanted the testimony of the younger girl as well, and the foreman answered in the affirmative and it was read. There was no error or misconduct in this procedure.

We find no merit at all in any of the numerous contentions of the appellant. He was accorded a fair trial; he was represented throughout the trial by an experienced lawyer and there was no misconduct on the part of the judge or the prosecuting attorney.

The judgment and order appealed from are affirmed.

NOURSE, P. J., concurs.

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110 Cal.App.2d 559

WOO et al. v. MARTZ et al.

Civ. 18824.

District Court of Appeal, Second District,
Division 2, California.
April 28, 1952.

George Woo and another brought action against James L. Martz and others to enforce an asserted easement for discharge of storm waters over defendants' lands and for damages to crops. The Superior Court, Los Angeles County, Arthur Crum, J., rendered judgment for plaintiffs, and defendants appealed. The Court of Appeal, Moore, P. J., held that plaintiffs were holders of a prescriptive easement and that acts of defendants in filling drainage ditch and raising embankments were proximate cause of damage to plaintiffs' crops.

Judgment affirmed.

1. Waters and Water Courses 🔑152(6)

In action to enforce asserted easement for discharge of storm water over land of defendants, who asserted that original use of their land was permissive and never became adverse, burden of proving permissive use was on defendants.

2. Waters and Water Courses 🔑152(8)

In action to enforce asserted easement for discharge of storm water over land of defendants, who asserted that original use of land was permissive and never became adverse, evidence sustained finding that an easement existed.

3. Waters and Water Courses ⚷150

Tenant lacked authority to grant permission to occupant of adjoining land to dig drainage ditch for discharge of storm water over land occupied by tenant, as regards prescriptive easement for discharge of storm water over land.

4. Waters and Water Courses ⚷152(6)

Although a use for drainage which has originated in permission is presumed to have continued as permissive until consent or license is repudiated, the rule does not apply where owner of servient estate has not proved that original diversion of water was result of consensual agreement.

5. Waters and Water Courses ⚷150

In action to enforce asserted easement by prescriptive right for drainage of storm water over defendants' land, where defendants alleged but failed to prove permissive use arising during period of joint control of both parcels of land, only effect of period of joint control would be to require its deduction from the prescriptive period. Code Civ.Proc. § 325.

6. Waters and Water Courses ⚷126(2)

In action by tenant for damage resulting from loss of crops that perished under water diverted by adjoining landowners where landowner testified that he filled ditch for purpose of preventing flow of water to land, defendant landowners could not successfully contend that action in filling ditch and raising embankment along line between parties was not cause of resulting damage to crops.

7. Waters and Water Courses ⚷119(6)

Where drainage ditch was wrongfully filled in and embankments wrongfully raised by landowners to prevent flow of water from adjoining parcel, further act of county in cutting dike and thus contributing to inundation of adjoining parcel was reasonably forseeable and necessarily a consequence to be effected by the original wrong and defendant landowners were liable for entire damage.

8. Negligence ⚷56(1.9), 136(25)

Proximate cause is ordinarily a question of fact, and where the initial act is a substantial factor in bringing about the final harm, it is proper to find liability on the part of the original actor.

9. Waters and Water Courses ⚷118

Owners of lower parcel of land who prevented discharge of water from higher parcel would be liable for damages caused to tenant of higher parcel.

10. Appeal and Error ⚷931(1)

Findings of trial court which stand unchallenged are presumed to have evidentiary support.

◆

J. Clifford Argue and John M. Davenport, Los Angeles, for appellants.

John A. Jorgenson, Los Angeles, for respondents.

MOORE, Presiding Justice.

This action was instituted to enforce an asserted easement for the discharge of storm waters over appellants' lands adjacent to the tract held under lease by respondents and for damages to the latter resulting from loss of crops that perished under the waters diverted by appellants from their established course.

In 1942 respondents Woo leased from one Raymond Hails about 51 acres of agricultural lands in the Dominguez Colony Tract in Los Angeles County. The lands were promptly planted to garden truck which by January, 1943, attained commercial maturity with a value of $6,100. The following season a new crop was planted which likewise became of marketable age in January, 1944, with a value of $1,800. Both crops were destroyed by the surface waters so diverted by appellants. This action demanded judgment for the total loss and for an injunction requiring appellants to remove the embankment which diverted the flood waters from the easement and caused them to be impounded on respondents' lands. Relief was denied by the trial court. The Supreme Court reversed the judgment because of the failure of the trial court to make a finding on the issue of a possible prescriptive right in plaintiffs to channel surface waters onto defendants' lands. Woo v. Martz, 28 Cal.2d 866, 172

P.2d 54. A second trial resulted favorable to Woo in the finding that plaintiffs were holders of a prescriptive easement and in judgment quieting title to the easement and for the value of the destroyed crops.

As ground for reversal, appellants now urge the insufficiency of the evidence to support the finding (1) of such prescriptive easement, (2) that Martz caused the destruction of respondents' crops, (3) that the use of appellants' lands by respondents was hostile and adverse.

The details with reference to the titles, leases, tenants, dikes and ditches, drainage, neighboring lands, etc., are meticulously set forth in an opinion by Mr. Justice Parker Wood in Hails v. Martz, Cal.App., 164 P.2d 834. The court below having determined that Woo enjoys a prescriptive easement in the lands of appellants for diverting storm waters that would otherwise flood the lands of respondents it is now the task of this court to determine whether the evidence was sufficient to support such finding.

The Evidence

The acres occupied by respondents belong to Mr. Hails. They are adjoined on the west by the 80-acre tract of appellants. Both properties slope slightly toward the southwest. Both properties are bounded on the north by Del Amo street. North of that street lies the 235 acre tract of the Del Amo estate. On that estate the Pacific Electric Railway Company maintains a spur track erected on an embankment about 17 feet high which crosses the estate lands at a short distance from, and parallel to Del Amo street. North of the spur track the lands are higher than the acres south of the street and their storm waters collect in a swale or valley, the mouth of which is directly north of the Woo farm at its northwest corner. At the time of the construction of the embankment (1927) two culverts were placed in it for the purpose of carrying the rain waters from the estate lands.

In 1924 while the Hails tract was owned by Mr. Cruz, one Marconi, then a tenant of the same land, erected an embankment along the north boundary which was later enlarged and improved by the county and thereafter known as the county dike. At the same time Marconi constructed a ditch immediately north of the embankment and along the south side of Del Amo street extending it to the Martz boundary line, thence south several feet onto the Martz land. The water flowed through this ditch and onto the Martz land where it was diffused until January, 1926, when Marconi then a tenant of the Martz land also extended the ditch along an embankment entirely across the Martz property. From that time until 1942 water crossing Del Amo street in front of respondents' property was carried across the Martz land in this ditch.

Shortly after respondents took the lease from Hails, appellants filled the ditch on their land. At about the same time they constructed an embankment along their east boundary line. These changes prevented the surface water from flowing onto the Martz land as it had done for years. When the flood waters accumulated on Del Amo street the county cut the dike to prevent their backing up into the Del Amo swale. Thereafter, in an effort to prevent the water from spreading over the Hails land an embankment running southwesterly from the cut made in the dike by the county was erected on the property. During heavy rains in January, 1943, water broke through the embankments on both lands and spread over both properties.

[1, 2] In support of their contention that the evidence does not support the finding that an easement existed appellants urge that the evidence establishes without contradiction that the original use of their land by the occupants of the Hails land was permissive and never became adverse. They assert that at the time of the original invasion of the Martz acres there was a unity of ownership and control of the two tracts in Cruz and that such fact made the original invasion without hostility. There is no satisfactory proof that Cruz was lessee of the Martz land when Marconi constructed the drainage ditch in 1924. There was no written lease to Cruz nor did the widow or children of W. H. Martz testify to facts or circumstances that would prove the leasehold in Cruz. The circumstantial

evidence is to the contrary. Since Cruz had seen the swale waters destroy his crops on the Hails land prior to 1924, it is inconceivable that, with his knowledge of the destructive force of such flood waters, he would have consented to their overflowing the Martz land. Inasmuch as the burden of proving the use of the Martz land for receiving the diverted waters as permissive was on appellants (17 Am.Jur. sec. 72, p. 981) it cannot be said that the trial court must necessarily have found a permissive use.

But if Cruz had been lessee of Martz at the time of the first invasion and if he had permitted the channeling of the surface waters, could he, as a tenant, have consented to the erosion, denudation and filling in of his lessor's land? Might he not with equal right have sold the top soil to another for rehabilitating distant lands? For a tenant to cause such a ditch as that of Marconi to be constructed might well have constituted waste since there was undoubtedly permanent damage to the freehold in the form of erosion or unprofitable deposition of foreign matter.

[3–5] It follows that Cruz lacked authority to grant permission to another to lay waste to the Martz lands. Appellants propose that the controlling rule is that where the use has originated in permission, it is presumed to have continued as permissive until the consent or license is repudiated. Such rule has no application since the evidence does not compel a finding that the original diversion of the waters was the result of a consensual agreement. The only effect of any period of joint control of the two parcels of land would be to require deduction of this length of time in computing the prescriptive period. (See cases collected in 98 ALR 591.) Therefore, since there is no claim of a joint control after 1929, the requisite period of adverse use to establish an easement (five years)[1] had elapsed prior to appellants' interference in 1942.

[6–8] Appellants' final contention is that their actions in filling in the ditch and raising the embankments along the line between the properties was not the cause of the resulting damage to respondents' crops. Such contention is not maintainable in the light of the testimony of appellant James Martz that he filled the ditch for the very purpose of preventing the flow of waters to his land. Moreover, the act of the county in cutting the dike and thus contributing to the inundation of respondents' lands was reasonably foreseeable and necessarily a consequence to be effected by appellants' original wrong. Proximate cause is ordinarily a question of fact and where the initial act is a substantial factor in bringing about the final harm it is proper to find liability on the part of the original actor. Gibson v. Garcia, 96 Cal.App.2d 681, 685, 216 P.2d 119.

[9, 10] It is also to be noted that the judgment may be supported on another theory for the court found that appellants erected embankments along their eastern boundary and that said dikes prevented the natural flow of water from respondents' land to the Martz acres. Since under the civil law rule, effectually adopted in California, the lower owner may not obstruct the natural flow of surface waters to his land, O'Hara v. Los Angeles County Flood, etc., District, 19 Cal.2d 61, 63, 119 P.2d 23, defendants would be liable in any event. The court found the natural flow to be from the Hails land westward to the Martz property although this was by way of a more circuitous route than provided by the artificial channel. These findings stand unchallenged and accordingly are presumed to have evidentiary support.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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[1] See Code Civil Procedure, section 325; Nelson v. Robinson, 47 Cal.App.2d 520, 526, 118 P.2d 350.

PEOPLE v. MILLER.

C. A. No. 169752.

Appellate Department, Superior Court,
San Diego County, California.

April 4, 1952.

Defendant was convicted in the Municipal Court, City of San Diego, State of California, Philip Smith, J., for violation of sections of Fish and Game Code making it unlawful to bring into the state without permit from Fish and Game Commission fish lawfully caught outside the state, and he appealed. The Superior Court, Burch, J., held that the sections had reasonable relation to broad policy explicit in the law dealing with conservation of state's fish and game and was not invalid as impinging upon supreme and paramount power of Congress.

Judgment affirmed.

1. Criminal Law 🔑13

Section of Fish and Game Code making permit from Fish and Game Commission a condition on right to bring into state fish lawfully caught outside state, section making violation of condition under code unlawful, and section providing that commission of any act declared by code to be unlawful or violation of any provision of code or rule or regulation made thereunder is misdemeanor, fix ascertainable standard and state a crime. Fish and Game Code, §§ 452, 460, 1410.

2. Fish 🔑13(1)

Sections of Fish and Game Code dealing with unlawful possession of fish were inapplicable in prosecution for bringing into state without a permit from Fish and Game Commission fish lawfully caught outside state. Fish and Game Code, §§ 428, 452 to 454, 460, 1410.

3. Fish 🔑15

Complaint charging that crime of failure to obtain written permit has been committed by defendant in that he on certain date in certain township and county and before making or filing of complaint, did then and there willfully and unlawfully fail, neglect or refuse to make record or written permit as required by Fish and Game Code of fish legally taken outside of state and brought into state, adequately stated charge and was sufficient. Fish and Game Code, § 460.

4. Criminal Law 🔑13
Fish 🔑9

Section of Fish and Game Code making permit from Fish and Game Commission a condition on right to bring into state fish lawfully caught outside of state, section making violation of condition unlawful, and section making that which is declared unlawful by section a crime, were not vague or uncertain, nor was resort to permit to be issued by commission under defined specifications of code an inadequate or improper means of effecting legislative will. Fish and Game Code, §§ 452, 460, 1410.

5. Commerce 🔑63
Constitutional Law 🔑230(1), 287
Fish 🔑9

Even if Fish and Game Code section requiring permit to bring into state fish lawfully caught outside of state may be interpreted as remotely and indirectly affecting foreign commerce, section would be legally justified upon ground that it tends to effectuate policy of law by rendering evasion of it less easy and would not violate due process or equal protection of law. Fish and Game Code, § 460; U.S.C.A.Const. Amend. 14.

6. Constitutional Law 🔑81

If not otherwise objectionable, legislature is authorized to pass measures for protection of people of state in exercise of police power, and legislature itself is judge of necessity or expediency of means adopted.

7. Fish 🔑15

Issue of attempt by state to exercise extraterritorial jurisdiction and imperium and dominion of three mile belt adjacent to shore of state, was immaterial in prosecution for bringing into state without permit from Fish and Game Commission fish lawfully caught outside state. Fish and Game Code, § 460.

8. Fish 🔑13(1)

Section of Fish and Game Code making it unlawful to bring into state without permit from Fish and Game Commission fish lawfully caught outside state, is directed to assist state policy of conserving an important food supply for growing population. Fish and Game Code, § 460.

9. Fish 🔑8

Game 🔑3½

Fish and game, along with other great natural resources, should be preserved in the public interest.

10. Commerce 🔑63

Provisions of Fish and Game Code making it unlawful to bring into state without permit from Fish and Game Commission fish lawfully caught outside state, had reasonable relation to broad policy explicit in the law dealing with conservation of state's fish and game, and as such was state interest of such importance as to outweigh what ever national interest there may be in freedom from such regulation, and hence was not invalid as regulating foreign commerce so as to impinge upon supreme and paramount power of Congress. Fish and Game Code, § 460.

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Fred Harding Miller, in pro. per., and Randolph Karr, Los Angeles, for appellant.

James Don Keller, Dist. Atty., and William B. Enright, Deputy Dist. Atty., San Diego, for respondent.

Huntington P. Bledsoe, San Diego, amicus curiae.

BURCH, Judge.

This appeal raises the question of the right of a California citizen to bring into the State, without complying with section 460 of the Fish and Game Code, three kelp bass legally taken outside of the State of California, and the construction of the applicable provisions of that code.

It appears that defendant joined a fishing excursion in Mexican waters on the sport fishing boat Fisherette. The captain of the Fisherette procured for defendant a Mexican license and, in compliance with other pertinent provisions of the Fish and Game Code covering vessels used to transport fishermen to fishing areas (section 432.5), made a report to the Fish and Game Commission upon its forms of the three kelp bass caught by the defendant. When the Fisherette docked at San Diego, a game warden, in the course of his duty as an agent of the Fish and Game Commission, was present at the dock. He asked the defendant to exhibit either a license or permit to land fish, as required by sections 428 and 460 of the Fish and Game Code, if he intended to land his fish in California. This the defendant refused to do and continued in refusing after the warden informed the defendant that defendant need only sign the forms there available stating his catch. Defendant was tried by a jury, convicted of violating the provisions of the Fish and Game Code, and has appealed.

The several pertinent sections of the Fish and Game Code which seem to bear upon the case are as follows:

Section 1410 provides that the commission of any act declared by the code to be "unlawful," or the violation of any provision of the code or of any rule or regulation made thereunder, unless otherwise provided therein, is a misdemeanor.

Section 452 reads in part as follows:

> "It is unlawful to possess * * * fish, * * * taken in violation of any of the provisions of this code, or of any rule, regulation, or condition made thereunder."

Section 460, so far as material, reads:

> "* * * fish, * * * legally taken outside of this State, may be brought into this State under a written permit issued by the commission.
>
> "The commission may also allow the bringing in of such * * * fish, * * * without such written permit if a record is made at the time of entry with the nearest justice of the peace or notary public, or with any State or Federal agency designated by the commission.
>
> "Such record shall be in a form prescribed by the commission. One copy of the record shall be carried by the person bringing in such * * * fish, * * * while the same are in his possession; one copy left on file with the person or agency before whom such record is made, and one copy sent to the commission."

It appears that no closed season has been established for kelp bass, nor is there any restriction or regulation as to use, sale or disposal of such fish. Defendant was not licensed as required by section 428 to catch fish for purposes other than profit. Defendant is a citizen and resident of California.

[1] Defendant urges that the pertinent code sections do not state a crime. In this we think he is mistaken. Briefly stated, section 460 makes a permit from the commission a condition on the right to bring into the State fish lawfully caught outside the State. Section 452 makes the violation of a condition unlawful. Section 1410 makes that which is declared to be unlawful by section 452 a crime. It cannot be held that the words of the sections fix no ascertainable standard; that the requirement of a permit is in terms so vague that men of common intelligence must necessarily guess at its meaning or differ as to its application. Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 446, 56 S.Ct. 513, 80 L. Ed. 772.

Our attention has been drawn to two other sections of the Fish and Game Code. Section 453 provides in part as follows:

> "Unless otherwise provided, it is unlawful to possess * * * fish, * * * except during the open season and if legally taken or brought into the State during the open season and for 10 days thereafter, and not more than one daily bag limit thereof may be possessed during said period after the close of the open season."

Section 454 provides in part as follows:

> "Unless otherwise provided, the provisions of this code relating to the possession of * * * fish, * * * apply to * * * fish, * * * taken either in or outside of this State."

[2] Since these sections deal only with the unlawful possession of fish, and in no manner with the unlawful importation of fish from foreign waters, we consider they are not applicable to the circumstances of the present case.

Defendant further urges, as he did in the court below, the insufficiency of the complaint. The complaint charged:

> "* * * that the crime of Failure to Obtain Written Permit (F&G 460) has been committed by said defendant as follows: That said Fred Harding Miller on or about the 9th day of June 1951, in San Diego Township, in the said County of San Diego, State of California, and before the making or filing of this Complaint, did then and there wilfully and unlawfully fail, neglect or refuse to make a record or a written permit as required by the Fish and Game Code 460 of the State of California, of fish legally taken outside of the State of California and brought into the State of California;"

[3] In view of the construction we have placed upon the sections, we hold the complaint sufficient. The complaint charges that upon a certain date within the jurisdiction the defendant violated the express condition of the statute with regard to bringing fish, legally taken outside the State of California, into the State of California. Such a complaint adequately stated the charge which the defendant was called to defend. See People v. Pierce, 14 Cal.2d 639, 644, 96 P.2d 784; People v. Myers, 1 Cal.App.2d 620, 37 P.2d 191.

[4] Neither do we think the provisions assailed are vague or uncertain, nor the resort to a permit to be issued by the commission under the defined specifications of the statute an inadequate or improper means of effecting the legislative will. People v. Stafford Packing Co., 193 Cal. 719, 227 P. 485; People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A.L.R. 1186; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 446, 56 S.Ct. 513, 80 L.Ed. 772.

[5, 6] Defendant contends further that section 460 is violative of the due process and equal protection clause of the Fourteenth Amendment of the Federal Constitution. We think, however, that if the section may be interpreted as but remotely and indirectly affecting commerce, the mere fact that it dealt with the use or treatment of

fish brought into the State from the outside would not invalidate it. The section would be legally justified upon the ground that it tends to effectuate the policy of the law by rendering the evasion of it less easy. See Ex parte Maier, 103 Cal. 476, 37 P. 402; Sherlock v. Alling, 93 U.S. 99, 23 L.Ed. 819; Plumley v. Massachusetts, 155 U.S. 461, 15 S.Ct. 154, 39 L.Ed. 223; Silz v. Hesterberg, 211 U.S. 31, 29 S.Ct. 10, 53 L.Ed. 75; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772. If not otherwise objectionable, the legislature of the State is authorized to pass measures for the protection of the people of the State in the exercise of the police power. The legislature itself is the judge of the necessity or expediency of the means adopted. See Chicago, B. & Q. R. R. Co. v. McGuire, 219 U.S. 549, 569, 31 S.Ct. 259, 55 L.Ed. 328.

[7] There has been some discussion in the briefs of an attempt to exercise extraterritorial jurisdiction and imperium and dominion of the three mile belt adjacent to the shore. We think the contention immaterial to the issues, but if it were material the decision in Toomer v. Witsell, 334 U.S. 385, 393, 68 S.Ct. 1156, 92 L.Ed. 1460, would be a sufficient answer. See, also, Commonwealth v. McHugh, 326 Mass. 249, 271, 272, 93 N.E.2d 751.

In our view, the essential question for judicial determination in this case is whether the regulation imposed on foreign commerce, explicit in the section, so far impinges upon the supreme and paramount power of Congress as to be invalid under the commerce clause, or whether there is manifest a state interest of such importance as to outweigh whatever national interest there may be in freedom from such regulation. Cooley v. Board of Wardens, etc., 1851, 12 How. (U.S.) 299, 13 L.Ed. 996; Cities Service Gas Co. v. Peerless Oil & Gas Co., 1951, 340 U.S. 179, 71 S.Ct. 215, 220, 95 L.Ed. 190.

In the last-cited case it is said that the state law must "not discriminate against or place an embargo on" commerce. There is no embargo here, for in order to have a permit to transport his fish into the State, defendant was only required to record his catch. If he complied with the requirement he might import the fish, for in such case he would be entitled to the permit. Bayside Fish Flour Co. v. Gentry, supra.

In determining the impact of the section upon commerce, it must be interpreted as it was above for other purposes, viz., that the code makes it unlawful to import fish into California which were legally caught outside the state waters. So interpreted, defendant contends he was forbidden by the section from doing what only Congress could forbid or allow. In this respect, unquestionably the statute is in contrast with other sections of the code which have been upheld. Section 1110 requires a permit for a fishing vessel operating in state waters in connection with fishing, regardless of home port, and regardless of where the fish were caught or taken aboard, whether from "* * * the waters of the Pacific Ocean within this State or on the high seas or elsewhere, * * *." It was held valid over constitutional objections in Santa Cruz Oil Corp. v. Milnor, 55 Cal.App.2d 56, 130 P.2d 256, and in Mirkovich v. Milnor, D.C., 34 F.Supp. 409. The holding was cited and approved as to both cases in Takahashi v. Fish and Game Commission, 30 Cal.2d 719, 185 P.2d 805. Reversed on other grounds in Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478. We quote from the Mirkovich case, supra [34 F.Supp. 411]:

> "That a state has the power to enact legislation for the conservation of its fisheries is, of course, not open to question. Any law having a reasonable relation to such object and its accomplishment, and which is not unduly oppressive upon individuals must be upheld as a legitimate exercise of the state's police power without inquiry into the possible soundness of legislative judgment in the premises, and without consideration for possible individual hardships. Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772.
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> * * * * * *

> "The insurmountable difficulties attendant upon policing the waters of the state from the coast to the imaginary three mile limit, wherever fishing operations occur; the impossibility of distinguishing fish taken in state waters from those taken from without, or between vessels fishing within from those fishing beyond the state's limits; the consequent ease with which fraud and deceit might be practiced by vessels delivering fish taken from the fisheries of the state to points outside the state on the pretext of operating solely beyond the three mile limit—these considerations alone justify the provisions of Section 1110 of the Fish and Game Code as a proper exercise of the police power of the State of California, having reasonable relation to the object of their enactment, and reasonably calculated to render effective the state's power of control over the fish supply within its territorial waters."

[8–10] In some respects, section 460 in its legal import is analogous to section 1110. In other respects it is not. Both sections are directed to assist the state policy of conserving an important food supply for a growing population. No one would question that fish and game, along with other great natural resources, should be preserved in the public interest. To this end, anglers are licensed to fish, and in proper cases a closed season is established for the various species from time to time in the legislative discretion. Upon other species, the open season may prevail according to what may be deemed necessary and desirable. Those considerations which have controlled judicial decision in cases cited in this opinion seem to apply to section 460 as corollary to the licensing statute (section 428) as they do to other state regulations therein adjudicated as valid. Codifying the fish and game law into separate sections still leaves the court free to find the reasonable relation which the section bears to the broad policy explicit in the law dealing with the conservation of the State's fish and game.

The judgment is affirmed.

TURRENTINE, P. J., concurs.

GLEN, J., deeming himself disqualified, did not participate herein.

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110 Cal.App.2d Supp. 850

LOS ANGELES FINANCE CO. v. FLORES.

Civ. A. 7871.

Appellate Department, Superior Court,
Los Angeles County, California.
April 22, 1952.

Action by Los Angeles Finance Company against Domingo M. Flores in which attachment was levied by plaintiff upon certain moneys due defendant as earnings for his personal services during next preceding thirty days. The Municipal Court of the City of Los Angeles, Lucius P. Green, J., entered order denying defendant's claim of exemption, and defendant appealed. The Appellate Department of the Superior Court, County of Los Angeles, Stephens, J., held that under statute providing that all earnings of debtor are exempt from execution or attachment if necessary for use of debtor's family residing within state, and unless debts are incurred by debtor, his family or wife, for common necessaries of life, debt incurred by debtor's wife for gold wrist watch for gift to debtor was not for common necessaries of life, and debtor was entitled to exemption of all his earnings.

Order reversed, with instructions.

1. Statutes 🔑206

In construing statutory language, effect must be given if possible, to each sentence, phrase and word thereof.

2. Exemptions 🔑4

The general policy of courts is to give liberal construction to exemption statutes in favor of debtor, and such policy requires that there be strict construction of any provisions which tend to limit exemptions extended elsewhere in statute to debtor. Code Civ.Proc. §§ 690–690.25, 690.2, 690.10, 690.11, 690.20, 1858.

3. Exemptions ⚿40, 68

As used in statute exempting necessary wearing apparel of debtor from execution, term "necessary wearing apparel" means necessary to particular debtor considering all the circumstances, his station in life, and his particular type of employment, while term "common necessaries of life", as used in statute exempting all of earnings of debtor if necessary for use of support of debtor's family residing within state unless such debts were incurred by debtor, his wife, or family, for common necessaries of life, means those things which are commonly required by persons for the sustenance of life regardless of their employment or status. Code Civ. Proc. §§ 690–690.25, 690.2, 690.10, 690.11, 690.20, 1858.

See publication Words and Phrases, for other judicial constructions and definitions of "Necessary Wearing Apparel" and "Common Necessaries of Life".

4. Exemptions ⚿68

Under statute exempting from execution, all of the earnings of debtor if necessary for use of his family residing within state and supported in whole by debtor, unless debts for which execution is sought were incurred by debtor, his wife or family, for common necessaries of life, debt incurred by debtor's wife for gold wrist watch for birthday present to debtor, was not for common necessaries of life, and when full amount of debtor's earnings was necessary for support of family, debtor was entitled to exemption of all of such earnings. Code Civ.Proc. §§ 690–690.25, 690.2, 690.10, 690.11, 690.20, 1858.

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Ellery Cuff, Public Defender, Los Angeles, for appellant.

A. Joseph Shapiro and A. Arthur Fineshriber, Los Angeles, for respondent.

STEPHENS, Judge.

Plaintiff's assignor sold to defendant's wife, for presentation to defendant as a birthday gift, a gold wrist watch for the price of $73.77. The sale was on credit, and plaintiff has brought action to collect the amount due and has caused an attachment to be levied upon certain moneys due the defendant and which represent the earnings of defendant for his personal services during the preceding thirty days. Defendant filed a claim of exemption under Code of Civil Procedure, section 690.11, for the entire amount attached, together with appropriate affidavits, as provided in said section, to sustain his contention that the whole amount is required for the support of his family. The trial court allowed the claim of exemption for one-half only of the amount held, and from this order defendant appeals. It was stipulated by counsel "that if the claim (of plaintiff) was determined to be not for one of the common necessaries of life, that the exemption would lie and be granted in full." To fully understand the circumstances, the following additional facts appear from defendant's affidavit and are undisputed: that defendant resides in this state with his wife and two minor children who are dependent upon him for support; that at the time the money involved herein was earned defendant's average take-home earnings were approximately $228 per month, and that his necessary family expenses were in excess of that amount; that defendant had never owned a watch other than this one nor had any necessity for one; that he had no need for a watch in his work and had never worn this one at his place of employment except upon one occasion, and at that time accidentally broke the face thereof and had never had it repaired; and he concluded that it was not practical to wear a wrist watch in his particular work. The question presented herein is, should the order of the trial court, holding in effect that the claim of plaintiff was for a debt incurred by defendant or his wife for the common necessaries of life, be sustained? We have concluded that it should not.

The section of the statute which we are called upon to construe is as follows: Following C.C.P. § 690, stating that the property mentioned in secs. 690.1 to 690.25 is exempt from execution or attachment, etc.: C.C.P. § 690.11. "One-half of the earnings of the defendant or judgment debtor received for his personal services rendered at any time within 30 days next preceding the levy of attachment or execution where such one-half is necessary for the use of the debtor, or his family supported in whole or in part by such debtor.

"All of such earnings, if necessary for the use of the debtor's family residing in this State, and supported in whole or in part by such debtor unless the debts are: (a) Incurred by such debtor, his wife or family, for the common necessaries of life; or, (b) incurred for personal services rendered by any employee, or former employee, of such debtor."

[1] "In construing statutory language, it is fundamental, if possible, to give effect to each sentence, phrase and word thereof." Whitley v. Superior Court, 1941, 18 Cal. 2d 75, 78, 113 P.2d 449, 452; Janise v. Bryan, 1948, 89 Cal.App.2d Supp. 933, 936, 201 P. 2d 466, and cases cited under [1]; see C. C.P. § 1858. It is to be noted that only in the second paragraph of the section quoted (the portion limiting the type of debt for which a part of the debtor's earnings of the previous 30 days may be taken) does the word "common" appear in connection with and immediately preceding the word "necessaries"; nor do the words "of life" following that word appear elsewhere in any of the sections referred to except where there is a similar limitation upon an exemption. See sections 690.10 and 690.20. It should also be noted that although the word "necessary" is used many times in the exemption sections, 690 to 690.25 inclusive, the exact phrase "common necessaries of life" is used only three times and only in those provisions which limit the type of debt for which property of the debtor otherwise exempt may nevertheless be levied upon. If this indicates an intention on the part of the legislature to give a particular meaning where this phrase is used as distinguished from the use of the single word necessary or necessaries, we must give effect to that meaning.

In Webster's New International Dictionary, Second Edition, we find many definitions of the word "common," among which are the following: "Belonging or pertaining to many or to the majority; general or prevalent"; "of frequent or ordinary occurrence or appearance; familiar by reason of frequency"; and among the synonyms we find: "Popular, universal, frequent, customary, usual, familiar."

The word "necessary" used alone to modify what follows, as in section 690.2 "Necessary household, table, and kitchen furniture * * * wearing apparel * * *" etc., has been given very liberal interpretation by the courts and now includes many things which would not ordinarily be considered as necessary in its strict sense of indispensable; indeed, the legislature itself has indicated in the above section a somewhat liberal policy in considering what should be exempt in the hands of the debtor, for it lists hanging pictures, a piano, a shot gun, a rifle and a radio. In 65 C.J.S., Necessary, page 268, it is said: "The term 'necessaries' is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society, such as ornaments of dress which are usually worn by persons of rank and position. In San Diego, etc., Ferry Co. v. Railroad Comm., 1930, 210 Cal. 504, 512, 292 P. 640, 643, the Supreme Court, in discussing the meaning of the word necessity, as used in the Public Utilities Act, said: "The word connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, or conducive. It is relative rather than absolute. No definition can be given that would fit all statutes. The meaning must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found."

In Sanker v. Humborg, 1941, 48 Cal.App. 2d 205, 119 P.2d 433, the court had before it the question of whether or not the whole of debtor's earnings for personal services within the preceding 30 days should be exempted, plaintiff claiming that certain listed items of expenditure by the debtor could not be classed as necessaries. It did *not* involve the status of plaintiff's claim under the clause now before us. At page 208 of 48 Cal.App.2d, at page 434 of 119 P.2d, the court said: "Under the rule prevailing here, what is a necessary of life must depend largely on the circumstances of each case and the position of the family involved." In re Estate of Millington, 1923, 63 Cal.App. 498, 218 P. 1022, 1024, likewise involved only the question of whether or not certain articles in the hands of the debtor were exempt as necessary under the wording (now contained in C.C.P. 690.2) of "necessary wearing apparel." After discussing the two extreme views, the one that practically any jewelry, no matter how valuable, that one could wear on his or her person would come under such designation, and the other that it encompassed only actual clothing, the court said neither extreme was correct. Many decisions of the courts of other states, as well as the federal courts, are cited therein, and the following are excerpts from the decision, 63 Cal.App. at page 501, 218 P. at page 1023: "Of course, the word 'necessary' does not limit wearing apparel to that which is indispensable, but it is sufficiently flexible to include things which are usual and appropriate for the reasonable comfort and convenience of a debtor, although they may not be absolutely necessary for mere subsistence. Freeman on Executions (3d Ed.) § 232; Leavitt v. Metcalf, 2 Vt. 342, 19 Am.Dec. 718; Sellers v. Bell, 5 Cir., 94 F. 801, 36 C.C.A. 502." and at page 504 of 63 Cal. App., at page 1024 of 218 P.: "While no general rule can be drawn from the foregoing conflicting decisions, it may be said that they generally recognize that wearing apparel may include something more than mere clothing. In many of them the value of the article claimed has been given weight, and logically so; because it is neither usual nor appropriate for one who is unable to pay his debts to wear expensive ornaments, and such ornaments therefore are not considered 'necessaries' in the sense in which the word is used in exemption statutes."

[2] These decisions are in accordance with the general policy of the courts of this state to give a liberal construction to exemption statutes in favor of the debtor. In Holmes v. Marshall, 1905, 145 Cal. 777, at page 778, 79 P. 534, at page 535, 69 L.R.A. 67, it is said that "Statutes exempting property from execution are enacted on the ground of public policy, for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence. The general rule now is to construe such statutes liberally, so as to carry out the intention of the Legislature and the humane purpose designed by the lawmakers." See also Industrial Loan & Investment Co. v. Superior Court, 1922, 189 Cal. 546, 209 P. 360.

It follows logically that this same policy requires a *strict* construction of any provisions which tend to limit the exemptions elsewhere in the statute extended to the debtor. In 25 Cor.Jur. 10 (par. 8), the rule is thus stated: "Conversely to the rule of liberal construction of the grant of an exemption, provisions which limit or take away the exemption are strictly construed, whether in provisos and exceptions or in amending statutes."

Only three cases in this state bearing directly upon the exception now before us have come to our attention. In the case of White v. Gobey, 1933, 130 Cal.App. Supp. 789, 19 P.2d 876, the plaintiff had recovered judgment against the wife for clothing sold to her before marriage, and execution was levied upon earnings of the husband for services rendered within 30 days prior to the levy upon the theory that such debts were recoverable out of community property. The trial court held that only one-half of such earnings was exempt under C.C.P. § 690, subd. 10 but the Appellate Department of the Superior Court of San Francisco held that the whole of such earnings was exempt. At page 792 of 130 Cal.App.Supp., at page 877 of 19 P.2d the court said: "The language of subdivision 10 is that, 'where debts are incurred by any such person, *or his wife* or family for the common necessaries of life * * *' one-half the earnings is subject to execution. We are satisfied that, as to debts incurred by 'his wife,' this must mean *while she is his wife*. 'The underlying purpose of the statute exempting from execution certain property is to provide for the support and welfare of the family of the person claiming exemption.' Bailey v. Superior Court, 215 Cal. 548 [554], 11 P.2d 865, 867. So that the beneficent purposes of this statute be not carried too far, it has been wisely provided that half of the earnings for the last thirty days prior to the levy may be taken in payment for common necessaries of life. *Necessities, then, used for the very maintenance of the debtor's family, for food, clothing, and the like, are what the Legislature meant to make special provision for.*" (Emphasis added.)

In the case of Evans v. Noonan, 1912, 20 Cal.App. 288, 128 P. 794, 795 the court had before it the question of whether or not medical services rendered to a member of the family were "necessaries of life". After discussing the subject the court made the following comment which clearly infers a distinction between "common necessaries of life" and "necessaries," 20 Cal.App. at page 293, 128 P. at page 795: "In the present case, however, there is nothing which requires us to go further than to say that, under our law, it most certainly at the least means the *common necessaries of life*, or such things as are proper and requisite for the sustenance of man. With equal certainty these include, besides food, clothing, and shelter, such medical attentions in cases of illness as are absolutely requisite to relieve physical suffering and pain and to overcome or conquer disease, if by such attentions it can be done." (Emphasis by the court.)

The third case is by this court: So. Cal. Merchants Ass'n v. Thomason (1931), Civ. A. 383. In that case the earnings of the debtor were attached for a debt incurred by defendant, a taxicab driver, for a watch of the value of twenty-three dollars. The plaintiff voluntarily released one-half of such earnings, but the trial court refused to release the remaining one-half and defendant appealed from such order. This court quoted from the opinion in Re Estate of Millington, supra, 63 Cal.App. 498, 218 P. 1022, and held that a watch worn by the debtor was included in the term "necessary wearing apparel." Undoubtedly that holding is sustained by the Millington and other cases in so far as it holds that, under the circumstances there appearing, *such* a watch in the hands of *that debtor* was a necessity. However, the decision went further and said (p. 3): "We are unable to distinguish between the term 'necessary wearing apparel' as appears in subdivision 4 and 'common necessaries of life' as appears in subdivision 10 of Section 690, Code of Civil Procedure." Upon further examination and consideration of the subject, we no longer adhere to this conclusion.

[3, 4] Necessary wearing apparel, as used in C.C.P. § 690.2 under the decisions, means necessary to the particular debtor considering all the circumstances—his station in life, his particular type of employment, etc.; while "common necessaries of life" as used in C.C.P. § 690.11, second paragraph, means those things which are commonly required by persons for the sustenance of life regardless of their employment or status. A tuxedo may be necessary wearing apparel to a waiter at a top-notch cafe, but not to a laborer who has never attended a type of dinner or other gathering where tuxedos are customarily worn; and under no circumstances could it be called a "common necessary of life." The determination of whether or not a certain article is exempted in the hands of a debtor under the term "Necessary * * wearing apparel" involves a determination of whether or not under all the circumstances *that article* is necessary to be worn by *that debtor;* on the other hand, the decision of whether or not a certain article previously sold to a debtor is a common necessary of life so that *one-half of the debtor's earnings* of the past 30 days, elsewhere exempted by the statute for the support of his family, shall nevertheless be taken to pay for *it,* involves a determination of whether or not it is such an article that *in the hands of anyone* it is to be regarded universally, or substantially so, as necessary to sustain life. Obviously the legislature, cognizant of the fact that to the great majority of persons supporting

a family the earnings of the past 30 days are required for such basic things as food, heat, shelter, etc. (*Common* to all) desired to make sure that these earnings shall not be taken to pay for something less basic.

We wish to acknowledge the substantial assistance we received from the excellent briefs presented on behalf of appellant by the Public Defender of Los Angeles County.

The order appealed from is reversed, with instruction to release the portion of appellant's salary held under the writ.

SHAW, P. J., and BISHOP, J., concur.

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109 Cal.App.2d Supp. 928

STOKES v. POLICE AND FIREMEN'S INS. ASS'N.

No. 2105.

Appellate Department, Superior Court,
San Francisco County, California.
July 2, 1951.

On Rehearing Feb. 7, 1952.

Elizabeth Stokes sued the Police and Firemen's Insurance Association, a corporation, to recover benefits under a policy after death of her husband. The Trial Court entered judgment for plaintiff and defendant appealed. The Superior Court, Appellate Department, held that evidence sustained finding that decedent suffered heart attack caused by and while fighting a fire, that events definitely set in progress a chain of events which led to his death and was sole and proximate cause of death, and that his death was caused by external, violent and accidental means, independent of all other causes.

Judgment affirmed.

Devine, J., dissented on original hearing.

1. Insurance 🔑665(5)

In action against insurer to recover benefits under policy after death of plaintiff's decedent, a fireman, evidence sustained finding that decedent suffered a heart attack caused by and while fighting fire, that those events definitely set in progress a chain of events which led to his death and was sole and proximate cause of death, and that death was caused by external, violent and accidental means, independent of all other causes.

2. Insurance 🔑454, 455

Recovery may be had under provisions of a policy providing for payment where "death is caused by external, violent and accidental means, independent of all other causes" and "excluding payment where death is caused solely or in part by disease" if accident is proximate cause and sets in motion a chain of events leading directly to death, and notwithstanding fact that a pre-existing disease contributed to death.

Orrick, Dahlquist, Neff & Herrington, San Francisco, for defendant and appellant.

Anthony J. Wiechers, San Francisco, for plaintiff and respondent.

KAUFMAN, Judge.

This is an appeal from a judgment of the Municipal Court in favor of plaintiff and respondent and against defendant and appellant on an insurance contract.

The facts as disclosed by the record are that one George B. Stokes, the deceased, was insured by the appellant, a fraternal benefit association, since February 28, 1928, and the contract of insurance provided that appellant would pay the beneficiary the sum of $2,000 in the event the insured's death was caused through external, violent and accidental means, independently of all other causes; otherwise, the beneficiary is to be paid the sum of $200 only as a funeral benefit.

The insured, George B. Stokes, had been a member of the San Francisco Fire Department for 28 years. It is undisputed that the general health of the insured was considered good by all who knew him up to January 30, 1948, the day of the fire at Brunton's Automobile Service Station.

There had been no evidence of any heart trouble. His wife testified on the trial that his health was good. The insured's mother likewise testified that he was in good health and likewise, his fellow fire fighters also so testified.

On January 30, 1948 at 5:00 a. m., the insured responded to a fire at Brunton's Automobile Service Station in San Francisco. The burning premises was a building with brick walls, tar and gravel roof and the building contained automobile parts, rubber tires, batteries and rubber hosing. The fire was major, and the insured and three other firemen were inside the building with a big hose, dragging the line through debris, the smoke was very dense; the heat was extremely intense; and there was a high carbon monoxide content. While in and amongst these conditions the insured collapsed to the ground and was helped out of the building by other firemen. Outside, in an alley way, he sat down. He felt sick to his stomach saying, "he had a belly full of smoke." One of the witnesses testified that he looked pale and felt cold, and that he complained of pain in his lungs and chest. The insured did not return to the fire; he went off duty at 8:00 o'clock Friday morning and at that time he complained of pains in his chest. On the following Sunday his wife testified that he wasn't feeling good that day and that he had pains in his chest. On Monday, the insured attended a gathering at the firehouse and complained of illness. That night he went to bed and was found dead in bed some four hours later, which was a period of time something less than four full days after he collapsed at the fire.

On the trial the cause of death of the insured was established by a medical expert called by the respondent, and this expert testified that many people in their 50's have an arteriosclerotic heart and do not know about it. The expert further testified that the insured died of coronary occlusion that occurred a few days before his death and that in his opinion the conditions of the fire, the exposure to the hot dense smoke, the fall, the inhaling of carbon monoxide precipitated the coronary occlusion which caused the insured's death.

The terms and conditions of the contract of insurance are not in dispute. Appellant has alleged as its defense that the insured's death "was not caused through external, violent and accidental means, which independently of all other causes resulted in death" and that, therefore, the policy of insurance here involved does not cover the facts of the case and entitle respondent to the $2,000 death benefit.

It is now well established in California that the presence of a pre-existing disease will not relieve the insurer from liability if the accident itself is the proximate cause of death, even though the pre-existing disease actually contributed to the cause of death.

See Brooks v. Metropolitan Ins. Co., 27 Cal.2d 305, 163 P.2d 689.

In the recent case of Happoldt v. Guardian Life Ins. Co., 90 Cal.App.2d 386, 203 P.2d 55, 63, the court said: "The Brooks case holds, * * * that the presence of a pre-existing disease will not relieve the insurer from liability if the accident is the proximate cause of death, and that recovery may be had even though a diseased condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death."

These California decisions allowing a recovery by the beneficiary dealt with policy language almost identical with the language here involved.

In the Indiana case of Police and Firemen's Ins. Ass'n v. Blunk, 107 Ind.App. 279, 20 N.E.2d 660, the facts are practically identical with those in the case now before the court. In that case the deceased was a fireman who died from a coronary occlusion after fighting a fire. The Insurance Association is the same appellant as we have in this case; the provisions of the policy are identical with the provisions of the policy in this case; and the medical testimony was similar to that given in this case. In the Blunk case the insured had been a fireman for 25 years and was in apparent good health before responding to a fire. Blunk fought a fire that was of great density, high temperature, and carbon monoxide was present. At the fire he was observed to be gasping for breath, and was helped to a chair and died shortly thereafter from a coronary occlusion. The Indiana court on appeal said [107 Ind.App. 279, 20 N.E.2d 663], "We think the testimony of the medical witnesses is susceptible to the interpretation that if it were not for the accident, the insured would not have died at the time from coronary occlusion. It is true that in a strict or literal sense any departure from an ideal or perfect state of health is a disease, defect or an infirmity. But it is not every defect or infirmity of the insured that is contemplated by the parties in attempting to define the chain of causation, for to so hold would make the contract an absurdity."

See also Graham v. Policemen and Firemen's Ins. Ass'n, 10 Wash.2d 288, 116 P.2d 352.

Appellant argues that under the facts of this case the death was not caused by external, violent and accidental means independently of all other causes. However, the major fire, the intense heat, the carbon monoxide, the fall and the extreme smoky conditions are external, violent and accidental means.

We conclude that the record before us contains evidence from which the trial court was entitled to draw proper inferences that the insured came to his death through external, violent and accidental means, which independently of all other causes resulted in the insured's death.

Accordingly, we find no error in the record before us and the judgment of the trial court must be and is hereby affirmed.

GRIFFIN, P. J., concurs.

DEVINE, Judge (dissenting).

I have dissented from the decision in this cause, because the policy expressly requires that the death be due to accident independently of all other causes. Although pre-existing disease probably can be eliminated as a causative factor under the Happoldt case, nevertheless over-exertion was not eliminated as a cause either by the testimony of the doctor who testified for the plaintiff or by the findings of the trial court. In fact, the testimony of the doctor was that the smoke was *a* factor. Although in the Blunk case there may have been exertion on the part of the decedent, the dominant cause seems to have been the smoke, because the decedent rushed from the building gasping for breath and holding his throat and immediately expired.

I do not believe that the "major fire" can be considered as the cause of death. That was the occasion, not the cause. If a "major fire" were to be considered as a cause of death in cases under such a policy as is here, every fireman who died from exhaustion or over-exertion while fighting a fire would be entitled to the accident benefit.

On Rehearing.

MOLKENBUHR, Judge.

This cause is before the Court after the granting of a rehearing. Since the facts are set forth in the original opinion, there is no need of setting them forth again.

Appellant contends that Lieutenant Stokes did not receive, through external, violent and accidental means, bodily injuries which, *independently of all other causes,* resulted in his death, and, secondly, that the policy excludes recovery where death is caused wholly or *in part* by mental or bodily infirmities or disease.

An examination of the briefs in the case of Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689, and Happoldt v. Guardian Life Ins. Co., 90 Cal.App.2d 386, 203 P.2d 55, divulges the fact that the identical points and almost the same authorities were presented there as in this case. After the decision in the Brooks case, counsel for Metropolitan Life and counsel for Pacific Mutual Life (as *amicus curiae*) petitioned the court for a re-hearing, requesting the court to delete the last four paragraphs of the opinion, regarding interpretation of the two clauses, claiming it was *obiter dicta* and if left to stand would raise an irreconcilable conflict with the California decisions of twenty-five years, and referred to the following cases in particular: Rock v. Travelers Ins. Co., 172 Cal. 462, 156 P. 1029, L.R.A. 1916E, 1196; Clarke v. New Amsterdam Casualty Co., 180 Cal. 76, 179 P. 195; Kellner v. Travelers' Ins. Co., 180 Cal. 326, 181 P. 61; Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 P. 1175; Ogilvie v. Aetna

Life Ins. Co., 189 Cal. 406, 209 P. 26, 26 A.L.R. 116; Bennetts v. Occidental Life Ins. Co., 39 Cal.App. 384, 178 P. 964; Horton v. Travelers Ins. Co., 45 Cal.App., 462, 187 P. 1070. These were all before the court before it rendered its decision; they are likewise in the briefs in the present case. In the Brooks case [27 Cal.2d 305, 163 P.2d 689], appellant argued that the decision completely disregarded the plain, simple language of the contract which provided for death benefits when the insured's death was the "result[s] of bodily injuries * * * caused directly and independently of all other causes by violent and accidental means" and specifically excluded death "caused wholly or partly, directly or indirectly, by disease or mental infirmity".

The same questions were before the court in the Happoldt case, namely, 1) Did death result, directly or indirectly, independent of all other causes, effected solely through external, violent and accidental means; and 2) Did death result directly or indirectly or in part from bodily infirmity or disease. Appellants there also referred to what they said was the plain language of the contract and contended that the court in so interpreting the policy violated the Fourteenth Amendment to the Constitution (right of freedom of contract).

Nevertheless the courts in both cases interpreted the language of the policy under both provisions, "independent of all other causes" and "caused in whole or in part by disease" to mean that if the accident sets in motion a chain of events that results in death, and such accident is the *proximate cause* of death, the insured is covered, and notwithstanding any prior existing disease may have contributed to the death.

Here the evidence shows that the decedent, aged about 53 years, was in good health prior to the fire; that no one knew that he had any heart disease; that the fire he fought in line of duty was a major one of especially high temperature, of intense, hot, noxious, black smoke containing carbon monoxide; that he "took a spill"; that he perspired freely; that he "took a beating"; that he dragged a heavy hose; that he "had a bellyful of smoke"; that he complained of pain in his chest and lungs; that he overexerted himself; that he suddenly went down on his knees; that he exerted a great deal of energy; that he inhaled carbon monoxide; that he was under great exertion dragging a 3" hose through debris, water and various obstructions. Medical testimony developed that the inhaling of hot smoke and carbon monoxide may damage the heart muscles; that inhaling hot smoke increased respiration and the work of the heart; that if carbon monoxide was present of sufficient concentration to be harmful, one of two things would happen—death immediately, or damage to the heart; that the smoke was a factor precipitating death; that because of various stresses and strains at the fire he damaged his coronary artery.

[1] These events, in our opinion, after allowing for all reasonable inferences to be drawn therefrom, substantially sustain the finding that the decedent suffered a heart attack caused by and while fighting the fire; that these events definitely set in progress a chain of events which led to his death and was the sole and proximate cause of death; that his death was caused by external, violent and accidental means, independent of all other causes. Who is to determine how long Stokes would have lived had he had his normal and usual powers of resistance? So far as anyone knew, as of the day of the fire he was well and healthy and actually performing his duties as a fireman.

[2] It is our opinion that it is now the settled law of this state since the Brooks decision that a recovery may be had under the provisions of a policy providing for payment where "death is caused by external, violent and accidental means, independent of all other causes" and "excluding payment where death is caused wholly or in part by disease" if the accident is the proximate cause and sets in motion a chain of events leading directly to death, and notwithstanding the fact that a pre-existing disease contributed to the death. Since the court here found as a fact that the accident was the prime and moving cause of death (the pre-existing heart disease only contributing) it cannot be said as a matter of

law, in interpreting the provisions of the policy and the evidence, that the death of Stokes was caused in whole or in part by any pre-existing heart disease. As stated above, counsel in the Brooks and Happoldt cases endeavored to avoid liability on the same grounds as appellant here; namely, that death was not caused by the accident, independent of all other causes, but was caused in part by a pre-existing heart disease. See also Barnett v. John Hancock Ins. Co., 304 Mass. 564, 24 N.E.2d 662, 126 A.L.R. 608; Handley v. Mutual Life Ins. Co., 106 Utah 184, 147 P.2d 319, 152 A.L.R. 1278; Guardian Life Ins. Co. v. Robison, 278 Ky. 678, 129 S.W.2d 192.

Appellant cites Towey v. New York Life Ins. Co., 27 Wash.2d 829, 180 P.2d 815, in its brief for re-hearing, to the effect that the proximate cause rule does not apply in construing the exclusion clause ("caused in whole or in part by disease"). That holding, in our opinion, is contrary to the Brooks and Happoldt cases, which we are bound to follow. Two interesting features are developed from the reading of the Towey case and Evans v. Metropolitan Life Ins. Co., 26 Wash.2d 594, 174 P.2d 961, which the court in the Towey case relied upon for the statement of the proximate cause rule. The first is that the court in the Towey case in the forepart of the decision holds exactly the same way as the Brooks case in interpreting the provision that the company will pay if "death is caused, independent of all other causes, through external, violent and accidental means"; namely, that the proximate cause rule applies. The second, and most interesting feature, is that the contract in Evans v. Metropolitan case on which the court in the Towey case relied upon as authority, specifically and definitely provided that the company would not pay if death was caused *"Or Contributed"*, directly or indirectly, wholly or partially, by disease. The policy in the Towey case moreover did not use the word "Contribute"—the word used was "Results"—the same as in the Happoldt case. Whether this was pointed out to the court in the Towey case we cannot tell; had it been, and the court had before it the case of Scanlon v. Metropolitan Life Ins. Co., 7 Cir., 93 F.2d 942, and the other authorities relied upon by our Supreme Court in the Brooks case, and the Brooks decision itself, the final result in the Towey case might have been different.

In Scanlon v. Metropolitan Life Ins. Co., supra, 93 F.2d at pages 945 and 946, relied upon in the Brooks case, we find the following language concerning the interpretation of the words "caused in whole or in part by disease":

"While the bodily infirmity need not be the sole cause of the death to defeat recovery under this policy, it is well settled that the 'cause' as here used, either sole or partial, refers to something different than a disease or affliction rendered more serious by the consequences of the accident.

"One may recover on an accident policy such as here in issue although the insured suffers from bodily infirmities. If the accident brought about conditions from which death resulted, the fact that the insured was ill, aged or infirm, or had bodily or mental infirmities, would not bar recovery provided the accident excited the bodily infirmity into activity and death resulted. If the infirmity alone would not have caused death, it cannot be said to have caused death when the immediate result was occasioned by an infirmity which became active only because of the accident. The infirmity may have made the insured less able to resist, but if the accident caused the condition which in turn affected the weak spot which did not resist as well as a healthy body, the cause is nevertheless the accident, and recovery cannot be avoided or evaded."

Rebenstorf v. Metropolitan Life Ins. Co., 299 Ill.App. 71, 19 N.E.2d 420, discusses the two provisions—"caused wholly or partly, directly or indirectly", and "independently of all other causes", and holds that the proximate cause rule applies in interpreting both provisions.

In Police & Firemen's Insurance Association v. Blunk, 107 Ind.App. 279, 20 N.E.2d 660, the same two provisions were again under consideration. There the court held that the inhalation of smoke, plus exertion, was the proximate cause of death and the company was liable; that the inhaling of black, hot, noxious smoke containing carbon monoxide affected the nervous mechanism of the heart; that although the insured died of a coronary occlusion, the exposure to the hot, dense, oily smoke was a factor which set off the coronary occlusion; that when a person is subject to such conditions, respiration increases and the heart is required to do more work and is under greater strain. Here Stokes inhaled smoke and exerted himself, and the testimony of the doctor was to the effect that smoke was a factor in the cause of death.

In U. S. Fidelity & Guaranty Co. v. Dowdy, 203 Okl. 207, 219 P.2d 215, the evidence was that the fireman was overcome by heat and smoke at a fire; the policy provided for recovery for injuries "effected, independently and exclusively of all other causes, through external, violent and accidental means". The court there held that the insured was covered. In the instant case the evidence showed that Stokes perspired heavily, inhaled smoke, was overcome by all of the conditions and was under great exertion.

In Metropolitan Casualty Co. v. Fairchild, 215 Ark. 416, 220 S.W.2d 803, a workman while engaged in thawing a frozen valve on a tank and standing with his left foot on a rod and leaning in a strained position with most of his weight on his left arm, reached over with a blow torch; in so doing he strained himself and suffered a coronary occlusion. The court held that the occlusion was the result of accidental means and that since the accident was the proximate cause of death, the insured was covered, and notwithstanding an existing disease did contribute to his death. There is no question here but that Stokes strained himself.

In Continental Casualty Co. v. Bruden, 178 Ark. 683, 11 S.W.2d 493, 495, 61 A.L.R. 1192, the insured while engaged in the performance of his duties as a machinist's helper, in putting grease in the cellar of an engine while in a pit under the engine became overheated and died shortly thereafter; he had been under a very hot firebox and as he came out he said, "Brother Coley, I got it", and wiped his face. It was held that such heat prostration was covered under the terms of a policy providing for payment in the event of loss of life resulting from injury independent of all other causes, etc. Here Stokes became overheated, and moreover said, "I got a bellyful of smoke".

In Dalbey v. Equitable Life Ins. Co., 105 Mont. 587, 74 P.2d 432, 436, the deceased, a fireman, was overcome by dense smoke and fumes, the effects of which proximately caused his death; defendant claimed death was not from accident. In that case the evidence disclosed that the conditions of the fire were unusual; that the smoke was dense; that the decedent became asphyxiated while shifting a hose; that it was a rural fire such as the department was rarely called upon to combat, necessitating the unreeling and laying of hose by hand, and, as the court stated, "a fact to be considered, since it called for extra exertion on the part of deceased." The court held that the deceased was indisputably overcome by smoke and fumes, the effects of which proximately caused his death, and was therefore covered.

In Stuart v. Occidental Life Ins. Co., 156 Or. 522, 68 P.2d 1037, the evidence was that the deceased was a fireman; that while engaged in fire fighting he was accidentally enveloped in smoke, soot and fumes in such a manner that he was unable to get away without suffering injury; that he subsequently contracted pneumonia from which he died. It was held that he died from an injury effected solely through accidental means.

Appellant at the argument on re-hearing referred to Johnson v. Business Men's Assurance Co. of N.A., 38 Wash.2d 245, 228 P. 2d 760. That case, in our opinion, merely holds that exhaustion of and by itself was not covered by the policy. There the court pointed out that there was absolutely no evidence to support a finding that death was caused by such accidental means as inhaling smoke, encountering heat, or any other deleterious effects of the fire; that there was no slip, fall nor unforeseen circumstance. Moreover, the court said that the act of Johnson was a deliberate one on his part. Here Lieutenant Stokes inhaled hot smoke containing carbon monoxide, encountered extreme heat, "took a spill", for some reason went down on his knees, and his exposure to any hidden danger was not voluntary.

Appellant refers to authorities denying recovery against death effected solely through external, violent and accidental means where the injury was sustained in cranking an automobile; assisting in carrying a door weighing 86 lbs.; climbing, with baggage, a long flight of steps in a rarefied atmosphere; raising and lowering himself by the arms; and similar acts. The rule in those cases is stated in Carswell v. Railway Mail Ass'n, 5 Cir., 8 F.2d 612 (cranking an automobile) as follows: "Where one voluntarily undergoes physical exertion, and nothing unexpected or unintended happens while he is doing so, the fact that such exertion unintentionally and unexpectedly causes injury does not make the means whereby such injury is caused, namely, the voluntary exertion, accidental. The physical injury caused by voluntary exertion or strain, which is unaccompanied by anything which is involuntary, unforeseen, and unusual, is not a result of, 'external, violent, and accidental means'".

It cannot be said that this rule is applicable to the facts in this case, because the Brunton fire developed hidden, unknown and unexpected dangers, and his exposure to that which happened was not voluntary. It cannot be said that Stokes intended to produce that which happened.

The finding by the court as to the proximate cause of death was one of fact for the trial court. The evidence definitely and substantially sustains the fact that the fire, with all its attendant circumstances, was the proximate cause of death. If appellant would avoid liability in cases of this type, it should have a "contributed" clause in its contract, as the Metropolitan Life had in the case of Evans v. Metropolitan Life Ins. Co., supra.

Accordingly we find no error in the record. The judgment of the trial court must be and it is hereby affirmed.

KAUFMAN, P. J., and DEVINE, J., concur.

38 Cal.2d 825

ANDERSON et al. v. SOUZA et al.

Sac. 6136.

Supreme Court of California, in Bank.

April 24, 1952.

Arvid G. Anderson and others brought suit against John J. Souza, doing business as the Turlock Airpark, and others to enjoin operation of airport, on ground that it was a nuisance, and to recover damages. The Superior Court of Stanislaus County, H. L. Chamberlain, J., entered a judgment for the plaintiffs, and the defendants appealed. The Supreme Court, Per Curiam, held that evidence sustained finding that operation of airport constituted a nuisance, but that decree of injunction should have been limited so as to provide for elimination of the nuisance and continued use of the airport if possible.

Judgment affirmed in part and reversed in part.

CARTER, J., dissents.

SCHAUER, J., dissents in part.

Prior opinion 232 P.2d 274.

1. Landlord and Tenant ⚷167(1)

A landlord is not responsible to other parties for misconduct or injurious acts of his tenant to whom realty has been leased for a lawful and proper purpose when there is no nuisance or illegal structure on the realty at the time of the leasing.

2. Landlord and Tenant ⚷170(4)

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, evidence that one of the owners constructed the airport, obtained county permit, flew his own airplane from and to the airport, and that he retained portions of the facilities of the airport sustained finding that both such owner and tenant operated the airport, and rule that landlord is not responsible for misconduct or injurious acts of his tenant was not applicable. Gen.Laws, Act 151a, §§ 2(a, d), 17.

3. Nuisance ⚷33

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, testimony of one of the owners that he owned and operated an airplane and testimony by tenant that he owned and operated four airplanes plus one which he operated for another, sustained finding that many airplanes operating from airport were owned and operated by one of the owners of the airport and the tenant. Gen.Laws, Act 151a, §§ 2(a, d), 17.

4. Witnesses ⚷258

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, it was not reversible error to permit witness to read a memorandum which he had made over a period of several years with reference to occasions when airplanes flew low over his home or near to it, where he testified that he made notations at the times when airplanes flew low over his home and then copied them into more permanent form. Code Civ.Proc. § 2047.

5. Nuisance ⚷36

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, it was error to enter judgment in favor certain of the owners of realty, where evidence did not show where they resided. Gen.Laws, Act 151a, §§ 2(a, d), 17.

6. Nuisance ⚷36

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, it was error to enter judgment as to certain of the owners of realty who testified that they had not authorized institution of the action in their names. Gen.Laws, Act 151a, §§ 2(a, d), 17.

7. Nuisance ⚷35

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, fact that only six of the fifty six owners of realty testified did not limit the benefit of their testimony to themselves alone, and such testimony could be relied on by the others, where conditions described in the testimony were common to all owners of realty who lived in the immediate vicinity of the airport. Gen.Laws, Act 151a, §§ 2(a, d), 17.

8. Nuisance 🔑50(7)

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, evidence was sufficient to support awards of $500 per couple to three couples owning realty near airport. Gen.Laws, Act 151a, §§ 2(a, d), 17.

9. Injunction 🔑17

An injunction is properly granted where it would be extremely difficult to ascertain amount of compensation which would afford adequate relief. Civ.Code, § 3422.

10. Injunction 🔑14

The term "irreparable injury" authorizing interposition of a court of equity by way of injunction means that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other. Civ.Code, § 3422.

See publication Words and Phrases, for other judicial constructions and definitions of "Irreparable Injury".

11. Nuisance 🔑33

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, evidence sustained finding that operation of airport and the flying of airplanes constituted a private nuisance. Gen.Laws, Act 151a, §§ 2(a, d), 17.

12. Nuisance 🔑3(1)

An airport is not a "nuisance per se" but it may become a nuisance either because of unsuitable location or improper operation or both. Gen.Laws, Act 151a, §§ 2(a, d), 17.

See publication Words and Phrases, for other judicial constructions and definitions of "Nuisance Per Se".

13. Nuisance 🔑19

Though statute providing that flight in aircraft over lands and waters of the state is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath did not go into effect until about one month after action to enjoin operation of airport, on ground that it was a nuisance, was begun, injunctive processes of court were prospective in operation and statute was applicable to that feature of the case. Gen. Laws, Act 151a, §§ 2(a, d), 17.

14. Nuisance 🔑6

The licensing and regulation of airports by the State Aeronautics Commission does not confer right to so operate an airport as to constitute a private nuisance to surrounding property owners. Gen. Laws, Act 151a, §§ 2(a, d), 17.

15. Nuisance 🔑6
Property 🔑7

Fact that federal government has declared that the United States possesses and exercises complete and exclusive national sovereignty in air space above the United States, and fact that the state legislature has declared that sovereignty in space above lands and waters of the state rests in the state, except where granted to and assumed by the United States pursuant to constitutional grant from the people of the state, did not divest owners of surface of soil of their lawful rights incident to ownership and did not permit flying of airplanes in such manner as to create a nuisance. Gen.Laws, Act 151a, §§ 2(a, d), 17; Air Commerce Act of 1926, § 6(a), as amended, 49 U.S.C.A. § 176(a).

16. Trespass 🔑10

Though there is no definite yardstick that may be used in determining how low an airplane may fly over property of others in landing or taking off, flying at low altitudes incident to landing and taking off may constitute trespass as it may cause more than mere apprehension of injury, and extensive low flying, causing unreasonable annoyance to occupants of land below, is a substantial interference with the enjoyment of the property.

17. Nuisance ⚷26

Regulatory provisions of the State Aeronautics Commission Act and federal laws do not supplant the ancient common law and long-established statute law declaring that nuisances may be abated at the suit of those injured thereby. Gen.Laws, Act 151a, §§ 2(a, d), 17; Air Commerce Act of 1926, § 6(a), as amended, 49 U.S.C.A. § 176(a).

18. Nuisance ⚷37

Injunctive process ought never to go beyond necessities of the case, and where a legitimate business is being conducted and in the conduct thereof a nuisance has been created and is being maintained relief granted should be directed and confined to the elimination of the nuisance, unless under peculiar circumstances of the case the business, lawful in itself, cannot be conducted without creating a nuisance and violating rights of contiguous property owners.

19. Nuisance ⚷5

Though owners and operators of an airport are engaged in a legitimate business, the encouragement and furtherance of which is a publicly declared policy of the legislature, they must nevertheless conduct airport with due regard for rights of others, and if, because of location, operation of such a business will result in depriving others of their property rights, it cannot be permitted, for to do so would, in practical effect, condemn the property of others in violation of constitutional guaranties.

20. Nuisance ⚷37

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, evidence warranted issuance of an injunction but not a decree completely forbidding continued use of the airport as an airport. Gen.Laws, Act 151a, §§ 2(a, d), 17; Air Commerce Act of 1926, § 6(a), as amended, 49 U.S.C.A. § 176(a).

21. Nuisance ⚷33

In action by owners of realty located near airport against owners of airport and their tenant to enjoin operation of airport, on ground that it was a nuisance, and to recover damages, burden was on owners of realty who sought to have the airport closed, to prove that no airplanes could fly to and from the airport at proper elevations. Gen.Laws, Act 151a, §§ 2(a, d), 17; Air Commerce Act of 1926, § 6(a), as amended, 49 U.S.C.A. § 176(a).

22. Nuisance ⚷19

Those who own realty located near airport, and who seek to enjoin operation of the airport, on ground that it is a nuisance, must to a reasonable degree yield their desired privacy to the general welfare which is contributed to by the operation of the legitimate business. Gen.Laws, Act 151a, §§ 2(a, d), 17; Air Commerce Act of 1926, § 6(a), as amended, 49 U.S.C.A. § 176(a).

◆

Donald B. Fowler and H. E. Gleason, Turlock, for appellants.

Brown, Brown & Bacon, Ralph M. Brown, William E. Bacon and T. M. Norton, all of Modesto, for respondents.

PER CURIAM.

This appeal is from a judgment enjoining the operation of an airport and awarding damages. After decision by the District Court of Appeal, Third Appellate District, a hearing was granted by this court to give further consideration to the important issues involved. We have concluded that the opinion of the District Court of Appeal, prepared by Mr. Justice Van Dyke, correctly discussed and decided the issues presented. That opinion, with additions and deletions, is adopted as the opinion of this court. As modified, the opinion is as follows:

"Plaintiffs below, more than 50 in number, brought this action against defendants to recover damages by reason of the alleged creation and maintenance of a nuisance through the operation of an airport, and for injunctive relief forbidding the defendants to operate the airport as such. The court, adopting in the main the allegations of the complaint, made the following findings of fact: That since April 19, 1946, plaintiffs were the owners of and resided on real property located close to the airport; that during that period of time the defendants operated the airport, defendants Souza and wife being the owners of the real property on which the airport is located; that in the course of the operation of the airport numerous aircraft of various types taxi, take off, circle, buzz, cruise about, maneuver, glide, climb, bank, turn, stunt and engage in acrobatics, and land on, from, and to said airport; that this aerial activity is continuous and frequent throughout the daylight hours and that the aircraft are operating with the consent, encouragement and solicitation of the defendants; that many of the airplanes so operated belong to defendants and are operated by them; that the airplanes fly over the homes of the plaintiffs at heights varying from 25 to 800 feet and in passing over or near said homes create such a tremendous noise that the same interferes with the lawful use, enjoyment and occupancy of the dwellings to the great disturbance and nervous upset of the plaintiffs; that because of said noises plaintiffs and members of their families are unable to sleep when planes from the airport are operating, to their great physical detriment and mental anguish; that normal conversation is interrupted; that plaintiffs have great difficulties listening to radio programs and in general the enjoyment of their homes is materially decreased; that plaintiffs, knowing that numerous airplane accidents have occurred throughout the country and that several have occurred at the airport, suffer great fear and apprehension when the airplanes pass over their homes at low altitudes; that defendant Earlandson operates a flying school at the airport, and the student pilots using airplanes belonging to Earlandson fly at low altitudes over plaintiffs' homes, but that only six plaintiffs were affected by the conduct of the student pilots and that, as to the six, such conduct placed their lives and property in great jeopardy and caused them to fear greatly for their property, their lives and the lives of their loved ones; that the real property of the same six plaintiffs by reason of said conditions has depreciated in value, but that this was not true as to the other plaintiffs; that plaintiffs have often requested and demanded of defendants that they cease operating the airport and the airplanes in the manner found, but that defendants have continued to operate them in said manner continuously from April, 1946, to the time of trial; that more airplanes are operating from the field each month and that still more airplanes will operate from the field in the future; that defendants by their acts have caused irreparable injury to plaintiffs and that irreparable injury will be done to them in the future if the defendants continue with their acts as found; that none of the plaintiffs have been damaged except the same six and that they have been damaged as follows, V. E. Anderson and wife jointly in the sum of $500, Arvid G. Anderson and wife jointly in the same sum, and Jack Harlan and wife jointly in the same sum; that plaintiffs have no plain, speedy or adequate remedy at law. As conclusions of law from the facts found judgment was ordered: 1. Enjoining and restraining the defendants from operating the airport on the premises described in the complaint; 2. For damages in the sum of $500 to each of the three couples named above. Judgment was entered accordingly. Motion for new trial was made and denied. From the judgment the defendants have taken this appeal.

[1, 2] "We shall discuss the contentions of appellants *seriatim* as they ad-

vance them in their briefs. Appellants first attack the finding of the court that appellants Souza and wife, along with appellant Earlandson, operate the airport. Herein it is claimed on behalf of Souza that it is Earlandson who operates the airport and that Souza, while he owns the property where the airport is located, has leased the airport to Earlandson, and that, therefore, under such cases as Gould v. Stafford, 91 Cal. 146, 27 P. 543, Wiersma v. City of Long Beach, 41 Cal.App.2d 8, 106 P.2d 45, Mundt v. Nowlin, 44 Cal.App.2d 414, 112 P.2d 782, and Meloy v. City of Santa Monica, 124 Cal.App. 622, 12 P.2d 1072, the nuisance complained of is created and maintained by Earlandson alone. These cases lay down the well-known rule that a landlord is not responsible to other parties for the misconduct or injurious acts of his tenant to whom his estate has been leased for a lawful and proper purpose when there is no nuisance or illegal structure upon it at the time of the leasing. We think, however, that in view of the evidence here this rule and the cases declaring it are not controlling, for it was shown that Souza owned the land, constructed the field, obtained the county permit, flew his own plane from and to the field and retained portions of the field's facilities, that is, the hangars and tie-down space for which he collected rent. Earlandson's rights were to operate his flying school, sell gas and repair planes. Earlandson, therefore, was not in sole charge of the field and it is a fair inference from the evidence that Souza at least joined with Earlandson in permitting public use of the field, and, in short, so participated in the operation of the field that the court's findings that he and Earlandson operated the field are substantially supported by the evidence.

[3] "There is next attacked the finding that 'many airplanes' operating from the airport were owned and operated by appellants Souza and Earlandson as being contrary to the evidence. We think this finding is sufficiently supported by Souza's testimony that he owned and operated a plane and by Earlandson's testimony that he owned and operated four airplanes, plus one which he operated for another owner. Whether such numbers constitute many or few is a comparative matter, but Earlandson's planes were shown to have been greatly used in the conduct of his air school and in view of the fact of dual control and operation of the port by the two men we find nothing erroneous in the challenged finding * * *.

"Appellants contend that the court ered in decreeing any judgment either for damages or by way of injunctive relief against defendant Souza. This is but another aspect of the contention previously discussed, which was based upon the theory that Souza, having leased the airport, did not operate the same, and we think separate treatment is unnecessary. What we have said heretofore disposes of this contention.

"Appellants contend that the court erred in allowing one of the respondents to testify from and read verbatim into the record a memorandum he had prepared without requiring, as they contend, a proper foundation therefor to be laid. It appears that the length of time covered by the testimony taken was quite considerable, in fact, several years in extent. The witness had from time to time over a considerable period of time and on observing airplanes flying low over his home or near to it and over his property made notations in whatever way was open to him at the time, consisting of a description of the plane, its numbers and such like matters. He made these notations on scratch paper he may have had with him at the time. Sometimes he entered them upon fence posts and even at times inscribed them on the surface of the ground. He then collected these memoranda and, as he testified, copied the same into more permanent form and either from these latter writings or from other writings copied from them in turn, he was permitted to testify over objections. Section 2047 of the Code of Civil Procedure covers the matter. It provides that a witness is allowed to refresh his memory by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter or while still fresh in his memory, if he knows the same to be correctly stated in the writing. He may also testify from a writing, though he retain no recollection as to the facts, but such evidence must be received with caution * * *.

[4] "An examination of the record discloses that the witness here did make the notations himself and he testified that he made copies of these notations. He was not asked directly either on direct or cross-examination whether he copied them correctly, but when a witness testifies under oath that he made a copy it is going far afield to say that such testimony is not equivalent to saying that he copied the memoranda correctly since it would not be a copy unless it was correct. While it is better, of course, to properly and fully qualify the witness who is to testify from or with the aid of memoranda, nevertheless we do not think that what happened here would justify reversal if, indeed, error at all was committed. As to his reading the memoranda into the record, that is permitted when the code says: 'So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts.' Where proper foundation has been laid the fact that the writing does not refresh the recollection of the witness does not prevent him from testifying from the writing and if his recollection is not refreshed there would be no other way to testify 'from the writing' save to read from it verbatim."

[5, 6] The record does not indicate where the following plaintiffs reside: C. H. Terry, Oma Terry, H. E. Fletcher, Dorothy Fletcher, William T. Harrison, and Grace Harrison. The judgment as to them must therefore be reversed. The judgment must also be reversed as to plaintiffs Frank Baba and Zale Wooters, who testified that they had not authorized institution of this action in their names.

[7] Of the fifty-six plaintiffs, only six testified at the trial. The court denied defendants' motion to nonsuit the plaintiffs who did not testify. The conditions described by the plaintiffs' witnesses were common to all plaintiffs who lived in the immediate vicinity of the airport. The testimony was received in behalf of all the plaintiffs. The six who testified were the plaintiffs' witnesses and the fact that these witnesses were themselves plaintiffs did not limit the benefit of their testimony to themselves alone. The conditions they were describing were to some extent common to all the plaintiffs since it described conditions such as low flying, stunting, indulging in acrobatics and the like which would affect those residents in the immediate vicinity of the airport and there was testimony that placed the other plaintiffs within that radius.

[8] In addition to the injunction abating operation of the airport, the trial court awarded the Harlans, the Arvid Andersons, and the Vern Andersons damages of $500 per couple for the annoyance and discomfort caused by defendants' operations before the institution of the action. Defendants contend that these damages are unsupported by the evidence. The testimony of the Harlans and Andersons, which is set out in detail below, is clearly sufficient to support the awards in their favor. See Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 172, 106 P. 581, 26 L.R.A.,N.S., 183; Alonso v. Hills, 95 Cal.App.2d 778, 787–788, 214 P.2d 50.

[9, 10] The trial court awarded these three couples $500 each for past injuries, but found that all the plaintiffs had suffered irreparable injury and were entitled to injunctive relief. Even though the decree must be reversed as to some plaintiffs, the findings are not necessarily inconsistent. The plaintiffs receiving money damages were the only plaintiffs to give testimony. The annoyance and disturbance caused by low flying airplanes is

very difficult to measure. The other plaintiffs could be injured by the airplanes sufficiently to justify equitable relief, even though their damages could not be measured. By definition, an injunction is properly granted where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." Civ.Code Sec. 3422. The term "irreparable injury" authorizing the interposition of a court of equity by way of injunction means that species of damages whether great or small, that ought not to be submitted to on the one hand or inflicted on the other. Edelman Bros. v. Baikoff, 277 Ill.App. 432. See also Greenfield v. Board of City Planning Commissioners, 6 Cal.App.2d 515, 518, 45 P.2d 219; Espenscheid v. Bauer, 235 Ill. 172, 85 N.E. 230, 232.

> [11] "The final contention made by the appellants is that the court erred in restraining defendants from operating an airport on the premises described in the complaint. This contention presents a difficult problem and to its discussion a fuller statement of facts than has heretofore been made is desirable. The defendant Souza owned 42 acres of land within one mile of the limits of Turlock. In 1946 he discussed with federal authorities the suitability of this land as an airport site. Encouraged by what he was told, he proceeded to lay out a landing strip and by locating a strip diagonally was able to achieve an airstrip 2,000 feet in length, just 200 feet beyond the minimum permitted by the United States Civil Aeronautics Administration. He constructed a strip 300 feet wide, oiling and smoothing the surface of the ground. Along the southerly line of his property and at the southerly end of the strip was a public road. The property bounding his property on the north was owned by the Andersons, their son and his wife, and the Harlans. A great deal of testimony concerning the location of the homes of these respondents and the location thereof with regard to the airport was given, along with the use of a map * * *. One of the Anderson couples does not reside near the airport, but owns an interest in the property of the other Anderson couple. The Anderson home is about 500 feet from the northern boundary of the strip and about 250 feet from the center line of the strip as extended. The Harlan house is about 500 feet from the northern end of the strip and about 300 feet distant from the same center line. North of the Anderson and Harlan properties and 660 feet from the north line of the airfield there is another public road. The public roads mentioned parallel the north and south boundaries of the airfield. Some of the plaintiffs reside northerly of this northernmost road. Bounding a part of the Souza property on the west there is another public road across which lie the residences and property of some of the other respondents. Others bound the field on the east. On the southerly road defendants had signs posted directed to vehicular traffic on the road reading as follows: One sign read, 'Stop, Aircraft Crossing.' There were two of these stop signs, apparently placed to warn vehicular traffic going in either direction upon the road. Between them was a sign reading, 'No Parking Between Signs—Look Out for Low-Flying Aircraft.' A sign directed to aircraft in this same vicinity read, 'All Aircraft Keep 20 to 30 Feet Above the Road.' There is considerable evidence that these warnings were appropriate and that aircraft, in fact, flew over this road onto the airstrip at elevations even below the 20 to 30 feet which the sign requested. The airstrip runs approximately north and south; the generally-prevailing wind is from the north and hence most craft take off in that direction and on the other hand, and for the same reason, generally land from the south. As a part of his construction of the airport Souza invested altogether in land and buildings some $80,000. The value of the homes and residences of the re-

spondents was not the subject of testimony. Although no considerable complaint seems to have been made while the airport was being constructed, the opposition and complaints began very shortly after the field was put in operation. The homes of the respondents were there before the airport was constructed. A flight pattern was laid out, after consultation with the federal authorities, which may be briefly described as follows: A plane taking off into a north wind would rise from the strip and fly over the property beyond its limits until it reached an elevation of approximately 500 feet, at which time it would turn to the west at a right angle, then turn at a right angle south, again turn at a right angle east and then make a landing on the airstrip from the south. The pattern was approximately rectangular. A similar pattern would be followed when a south wind was blowing and the planes took off toward the south, this pattern being the reverse of the one just described. Planes desiring to leave the pattern would make the first right angle turn and then proceed away from the pattern as desired. Incoming planes would fly into the pattern and follow it to a landing. There apparently was no restriction as to the size or type of aircraft permitted to use the field and although the airfield was privately owned, nevertheless, it was available to the flying public. At frequent intervals planes belonging to business enterprises would arrive and depart from the field in pursuit of their private concerns. Souza testified that there were approximately 18 to 20 planes hangared or tied down at the field as a fair average. The testimony as to the frequency of flight ran all the way from 150 flights per day down to 40 or 50. Most of this flying was during the daytime, beginning around 6 o'clock in the morning and continuing into the evening, but there were apparently no time limitations and planes would arrive and depart during the night, makeshift landing lights being provided. It appears that a light plane taking off to the north would become airborne well before reaching the end of the runway. A heavier plane would make a longer run and would sometimes pass between the Harlan and Anderson homes with little altitude. Supportive of the court's findings that a nuisance existed, in addition to what we have already referred to, we select the following testimony which, although contradicted to some extent by witnesses for appellants, yet must here be taken to be true. Mrs. Neva Harlan testified that 45 or 50 planes used the field daily, many of them flying low over her home; that she was unable to rest during the day because of the disturbance; that the noise was so loud she could not understand normal conversation or hear the radio or use the telephone when the planes went over; that night flying awakened her; that the planes kept the family awake and so upset they could not get back to sleep after being awakened; that the children were awakened early in the morning; that when friends visited the noise drowned out conversation. Arvid Anderson, who resided away from the airfield, but owned an interest in his son's property bordering the field on the north, was accustomed to work about the 10-acre farm, of which it consisted. He testified that as he worked the planes sometimes made him so jumpy he had to leave; that he had to be on the constant lookout because they came in so low that it was really dangerous; that once while running a tractor a plane came in so low that he rolled off the tractor because he was sure it was going to strike him; that once a plane zoomed over him so low that he put his pitchfork up and felt sure the fork would hit the plane; that he had noticed planes crossing from the airfield over his property at heights of 10, 15 or 20 feet; that some of the lighter planes went higher, but he had seen the larger planes skim the top of the 6-foot fence posts along his southern boundary; that while he had wanted to put a home for himself on the place he could not do it and could not use the place for poultry or turkeys because of the low flying; he was afraid to live on the place. Irene Anderson, who lived in the Anderson home, testified that she had made a count of the planes flying over on certain dates; that on May 15, 1948, just before the case was tried, 110 came over, on May 16th, 105, on Saturday, May 22d, 101, on Sunday, May 23d, 140; that during weekdays there would be 50 a day; that flights generally began at 6 o'clock and continued until dark; that the planes greatly affected her enjoyment of her home and family life, made her nervous, gave her digestive upsets, scared the children. She said 'We are just helpless, we don't have a home, we are without anything, nothing to fight for; we are just helpless where we are; it has just been Hell'; that she could not enjoy radio programs because of the continual noise; that she couldn't use the telephone, nor enjoy the visit of guests or relatives. She said 'When they come there to see us it is Zoom! Zoom! Zoom! just like that, all the time'; that she was awakened early in the morning and when awakened at night could not get to sleep again; that she had no rest and had no peace at all; that the children were scared many times until they were hysterical and would run into the house screaming and crying; that her whole home was upset; that when the airport started operating she was well. She said 'The noise from the airplanes, when I hear them from the beginning, when they start coming off the runway and into the field, they start the motors up, I hear them, they come closer and closer to the house and I see them and my stomach goes—I don't know, it just goes upside down sometimes, and sometimes I vomit. My stomach feels like the insides are just turned upside down—my health is—what are we going to do?' There was considerable testimony along the same general lines. This record supports the conclusion of the trial court that the operation of the field and the flying of the planes as usually and normally occurring constituted a private nuisance and that in view of the increasing use of the field this nuisance would continue and be aggravated. Both Souza and Earlandson testified that they had continually done all they could to prevent improper flying and it is a fair inference that they either cannot or will not abate the nuisance themselves. This is significant in view of the fact that the action had been filed on August 7, 1947, and the case was tried beginning May 18, 1948.

[12–14] "An airport is not a nuisance *per se,* but that it may become a nuisance either because of unsuitable location or improper operation or both has been clearly decided. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817, 99 A.L.R. 158; 2 C.J.S., Aerial Navigation, § 29, p. 909. Our Legislature in 1947 passed a State Aeronautics Commission Act. It therein declared that, 'Flight in aircraft over the lands and waters of this State is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.' State Aeronautics Com. Act, § 2(d), ch. 1379, Stats. 1947, 1 Deering's Gen.Laws, Act 151a. While this act had not gone into effect when the action before us was begun it went into effect approximately one month thereafter and since the injunctive processes of the court are prospective in operation it was applicable to this feature of the case. The licensing and regulation of airports, subject to federal control, is committed by the act to the State Aeronautics Commission. Nevertheless the licensing of the airport by the commission does not confer the right to so operate the port as to constitute a private nuisance to surrounding property owners.

"'* * * A license granted by a state aeronautics commission for the operation of an airport does not confer upon the proprietor thereof the right to operate it in such a manner as to constitute it a private nuisance.' 2 C.J.S., Aerial Navigation, § 29, p. 909.

"While apparently no formal license had up to the time of trial been granted to this airport, nevertheless since it was operative prior to June 30, 1947, it comes under the so-called 'grandfather clause' of the State Aeronautics Commission Act, Section 17, which provides that 'Airport site approvals shall be granted and airport permits shall be issued for any improved airports in use or ready for use on June 30, 1947.' We shall treat the airport as a licensed or permitted airport.

[15] "Further, as to the effect of regulations concerning flying operations, it has been held that such regulations do not determine the rights of the surface owners as to nuisance. Swetland v. Curtiss Airports Corp., 6 Cir., 55 F.2d 201, 203, 83 A.L.R. 319, a ruling which is in line with the general principle above stated that permits and licenses are not to be considered as granting leave to maintain a private nuisance. It is not controlling that the federal government has declared that the United States of America possesses and exercises complete and exclusive national sovereignty in the air space above the United States, U.S.C.A., title 49, § 176(a), and that our Legislature has said 'It is further declared that sovereignty in the space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the State' State Aeronautics Com. Act, § 2(b), for it must be said that these declarations were not intended to and do not divest owners of the surface of the soil of their lawful rights incident to ownership.

[16] "'There is no definite yardstick that may be used in determining how low an airplane may fly over the property of others in landing or taking off; however, flying at low altitudes incident to landing and taking off may constitute trespass, as it may cause more than mere apprehension of injury. And, extensive low flying, causing unreasonable annoyance to occupants of land below, is a substantial interference with enjoyment of the property.' Brandes v. Mitterling, 67 Ariz. 349, 196 P.2d 464.

[17] "The regulatory provisions of the State Aeronautics Commission Act and the federal laws referred to do not supplant the ancient common law and long-established statute law declaring that nuisances may be abated at the suit of those injured thereby. Restatement of the Law of Torts, section 194, provides:

"'An entry above the surface of the earth, in the air space in the possession of another, by a person who is traveling in an aircraft, is privileged if the flight is conducted

"'(a) for the purpose of travel through the air space or for any other legitimate purpose,

"'(b) in a reasonable manner,

"'(c) at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it, and

"'(d) in conformity with such regulations of the State and federal aeronautical authorities as are in force in the particular State.'

"But:

"'Under the rule stated in this Section, only those flights are privileged which are conducted at such a height as not unreasonably to interfere with the possessory interest in the land. Thus, a flight, although otherwise conducted in a reasonable manner, for a legitimate purpose, and in conformity with all applicable local regulations, if conducted at such a low height as to cause reasonable fear or substantial annoyance to occupants of the land or to frighten cattle or other animals thereon in such a way as to cause them harm, or to endanger the surface of the land, or persons, trees, structures or other things thereon, or to interfere with the possessor's legitimate use of the air space, is not within the privilege.' (Comment on clause (c) of § 194.)

"As illustrative of the general trend of judicial decisions upon the subject hereof see the following: Thrasher v. City of Atlanta, supra (judgment reversed with directions to issue injunction against continued spreading of dust in excessive or unreasonable quantities over adjoining residential property; Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (decree affirmed, upholding injunction against flying below height of 500 feet over residence 2,800 feet from city-controlled, but privately-operated, airport); Mohican & Reena, Inc. v. Tobiasz, 1938 U.S.Av.Rep. 1 (injunction granted at suit of owner of summer camp for children against flying below 1,000 feet within 500 feet of camp); Vanderslice v. Shawn, 26 Del.Ch. 225, 27 A.2d 87 (residents entitled to an injunction against owners of private airport from permitting flights at less than 100 feet of adjacent dwellings); Alhambra Airport case, 13 J. of Air L. & Com. 138 (injunction at suit of taxpayers and board of education prohibiting further use of private airport for pilot training and limiting future use to emergency landings and actual business needs of two aircraft manufacturing plants located at airport); Dlugos [Dlugas] v. United Air Lines Transp. Co., (Ct.Com. Pl. Pa. Lehigh Co., 1944) 53 Pa.Dist. & Co. 402 airline enjoined from operating planes at altitude below 100 feet over plaintiff's fields adjacent to municipal airport, on days when plaintiff engaged in farming such fields, not to exceed 10 days during following year, provided five hours' written notice given airline at its office); Swetland v. Curtiss Airports Corp., supra (airport completely abated by circuit court, notwithstanding refusal of trial court to do so.)

[18] "A further contention is made that the trial court still was not authorized to enjoin the further operation of the airport and necessarily must have limited its injunctive order to prevention of the nuisance existing; that this could be done without forbidding all operation of the airport. Injunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct thereof a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance, unless under the peculiar circumstances of the case the business, lawful in itself, cannot be conducted without creating a nuisance and violating the rights of contiguous property owners. In Vowinckel v. N. Clark & Sons, 216 Cal. 156, 162, 13 P.2d 733, in a case involving a decree ordering defendant to cease operating a number of pottery kilns, the court said:

" 'In the present case the court appears to have given due consideration to the situation of the defendant. This is apparent from the fact that it refused to abate entirely the defendant's operations and granted the relief sought to the extent necessary to preserve the rights of both parties. In other words the court, in the exercise of its equity powers, has compared consequences and has considered the injuries resulting to each party, on the one hand if the injunction be wholly denied, and on the other if it be granted. The court, from the evidence presented, gave heed to the rule that in a proper case it will not enjoin the conduct of the defendant's entire business, where such business is not a nuisance per se, if a less measure of restriction will afford to the plaintiff the relief to which he may be entitled. McMenomy v. Baud, 87 Cal. 134, 26 P. 795; Tuebner v. California St. R. R. Co., 66 Cal. 171, 4 P. 1162; Williams v. Blue Bird Laundry [Co.] [supra, 85 Cal.App. 388, 258 P. 484]; McIntosh v. Brimmer [supra], 68 Cal.App. 770, 230 P. 203.'

"In this case it is apparent from the memorandum opinion written by the able trial judge, on motion for new trial, that it was his conclusion nothing short of complete abatement would preserve the rights of respondents and he attributed this principally to the shortness of the runway. The learntrial judge said:

" 'The third contention, that the injunction was too broad, is a more difficult question. Ordinarily it is true that a lawful act should not be enjoined; that all that should be enjoined is the commission of the act in such a way as to constitute a nuisance; in other words, that only the nuisance should be enjoined. Under that interpretation, defendants ask to be allowed to continue operations provided they commit no nuisance. But in the Court's opinion, that is impossible. The continued operation of that field in its present condition, according to the evidence, must inevitably result in continuance of the nuisance. The field is entirely too small to avoid the nuisance; and the runway is too close to the homes of some of the plaintiffs.'

[19] "Pertinent to the problem now being discussed is the nature of the airfield involved. It is a private airfield which cannot exercise the power of condemnation and the establishment of which requires no finding by any public agency of public convenience and necessity. The owners and operators of such an airport, notwithstanding they are engaged in a legitimate business, the encouragement and furtherance of which is a publicly-declared policy of our Legislature (State Aeronautics Com.Act, § 2(a)) [see also Deering's General Laws, Acts 153c and 153e] must nevertheless conduct it with due regard for the rights of others, and if because of location the operation of such a business will result in depriving others of their property rights, it cannot be permitted, for to do so would, in practical effect, condemn the property of others in violation of constitutional guarantees. Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436.

"The distinction between a public and private use as regards the use of injunctive process is pointed out in New York City v. Pine, 185 U.S. 93, 22 S.Ct. 592, 46 L.Ed. 820, wherein the Supreme Court of the United States recognized the principle that, where the defendant in an injunction suit has the ultimate right, that is to say, where it is entitled to continue with its work by eminent domain proceedings, a permanent injunction will be denied, but a temporary injunction may be granted to compel the defendant to make compensation. The State Aeronautics Commission Act contemplates the furtherance of aviation, with its manifold benefits to the public, by operation of both public and private fields, but with respect to the public fields it provides for their establishment by counties, cities and other municipal agencies, requires the finding of public convenience and necessity and contemplates the use of the power of condemnation. No such power is given or could be given to those putting their property to private use, even though incidentally the general purposes of the act are thereby subserved. We conclude there is nothing to distinguish a private airport from any other private business with regard to enjoining operations which create a nuisance.

"However, we are still confronted with the final question of whether or not the record here and the findings of the trial court itself support the issuance of the decree completely forbidding the continued use of the property involved as an airfield.

[20] "The allegations in the complaint which have been heretofore stated indicate clearly that it is the way in which the flying has been done that constitutes the nuisance complained of. Considering these allegations, the following things must be said: That buzzing, stunting and engaging in acrobatics can be prohibited without difficulty. The allegations that planes taxi, take off, circle, cruise about, maneuver, glide, climb, bank and turn are descriptions of ordinary and necessary actions in flying a plane, not objectionable unless conducted in such close proximity to plaintiffs' homes as to constitute a nuisance. It is the way they are being done and not the doing of them in and of itself which is the cause for complaint. It is the doing of these things as such low altitudes and in such close proximity to plaintiffs' homes and property that is the gravamen of the cause. Limits could be placed upon the doing of these acts which would eliminate the nuisance. Plaintiffs also plead that 'the only available remedy to Plaintiffs, * * * is a permanent injunction restraining the Defendants permanently from operating the said airport as an airport,' but this is said to be necessary 'because of the peculiar acts of the Defendants.' While all these allegations were found to be true by the trial court we think that neither the pleadings nor the findings justify the complete abatement of the enterprise; and that the testimony does not support the extreme decree granted."

[21] Defendants maintained throughout the case that their ordinary operations did not constitute a nuisance and therefore offered no evidence or suggestions as to how the airport could be operated without constituting a nuisance. Although they were in error in concluding that their operations did not constitute a nuisance, the burden was on plaintiffs who sought to close the airport to prove that no planes could fly to and from the field at proper elevations.

[22] "No witness testified planes could not fly to and from the field and still fly at such elevations as would eliminate the nuisance factor which now exists. Contiguous property owners must to a reasonable degree yield their desired privacy to the general welfare which is contributed to by the operation of legitimate businesses. Were it not so, railroads could not operate near residences, and factories could not be established without the necessity of purchasing prohibitively large areas of property. That reasonable inconvenience must be suffered by owners whose holdings are contiguous to commercial enterprises is too well decided to require citation of authorities. The evidence shows that the length of the runway here, while approximating the lowest limit fixed by federal authority, yet does exceed that limit. We are aware that airplanes necessarily ascend and descend on rising and descending planes and that where a runway is too short to permit them to ascend or descend over contiguous property without invading the lawful right of the surface owner to the air above his holdings their flight would constitute an unlawful act. Nevertheless there is no testimony here that the runway is so short that no planes could lawfully operate from the field. That such was the situation in the opinion of the learned trial judge appears from that part of his written opinion which we have quoted, but the evidence does not sustain that position. We think, therefore, that upon this record here, considering the evidence, the pleadings and the findings, the decree rendered went beyond permissible limits. It may be that the imposition of appropriate limitations will, by reason of the shortness of the runway, and the prevailing flying conditions, make it impossible for the airfield to be operated in a normal and usual manner, but that has not been shown; and until it is the injunction forbidding all operations from the field cannot be sustained. It may be difficult, but we think it is not impossible for the trial court either upon the evidence now in the record, or to be taken, to frame a decree which will eliminate the nuisance that has been shown to exist * * *." For example, flight over the homes of plaintiffs at elevations below those set by federal authority could be forbidden; flight by flyers

unable to comply with such a regulation by reason of inexperience could be forbidden; use of the airport by any type or size of aircraft for which the court on competent evidence finds the airport inadequate, could be forbidden; flight except during daylight hours could be forbidden if necessary; if defendants cannot comply witth such restrictions all operations from the field could be forbidden. Complete abatement of the enterprise is undoubtedly the result plaintiffs desire, but, in the absence of a showing that the airport and flying school could not be operated in such a way as not to constitute a nuisance, complete abatement is beyond the rights of plaintiffs.

The advance of aeronautical science may make use of the field possible without injury to plaintiffs, by aircraft that can operate without making unduly low and noisy flights. Defendants may acquire additional land and extend their runway. Upon a proper showing of changed circumstances, the trial court may modify or dissolve the injunction. Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 113 P.2d 689; see cases collected in 28 Am.Jur. 485–495.

The judgment for damages is affirmed. The judgment is reversed as to plaintiffs C. H. Terry, Oma Terry, H. E. Fletcher, Dorothy Fletcher, William T. Harrison, Grace Harrison, Frank Baba, and Zale Wooters. That part of the judgment enjoining and restraining the defendants from operating the airport on the premises is reversed and the cause is remanded to the trial court for further proceedings in harmony with the views expressed in this opinion. Costs are awarded to plaintiffs.

SCHAUER, Justice (concurring and dissenting).

I concur in the reversal of the judgment as to plaintiffs Terry, Fletcher, Harrison, Baba and Wooters, and in the reversal of the part of the judgment which restrains defendants from operating the airport. I agree that the cause should be remanded for further proceedings in accord with the view that "Contiguous property owners must to a reasonable degree yield their desired privacy to the general welfare which is contributed to by the operation of legitimate businesses. Were it not so, railroads could not operate near residences, and factories could not be established without the necessity of purchasing prohibitively large areas of property. That reasonable inconvenience must be suffered by owners whose holdings are contiguous to commercial enterprises is too well decided to require citation of authorities."

An airport is just as lawful, just as much in the public interest and as necessary for its convenience, as a garage or a service station, and a school of aeronautics is just as lawful and serves the public interest as truly as any other school which teaches a useful art or science or craft. Such activities may constitute "a substantial interference with enjoyment of the property" which is in proximity to the places where they are carried on, but it is only an interference which is unreasonable under all the circumstances that can be enjoined. (See e. g., Nagel v. Dorrington (1927), 202 Cal. 698, 700, 262 P. 718, refusing to enjoin operation of garage and service station in the absence of a showing that "it is operated in some extraordinary manner so as to be a nuisance because of such operation.")

I dissent from the affirmance of the judgment for damages against Souza, owner of the airstrip, and his wife. In my opinion the evidence does not support the findings that the Souzas operated the airport and that Souza operated "many" planes from it. Souza testified that he did not operate the airport; that he had leased it to Earlandson, who, under the terms of the lease, had the exclusive right to operate it. Mr. Souza collected rent from Earlandson and from the owners of some 18 planes which were kept at the field. There is no evidence that Souza controlled the operation of these planes which regularly occupied space at the airport or that these particular planes were operated in a manner which was legitimately objectionable to any plaintiff. Souza did not lease the land for any improper purpose; he leased it for the lawful, useful purposes of the operation of a flying school, the storing of planes, and the servicing of planes which used the field. Souza did not operate "many" planes; he owned and operated only one plane and there is no evidence that he himself ever used his airport or his airplane unlawfully or in such a manner as to interfere with any plaintiff's use and enjoyment of plaintiffs' land.

Would it be reasonable to hold that the owner of property used as a garage, for the storing and repair of automobiles, is to be liable for damages and for abatement of the use of his property if owners of the automobiles stored or serviced at his garage drive them on the highways in such a manner as to violate the law and constitute a nuisance? If the owner of garage property is not to be held to such an extended degree of responsibility for the independent acts of his patrons then neither should the owner of an airport. The liability here of Mr. and Mrs. Souza rests on no better foundation.

It is relatively but a few years since courts—and, of course, the citizenry at large who brought the cases to court—were struggling with a new concept: the use of public highways by self-propelled vehicles. Illustrative of the difficulties encountered then is Nason v. West (1900), 31 Misc. 583, 65 N.Y.S. 651, 652-653, an action for damages which resulted when plaintiffs' horse was frightened by defendant's carefully driven motor carriage. The court said: "It will not do to say that it is proper to run any kind of a contrivance upon the street, in which persons may be carried. A machine that would go puffing and snorting through the streets, trailing clouds of steam and smoke, might be a nuisance; but this is not such a case. It cannot be said that the defendant's machine is such a departure in its construction or mode of operation from other steam motor carriages, which experience has lately shown to be entirely practicable for street use, as to make it a nuisance, although because of the present novelty of horseless carriages, horses may take fright at its approach." Judgment for the plaintiffs was reversed.

The thought that privately owned automobiles might be generally barred from public highways is now archaic. So also is the thought that privately owned surface vessels might be generally barred from the use of navigable waters. But there are still many people who have not yet accepted the concept that the navigable sea of the air is a public domain and that "Flight in aircraft over the lands and waters of this state is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath." (State Aeronautics Com.Act, § 2(d), ch. 1379, Stats.1947, 1 Deering's Gen.Laws, Act 151a.) Only a couple of decades ago pilots often heard the statement (which almost became an adage) that "One doesn't have to be crazy to fly but it helps." There are people who still believe this. But the magnificent records of safe, speedy and comfortable transportation through the use of airplanes, made by both airline companies and conservative private owners, have disproved the "adage."

The published records of the Civil Aeronautics Authority disclose that (as of February 1, 1952) there were 88,275 civil aircraft registered in the United States, of which 1,258 were scheduled air carrier aircraft and 87,017 were privately owned and operated in other than scheduled air carrier operations. Every one of these 88,275 airplanes must have airports from and to which to operate; the utility of each can be no greater than the available take off and landing facilities. By reason of size, weight and other limitations, the 1,258 scheduled air carrier aircraft are limited to the use of relatively very large and highly improved airports but the great majority of the 87,017 privately owned and operated airplanes are built to take off and land on much smaller fields. The loss of any approved and established airport—small or large—is a loss to the people of the entire state. As declared in "California Airport Study" (1950), prepared by the California Aeronautics Commission,

> "Aviation's part in California's growth is large. The State has accepted the aircraft as an important means of transportation, and as a new tool of agriculture. Airports must be provided on a permanent and equitable

basis. Detailed study of the inventory of the State's airports and careful consideration of the specific needs of the various counties and cities, individually and collectively, leads to certain broad conclusions. These are:

"An airport is a part of a state-wide transportation system and serves all of the people of the State—not just those who live in the immediate vicinity of the terminal.

"The 'highway *system* of the air' will not give full service nor show adequate returns until it is completed.

"To keep California abreast of national progress a definite, integrated, program must be instituted to establish the system.

"The problem confronting the people of the State of California at the present time is the establishment of a System of airports on a permanent basis in order to realize the full benefit to be derived from aviation.

"The terrain will force the use of the airplane for rapid and economic travel in many areas. The distances between the State's major areas of population will demand transportation means faster than can be accomplished on the surface.

"Many airports are needed to adequately serve populated areas.

"Airports are needed to give access to the many fine existing recreational areas, and to develop others that are not otherwise accessible.

"Isolated airports are required to complete the system.

"Some airports are needed to save lives."

Returning more particularly to the law applicable to this case I would emphasize that neither noise alone (see Smith v. New England Aircraft Co. (1930), 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300, 306; Delta Air Corp. v. Kersey (1942), 193 Ga. 862, 20 S.E.2d 245, 140 A.L.R. 1352, 1356; Crew v. Gallagher (1948), 358 Pa. 541, 548, 58 A. 2d 179), nor mere apprehension of danger of falling airplanes (see Thrasher v. City of Atlanta (1934), 178 Ga. 514, 173 S.E. 817, 99 A.L.R. 158, 163; Batcheller v. Com. ex rel. Rector and Visitors (1940), 176 Va. 109, 117, 10 S.E.2d 529)—the two elements of which particular complaint is made in the testimony of those plaintiffs who took the stand in support of the allegations of the complaint—are sufficient grounds for enjoining the operation of an airport.

In the state of the evidence here I would hold that the Souzas are within the rule of such cases as Meloy v. City of Santa Monica (1932), 124 Cal.App. 622, 627, 12 P.2d 1072, and Mundt v. Nowlin (1941), 44 Cal.App.2d 414, 416, 112 P.2d 782, that a landlord is not liable for a nuisance created by lessees who have leased the land for lawful and proper purposes. It was not shown that a nuisance is a necessary consequence of the operation of the flying school and airport here. The lessor should not be liable for their operation in a manner which he did not contemplate and to which he did not consent.

Earlandson states that he has no objection to any unlawful or improper actions being enjoined. Earlandson is liable only for unlawful use of the airport which he could control. Since there is evidence tending to show that planes of Earlandson's flying school, inferentially controlled by him, often passed over the land of plaintiffs at unnecessarily low altitudes when taking off, the finding against Earlandson on this point can be upheld, but the relief adjudged against him should go no further than the ends of equity, upon the proof, may require.

CARTER, Justice.

I dissent.

I agree with everything in the majority opinion of this court *except* its conclusion that a permanent injunction should not have been granted. The trial judge who heard the evidence, saw the witnesses, and viewed the maps and photographs, was of the opinion that the airfield could not be so operated that it would not constitute a continuing nuisance as to plaintiffs.

Inherent in the majority opinion is the premise that plaintiffs had clearly shown that a nuisance existed as it undoubtedly did and will continue to exist. The trial court was of the opinion that the continued operation of the field "in *its* present condition, according to the evidence, (note that it was not *only* the manner in which the planes were operated) must *inevitably* result in continuance of the nuisance. *The field is entirely too small* to avoid the nuisance; and the runway is too close to the homes of some of the plaintiffs." (Emphasis added.) Having heard the evidence, the trial judge was in a position to know that a permanent injunction was necessary to preserve the rights of these plaintiffs. A majority of this court, however, feels that this is much too drastic a step and reverses that portion of the judgment.

The landing strip on the airfield is laid out *diagonally*. The airstrip is 2,000 feet in length, just 200 feet beyond the minimum permitted by the United States Civil Aeronautics Administration. The majority states that there is no testimony to show that the runway is so short that planes could not lawfully operate from the field. Apparently the testimony was all to the effect that no planes *did* lawfully operate from the field and it is stated by a majority of this court that although defendants testified "that they had continually done all they could to prevent improper flying * * * it is a fair inference that they either *cannot* or will not abate the nuisance themselves. This is significant in view of the fact that the action had been filed on August 7, 1947, and the case was tried beginning May 18, 1948." (Emphasis added.) It is conceded that a nuisance existed; that the plaintiffs proved their case, but the judgment granting a permanent injunction is reversed. The reason assigned for this conclusion is that plaintiffs have not shown that it is impossible for the airfield to be "operated in a normal and usual manner." If this is stated in another way, it means that plaintiffs are required to prove what defendants *should* be required to prove: *That the airport can be so operated as not to create a nuisance.* The injunction having been granted, it appears to me that it is now up to the defendants to prove that they are prepared to so operate their admittedly lawful business as to comply with the regulations this court has decided will constitute a lawful operation thereof. For example, "flight over the homes of plaintiffs at elevations below those set by federal authority *could* be forbidden; flight by flyers unable to comply with such a regulation by reason of inexperience *could* be forbidden; use of the airport by any type or size of aircraft for which the court on competent evidence finds the airport inadequate, *could* be forbidden; flight except during daylight hours *could* be forbidden if necessary"; and "the advance of aeronautical science *may* make use of the field possible without injury to plaintiffs * * * defendants *may* acquire additional land and extend their runway." *And,* as a complete answer, it is stated that "*upon a proper showing of changed circumstances,* the trial court *may modify or dissolve* the injunction"—this undoubtedly refers to the "further proceedings in harmony with the views expressed in the (majority) opinion." (Emphasis added.)

It appears to me that under the "views expressed," plaintiffs now must show defendants how to try to lawfully operate their airfield. Then, if the nuisance continues to exist, they must again go to court, prove the existence of the nuisance and receive money damages and a permanent injunction which would, in turn, probably be again reversed by a majority of this court. Up until now, it had always been my understanding that a single suit in equity took the place of many successive suits at law for damages with the court of equity ending by injunction the violation of the plaintiff's rights which, together with recovery of damages sustained, settled the entire controversy in a *single* suit. Damages are clearly inadequate here; a permanent injunction is the only thing which will give plaintiffs the relief they seek, and the only thing which will prevent a multiplicity of suits.

It appears to be that the result reached by a majority of this court is in direct conflict with the usual procedure. It is uniformly recognized that where a final or permanent injunction has been granted, the court *which granted it* may dissolve or modify it where changes in circumstances or conditions warrant it, Santa Rita Oil Co. v. State Board of Equalization, 112 Mont. 359, 116 P.2d 1012, 136 A.L.R. 757; Ladner v. Siegel, 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172; Washington Water Power Co. v. City of Coeur D'Alene, D.C. Idaho, 24 F.Supp. 790; Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 113 P.2d 689; Kelley v. Earle, 325 Pa. 337, 190 A. 140; Hodges v. Snyder, 45 S.D. 149, 186 N.W. 867, 25 A.L.R. 1128, Id., 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819; Equity, de Funiak, § 8, p. 19.

In the Sontag case, 18 Cal.2d at page 94, 113 P.2d at page 690, this court in discussing a permanent injunction had this to say: "This is so because the decree, although purporting on its face to be permanent, is in essence of an executory or continuing nature, creating no right but merely assuming to protect a right from unlawful and injurious interference. Such a decree, it has uniformly been held, is always subject, upon a proper showing, to modification or dissolution by the court which rendered it. The court's power in this respect is an inherent one." This would appear to be particularly applicable to the instant case. When, and if, the defendants can show that they are able to so operate their airfield as to respect plaintiffs' property rights, then the court which granted the injunction may modify or dissolve it. This procedure places the burden where it belongs—on the ones who have created, and who continue to create, the nuisance complained of. The numerous ways in which the airport could be operated so as not to interfere with plaintiffs' rights (as pointed out in the majority opinion, and which I have heretofore set forth) would seem to be innovations which defendants could put into practice *before* applying for modification or dissolution of the injunction. In effect, the majority says to plaintiffs: You have proven sufficient facts to show that the manner in which defendants have operated their airport constitutes a nuisance, and you have been damaged thereby, but defendants may be able to change their method of operation so as to eliminate the objectionable features and thereby discontinue the nuisance. Therefore, without any assurance that defendants will do so, we will deprive you of the protection afforded by the injunction and will force you to again apply to the trial court for such protection, and if the trial court grants it, we may again reverse the judgment, in the hope that defendants may, at some time in the future, change their method of operation so as to make their operation lawful. This may continue ad infinitum.

The holding of the majority in this case marks a clear departure from the settled course of procedure, as it places the burden on plaintiffs to press their claim for relief or suffer from the continuance of the nuisance. As I have hereinabove pointed out, if the injunctive provisions of the instant judgment are affirmed, defendants are not thereby prevented from so changing their method of operation as to eliminate the nuisance, if this can be done. At such time they may apply to the court for such relief as they may be entitled to receive. In the meantime, plaintiffs are protected from the continuance of the nuisance and the consequent damage to their property which the injunction was issued to prevent.

For the foregoing reasons, I would affirm the judgment.

38 Cal.2d 853

HOUSING AUTHORITY OF CITY OF LOS ANGELES v. CITY OF LOS ANGELES et al.

L. A. 22211.

Supreme Court of California, in Bank.
April 28, 1952.

Rehearing Denied May 19, 1952.

Proceeding in mandamus by the Housing Authority of the City of Los Angeles against the City of Los Angeles and others to compel the city to perform specified acts contemplated by cooperation agreement of the parties, and for other appropriate relief. The Supreme Court, Shenk, J., held that where the city had adopted a low-rent housing project and had entered into a co-operation agreement with the housing authority, the city could not thereafter rescind the prior approval and abrogate the cooperation agreement.

Peremptory writ of mandate issued.

1. Municipal Corporations 🔑54

A city under the Housing Authorities Law is an agency of the state functioning under state law to fulfill state purposes and is not acting pursuant to its fundamental law to effect solely municipal objectives. Health and Safety Code, §§ 34200 et seq., 34500 et seq.

2. Municipal Corporations 🔑1, 54

Housing authority of city and the city are separate bodies politic vested with specific duties and powers to effect a state objective and neither is functioning independently of the Housing Authorities Law and the Housing Cooperation Law, and both function as administrative arms of state in pursuing state concern and effecting legislative objectives. Health and Safety Code, §§ 34200 et seq., 34500 et seq.

3. Municipal Corporations 🔑313

Where the city of Los Angeles was given discretionary power to determine initially the need for housing authority to function and to give approval to low-rent housing project, after adoption by the city of the housing program and exercise thereof pursuant to the co-operation agreement which was required under the Federal Housing Act, the city and the housing authority had nothing left to do, but to perform administrative duties, and thereafter the city could not refuse to co-operate and thereby decline to exercise its power to effect completion of the project, except as might be otherwise specifically provided for by statute under which it was operating. United States Housing Act of 1937, § 15(7)(b), 42 U.S.C.A. § 1415(7)(b); Health and Safety Code, § 34320.

4. Municipal Corporations 🔑313

Where the City of Los Angeles adopted a low rent housing program and authorized housing and slum clearance contracts, and construction thereof had been in operation for a period of two years, the city could not withdraw or modify the agreement except by express legislative authority. United States Housing Act of 1937, § 1 et seq., 42 U.S.C.A. § 1401 et seq.; Health and Safety Code, §§ 34200 et seq., 34500 et seq.

5. Municipal Corporations 🔑313

Where federal statutes prohibited authorization of construction of projects initiated before or after certain date in any locality in which projects have been or may thereafter be rejected by the governing body of the locality, unless the projects have been subsequently approved by the same procedure through which the rejection was expressed, statutes were dealing with the authority of the federal agency and did not validate an action by the city of Los Angeles which attempted to rescind prior authorization of construction of a housing program, which was invalid under state law. Independent Offices Appropriation Act, 1952, § 101, 42 U.S.C.A. § 1411a; United States Housing Act of 1937, § 1 et seq., 42 U.S.C.A. 1401 et seq.; Health and Safety Code, §§ 34200 et seq., 34500 et seq.

6. Municipal Corporations 🔑313

Under statute providing that the city of Los Angeles may within its discretion determine the local need for the functioning of a housing authority created by a state act, upon determining that there is such a need and adopting a co-operation agreement with the state and federal authorities to create such a housing development, statutory provisions impose duty upon the city to perform the administrative acts contemplated by the state legislative action in a matter of state concern, and the policy of that law is not a matter of judicial concern or control, and contracts entered into by the city and state authority are to be enforced as a matter of public policy. United States Housing Act of 1937, § 1 et seq., 42 U.S.C.A. 1401 et seq.; Health and Safety Code, §§ 34200 et seq., 34240, 34500 et seq.

◆

Faries & McDowell, McIntyre Faries, Stanley A. Furman, Leonard S. Janofsky, Loeb & Loeb and Herman F. Selvin, Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., William H. Neal, John L. Flynn, and Bourke Jones, Asst. City Attys., Weldon L. Weber, Deputy City Atty., Joseph Scott, Frank P. Doherty, Oscar A. Trippet, Kenneth K. Wright and Bodkin, Breslin & Luddy, Los Angeles, for respondents.

SHENK, Justice.

By this proceeding in mandamus the Housing Authority of the City of Los Angeles seeks to compel the City of Los Angeles to perform specified acts contemplated by the cooperation agreement entered into between them pursuant to the Housing Authorities Law, § 34200 et seq. Health and Safety Code, and the Housing Cooperation Law, § 34500 et seq., Health and Safety Code, and for such other relief as may be deemed proper. The matter is submitted on an agreed statement of facts.

The controversy arises by reason of certain action taken by the city council on December 26, 1951, whereby it purported to rescind the prior approval of a low-rent housing project and to abrogate the cooperation agreement entered into in all respects in accordance with law. Subsequently the city refused to perform any of the terms or obligations of the agreement. The facts antecedent to that action are in substance the following:

A resolution adopted by the city council on June 2, 1938, declared the need for a housing authority to function in the city. The Housing Authority of the City of Los Angeles thereby came into being as a body corporate and politic pursuant to the Housing Authorities Law.

On August 8, 1949, Ordinance No. 95,222 was adopted[1] by the unanimous vote of the members of the City Council. By the ordinance it was declared that there existed in the city unsafe and insanitary dwelling units greatly in excess of 10,000; and that there were greatly in excess of 10,000 families of low income who were forced to occupy unsafe and insanitary accommodations because private industry had not been able to make available safe and sanitary dwellings at rentals they could afford to pay. The City Council thereby approved the development, construction and operation of a low-rent housing project consisting of approximately 10,000 dwelling units, and the application of the housing authority to the Public Housing Administration of the United States for a preliminary loan to make plans and surveys. By the ordinance the city was authorized to enter into the cooperation agreement with the Housing Authority. The agreement was written into the ordinance and was executed on August 9, 1949. It referred to the 10,000 unit project. It was expressly exclusive of ten prior projects as to which the city had theretofore executed cooperation agreements and which, it is assumed, have been or are being carried out. It expressed approval of applications to the Public Housing Administration of the United States for preliminary loans and for annual contributions on the 10,000 unit project.

On August 10, 1949, the application for reservation of urban low-rent public housing and for the preliminary loan was submitted to the public housing administration of the United States. On August 17, 1949, the application was accepted and a program reservation issued covering 10,000 dwelling units. A preliminary loan contract was entered into between the housing authority and the federal administration on December 2, 1949. The same contracting parties signed annual contributions contracts on

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[1] Any question of the due adoption of the ordinance because it was not first submitted to the city planning commission has been settled adversely to the contentions of the plaintiff taxpayers in Drake v. City of Los Angeles, Cal., 243 P.2d 525.

October 27, 1950, and November 7, 1950, providing for loans not in excess of $44,694,800 to assist in the development of the project. Advances to the housing authority under these instruments to date aggregate approximately $12,000,000 evidenced by notes outstanding and unpaid.

The housing authority employed architects, engineers, and attorneys; investigated and selected tentative sites, made surveys, and obtained reports from the planning department; submitted reports to the city council which, after reference to the Veterans' Affairs and Housing Committee, were approved; instituted proceedings to acquire the sites and obtained conditional use permits as to some; made contracts for architectural and engineering services under which there has been substantial performance; let a construction contract on one project, and opened bids for construction on another—in connection with all of which the housing authority has expended large sums of money and incurred further substantial obligations. The housing authority collaborated with the various city departments and voluminous exhibits are presented showing cooperative action by the city council including instructions to other city departments to collaborate with the housing authority.

On December 29, 1950, certain taxpayers commenced an action for an injunction to restrain the city and the housing authority from developing, constructing or acquiring the housing project involved until approval had been obtained from a majority of the qualified electors of the city at an election for that purpose, and in conformity with certain requirements of the city charter. See Drake v. City of Los Angeles, Cal., 243 P.2d 525. In that action, on March 16, 1951, a judgment was rendered for the defendants on their demurrer to the complaint and an appeal was taken by the plaintiffs.

On March 22, 1951, the city council by resolution authorized a contract between the city and the housing authority whereby the city agreed to acquire and to sell and the housing authority agreed to purchase on specified terms tax deeded lands within the project areas. Pursuant to the contract the city acquired 468 of the unredeemed tax deeded lots and parcels.

Under the cooperation agreement the city agreed to cooperate with the housing authority by vacating streets, roads, and alleys within the areas necessary in the development of the project, to accept dedication of land for new streets and to zone or re-zone areas as might be necessary in connection with development and construction.

Between May 28, 1951, and November 1, 1951, the housing authority made various requests to the city to take the necessary action to vacate streets within the areas of the selected sites. In accord with the opinion of the city attorney that the city was legally obligated to take appropriate action, the city council on November 30, 1951, declared by resolution that the streets in such areas be closed. This was the course employed pending the enactment of ordinances. In the case of one area the council adopted an ordinance of intention to vacate streets and fixed a date for hearing, subsequently postponed.

On December 3, 1951, the city council by a margin of one vote adopted a motion that the housing authority be requested to desist from furtherance of the housing program pending a report from the City Administrator and the return of Mayor Bowron, and requested advice from the City Attorney as to the legal steps to be taken to stop the housing program until it should be submitted to the electors of the city.

On December 11, 1951, a resolution introduced and seconded was referred to the Committees of the City Council on Veterans' Affairs and Housing and on Finance jointly for report. That resolution evidenced a purpose to abandon the undertaking, development and administration of the 10,000 unit housing program; to abrogate and cancel the cooperation agreement of August 9, 1949; to rescind all action taken thereunder and to set aside the council's approvals given as required by the state and federal housing acts. Pending final action thereon the council also issued requests to various officers, boards and departments and to the housing authority to halt furtherance of the project.

On December 18, 1951, the District Court of Appeal, Second District, Division Three, affirmed the judgment for the defendants in Drake v. City of Los Angeles, Cal. App., 238 P.2d 1062. On December 26, 1951, without receiving the awaited reports the council adopted the pending resolution by a vote of eight to seven. On the same day the petition herein was filed. On January 2, 1952, in a message to the council, the mayor recorded his disapproval of the action.

On January 3, 1952, the city council adopted a report of the Charter and Administrative Committee recommending that the city attorney prepare a resolution which would submit to a vote of the people the question whether the 10,000 unit housing program, rescinded by the council, should be reinstated. On January 17, the council adopted a resolution requesting consolidation of a special election to that end with the state primary election on June 3, 1952. The presentation of the resolution to effect the election call and consolidation has been withheld pending the outcome in the present proceeding.

The petition for the writ of mandate and the stipulated facts show that the city has refused to continue performance under the cooperation and the other agreements. Specifically the city has refused to deed to the housing authority the lands acquired for that purpose or to acquire the remaining unredeemed parcels in the area; has refused to continue with the proceedings to vacate and close streets in the area; has refused to withdraw the cessation requests made to the various city departments; and has declined to take any other cooperative action necessary in the development of the project.

The petitioner Housing Authority takes the position that the city has duties and obligations under the statute and the cooperation agreement and that the court should direct performance. The city on the other hand contends that there is no mandatory duty imposed on it under the statute or the cooperation agreement.

The matter presents to this court the question whether the city had the right to rescind the approval of the projects and to abrogate the cooperation agreement under which it had pursued the obligations thereby assumed for a period of over two years. Counsel for the city rely on the absence of any express provision in the state housing authorities law making performance of the cooperation agreement mandatory, as support for the contention that the law imposes no duty of performance. The contention is also advanced that the city had the power to rescind by virtue of a proviso added in August, 1951, to the Independent Offices Appropriation Act, applicable to the fiscal year ending June 30, 1952. Public Law 137, 82nd Cong., 1st Sess., Ch. 376, 42 U.S.C.A. § 1411a.

The constitutional validity of the United States Housing Act of 1937 is recognized as settled. City of Cleveland v. United States, 323 U.S. 329, 65 S.Ct. 280, 89 L.Ed. 274; Housing Authority v. Superior Court, 35 Cal.2d 550, 557, 219 P.2d 457. No question arises as to the validity of the Housing Authorities Law or of the Cooperation Agreement Law. The constitutionality of those enactments has been determined by prior decisions of this court. Housing Authority v. Dockweiler, 1939, 14 Cal.2d 437, 94 P.2d 794; Kleiber v. City and County of San Francisco, 1941, 18 Cal.2d 718, 117 P.2d 657; Housing Authority of the City of Eureka v. Superior Court, supra, 1950, 35 Cal.2d 550, 219 P.2d 457.

The declarations of policy and the general provisions contained in the federal and state acts are reviewed extensively in the prior cases which determined the matters of constitutional validity.

[1, 2] The federal slum clearance and low-rent housing act, designed to employ funds and credit of the United States to assist the several states and their political subdivisions in achieving the declared policy, was enacted in 1937. Sept. 1, 1937, c. 896, 50 Stat. 888, Title 42 U.S.C.A. § 1401 et seq. Our state legislature meeting in extraordinary session in 1938 enacted the Housing Authorities Law, Stats.1938, Ex.Sess., p. 9, as amended; now sec. 34200 et seq. of the Health and Safety Code, and the Housing Cooperation Law, Stats.1938,

Ex.Sess., p. 2, as amended, now sec. 34500 et seq. Health and Safety Code, in order to afford the means for utilizing the benefits available under the United States Housing Act of 1937 by receipt of federal loans for repayment through operation of completed projects. The legislature found that there was in existence in this state insanitary and unsafe dwelling accommodations in which persons with low income were forced to reside; that the conditions caused increase and spread of disease and crime and were a menace to the health, safety and economic welfare of the state which could not be relieved through the operation of private industry; that the amelioration of such conditions and the use of public funds for the purpose was a governmental function of state concern; and that it was also in the public interest to have the act immediately effective to relieve the then existing unemployment emergency. In the same year through action of the city council, the "Housing Authority of the City of Los Angeles" was organized to function as the creature, however, of the state legislative action. Section 4 of the Act, § 34240, Health and Safety Code. The housing authority was thereby created as a state agency, "a public body corporate and politic" and is not an agent of the city in which it functions. Similarly the city under the Housing Authorities Law is an agency of the state, functioning under state law to fulfill state purposes, and is not acting pursuant to its fundamental law to effect solely municipal objectives. Housing Authority v. Superior Court, supra, 35 Cal.2d 550, 558, 219 P.2d 457; Kleiber v. City and County of San Francisco, supra, 18 Cal.2d 718, 724–725, 117 P.2d 657. Each functioning body, the city and the housing authority, is a separate body politic vested with specific duties and powers under the Housing Authorities Law and Housing Cooperation Law to effect a state objective. Neither is functioning independently of that state law. In pursuing the state objective each is governed by the state law and neither may exercise powers not vested or recognized by that law. The city and the housing authority function as administrative arms of the state in pursuing the state concern and effecting the legislative objective.

The city acted within its discretion in determining the local need for the functioning of the housing authority created by the state act. All considerations of wisdom, policy and desirability connected with the functioning of a housing authority in the city of Los Angeles became settled and have been resolved adversely to the adherents of the city's present position by the actions of the state and of the city in declaring the existence of the need. Upon the formation of the housing authority the state law thereupon and thereafter controlled the city and the housing authority and no other law concerning the acquisition, operation or disposition of property is applicable to the authority except as specifically provided. § 34320, Health and Safety Code.

[3] In enacting the Housing Authorities Law and the Housing Cooperation Law the legislature did not take from the city all power to act in connection with housing projects under the statute. The city was given discretionary power to determine initially the need for the housing authority to function and to give approval of a proposed project. The city was also vested with discretionary powers to be exercised pursuant to the cooperation agreement which is required under the federal act. 42 U.S.C.A. § 1415(7)(b). But having taken the initial discretionary action to bring the housing authority into operation and having approved a project and entered into a cooperation agreement, there was nothing left to be done by either contracting party but to perform administratively whatever was necessary to carry the agreement into effect. Kleiber v. City, etc., of San Francisco, supra, 18 Cal.2d 718, 724, 117 P.2d 657; Housing Authority v. Superior Court, supra, 35 Cal.2d 550, 558, 219 P.2d 457. Thereafter the city may not refuse to cooperate and thereby decline to exercise its power to effect the completion of the project except as may be otherwise specifically provided by the statute under which it is operating.

The chapters dealing with housing authorities and cooperation agreements are now included in Division 24 of the Health and Safety Code relating to Community Redevelopment and Housing. Chapter 1 of Part 2 contains the Housing Authorities Law, §§ 34200–34368, and chapter 2 of that part contains the Housing Cooperation Law, §§ 34500–34521. In the following discussion of the city's specific powers, reference will be to the sections of the code.

The legislation created a housing authority in the city but it was not organized to transact business until the city council by resolution declared the need for the housing authority to function. §§ 34240–34243. Upon proof of the adoption of the resolution so declaring, the housing authority was conclusively deemed to have been established and authorized to transact business and exercise its powers. § 34244. The city had the power to suspend the functioning of the housing authority if after becoming established the housing authority for a period of two years failed to transact any business or exercise any of its powers, and might re-establish it upon subsequent declaration of necessity. § 34245. The mayor or the city council has the power to appoint the commissioners of the housing authority, who serve without compensation but are entitled to reimbursement for expenses. § 34270 et seq. The appointing power may remove a commissioner for inefficiency, neglect of duty, or misconduct in office. § 34282. Section 34326 declares that all housing projects are subject to the planning, zoning, sanitary, and building laws, ordinances, and regulations applicable to the locality in which they are situated; and that in the planning and location of the project the authority shall take into consideration the relationship to any larger plan or long-range program for the development of the area in which it functions.

Under § 34509 the city is also granted specified powers, such as to dedicate, sell, convey or lease any of its property to the housing authority or to the federal government, § 34510; to furnish parks, playgrounds, recreational, community, educational, water, sewer, drainage facilities or other works, § 34511; to furnish, dedicate, close, pave, install, grade, regrade, plan or replan streets, roads, roadways, alleys, sidewalks, or other places, § 34512; to plan or replan, zone or rezone any part of the area, and make exceptions to building regulations and ordinances to that end, § 34513; also to change its maps, § 34514. The city may do all things necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of housing projects, § 34516, and incur expenses thereof, § 34518. It may enter into agreements with the housing authority or the federal government respecting the action so to be taken without any limitation on the duration of such agreements (§ 34515); also agreements with respect to the amounts the housing authority will pay for improvements, services and facilities to be furnished by the city for the benefit of the project, § 34519. The exercise of the powers thus granted is authorized to be by resolution, § 34521.

[4] The housing authority is given powers and duties which avowedly are bestowed and imposed for the purpose of carrying to completion the housing projects initiated under the Act. See §§ 34310, 34311, 34312. Until 1945 the city was not called upon to voice approval or disapproval of a proposed project. In that year, Stats.1945, p. 1450, as amended 1951, pp. 1922, 1953, § 34313, Health & Safety Code, in order to give the city an opportunity to reappraise the existing need, the legislature enacted an exception to the exercise of the housing authority's powers by providing that where there did not exist on September 15, 1945 (the effective date of the enactment), contracts for financial assistance between a housing authority and the federal government, no low rent housing or slum clearance project should thereafter be developed, constructed or owned by a housing authority except after consultation with the school district in which the project was located, and until the city council approved it by resolution. The city approval and declarations under the statute also serve the federal act requirements for city approval and declarations of existing need prior to entering into federal contracts for preliminary loans and annual contributions. § 1415(7)(a, b) of

Title 42, U.S.C.A. The clause in § 34313 saving therefrom projects as to which contracts for financial assistance from the federal government had already been signed, is a plain recognition by the state legislature that it had no power to enact laws which would interfere with the obligations of those contracts. Likewise it manifests a legislative intent that when a project has progressed to the point of contractual obligations with the federal government, it should proceed to completion unless the signatory bodies have the power to withdraw from or modify the agreements. This recognition is controlling on the city and, in the absence of modifications of existing contracts by mutual consent of the signatory bodies or with legislative sanction, requires the city to proceed.

It was pursuant to the 1945 amendment (now § 34313 of the Health & Safety Code) that the city council on August 8, 1949, adopted Ordinance No. 95,222 approving the project here involved.[2] Since that time, as noted, pursuant to the city's approval, contracts with the federal government have been signed and partially performed by the signatories by advances pursuant thereto. Thereunder obligations were incurred by the housing authority which bound it to performance whereby the amounts of the loans might be recouped from rentals realized from completed projects and repaid to the federal government. Section 34353 provides that the bonds of the housing authority are not an obligation of the city and that neither the bonds nor the obligations of the housing authority are payable out of funds or properties other than those of the housing authority; and that the obligations of the housing authority do not constitute an indebtedness within the meaning of constitutional or statutory debt limitations. These provisions erect a further barrier to the purported exercise of an asserted power by the city that it may "breach" the contracts and become liable in damages or for the repayment of the advances. If it could do so, the city council would be faced with the additional problem of power under the city's fundamental law to incur that indebtedness. No bonds as to this project have as yet been issued, but outstanding are $12,901,000 in short term notes of the housing authority with annual interest at 1.19 percent, sold in the market and held by local banks.

A housing project under these acts is solely one to be financed in whole or in part by the federal government to meet the declared need for slum-clearance and low-rent housing construction, § 34212. The time when the city might halt the project is before it has given the approval which authorizes the authority to proceed to make applications for and procure the federal loans. When the declaration has been made, the project is approved, and is in the course of development and construction with the use of the borrowed funds, it is then too late for the city to withdraw except by express authority. As the provisions of the law hereinbefore referred to indicate, there is no inclusion of a power to proceed by abandonment or rescission. From that time the federal and the state acts contemplate completion of the statutory and contractual objectives. The city is given the power to prevent a project's being initiated, and no project under the state and federal law may be commenced or loans made without its approval and entry into a cooperation agreement. 42 U.S.C.A. §§ 1410, 1415(7) (a, b). It was obviously never assumed, and certainly it was not authorized by law, that after the city council had declared the need, had given requisite approvals of a project under state and federal law, and had undertaken binding commitments, it would or could repudiate them.

The matters and details as to which the city had power to exercise and to contract and as to which its contract was required under the federal act, were treated in the cooperation agreement, which also expressly provided that the contract should not be abrogated, changed or modified so long as bonds or other obligations, issued to aid in financing the development of the project, remained outstanding. As stated over $12,000,000 of housing authority obligations are outstanding. Thus the city and the authority, as well as the legislature, have recognized that no action might be taken which would have the effect to prevent a fulfillment of those obligations.

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[2] The outcome makes it unnecessary to consider the contention of the petitioners that the city council's approval, having been given by ordinance (although resolution only was required), the purported rescission by resolution was invalid.

The foregoing refutes the statement of the city that the power to approve a project includes the power to abandon it, and that it has the inherent power to determine that housing projects may be discontinued "whenever the public interest so requires." The city stated the public interest when it declared the need. Assuming materiality, the record shows that according to the last census there were in Los Angeles 69,000 families in substandard homes; that at the time this project was initiated private industry was still unable to cope with the situation; and that at the time of the purported rescission the need was still greatly in excess of the 10,000 authorized units which private industry, through governmental assistance or otherwise, could not meet.

[5] The city also looks to a proviso in the Independent Offices Appropriation Act, 1952, supra, Public Law, 137, 82nd Congress, 1st Sess., Ch. 376, approved August 31, 1951. That proviso, after the date of its approval, prohibits authorization of the construction of projects initiated before or after March 1, 1949, in any locality in which such projects have been or may thereafter be rejected by the governing body of the locality or by the public vote, unless the projects have been subsequently approved by the same procedure through which the rejection was expressed. This proviso does not purport to grant a power to the city. It was dealing with the authority of the federal agency. As material here the proviso prohibits that agency's authorization of construction where the city had validity disapproved the project pursuant to state law. It does not purport to validate action of the city council which is invalid under state law. It is quite apparent that the local rejection referred to is that by which the city might withhold approval of the project. It deals with future action of the agency. It does not contemplate a case where, as here, the city has approved the project and the federal agency has authorized the construction. It does not give the agency power to rescind prior authorization of construction or repudiate the obligations incurred thereunder. This view is in accord with the opinion of the acting general counsel for the Public Housing Administration in a Circular issued February 8, 1952.

Thus the federal act contemplates fulfillment of the objectives and the contracts. It also contains authority, to be exercised when deemed necessary or desirable *in the fulfillment of the objectives,* for consent to the modification, amendment or supersedure of existing contracts. An express exception prohibits exercise of that authority when it would impair the rights of holders of outstanding obligations of the public housing agency for which annual contributions have been pledged. 42 U.S.C.A. § 1414. The federal act pledges the faith of the United States to the payment of all contracted annual contributions and authorizes appropriations in each fiscal year of the amounts necessary therefor. 42 U.S.C.A. § 1410(e). That provision has never been deleted from the federal act. Therefore neither the state nor the federal law permits entire withdrawal from contracts, and the exercise of authority for modification is restricted to such as will not impair outstanding obligations which, it is obvious, the federal government has a direct interest in protecting.

The decisional law does not support the city's position. In Brooks v. City of Gilroy, 219 Cal. 766, 29 P.2d 212, abandonment by the city of a contract for construction work and improvement was in the exercise of an express power and right under the act involved, which also made provision for payment of obligations incurred. It is assumed that the rescission of prior action may appropriately be accomplished by a municipal legislative body where rights of third persons have not intervened. The application of this recognized principle is to matters of municipal concern. McConoughey v. Jackson, 101 Cal. 265, 35 P. 863. Here the state law is controlling in a matter of state concern. Thereby the city is authorized to contract in respect to the granted powers, but it is also bound to compliance therewith accordingly. Kleiber v. City and County of San Francisco, supra, 18 Cal.2d 718, 724–725, 117 P.2d 657. As also shown in the Dockweiler case, Housing Authority v. Dockweiler, supra, 14 Cal. 2d at pages 456–457, 94 P.2d 794, with citation of McNulty v. Owens, 188 S.C. 377, 199 S.E. 425, see also Rutherford v. City of Great Falls, 107 Mont. 512, 86 P.2d 656, 661, the cooperation agreement is not an unauthorized attempt by the city to bind itself as to the exercise of governmental functions. It is simply an authorized contract to cooperate in the performance of those functions and as such is valid. Thus control of city streets is a governmental function which the city without authority may not by contract prohibit or curtail. Wills v. Los Angeles, 209 Cal. 448, 287 P. 962, 69 A.L.R. 1044; see also Beals v. City of Los Angeles, 23 Cal.2d 381, 386, 144 P.2d 839; County of San Diego v. Cal. Water, etc., Co., 30 Cal.2d 817, 822, 824, 186 P.2d 124, 175 A.L.R. 747. But as pointed out the city is authorized under the state law to cooperate by contract with the housing authority in the exercise of the granted power to close city streets, and in doing so is acting pursuant to the statute in a matter of state concern. In this as in the other respects the general principle applies that the state grant of the powers and the authority to execute and enter into the contract to exercise those powers contemplates performance of the contract and implies no authority to breach it. California Highway Comm. v. Riley, 192 Cal. 97, 107–108, 218 P. 579. Likewise the statute provides the method for the exercise of those powers, including the power to close streets. There is no merit in the contention that certain other statutes supply a method. The city concedes that the state has the power to control the streets and to provide the exclusive methods for the vacation of streets. The state has exercised that power in relation to housing projects in the Housing Authorities Law and the Housing Cooperation Law. The provision of § 34512 that the city may furnish, dedicate, close etc., streets "which it is otherwise empowered to undertake" does not alter this meaning. The same phrase appears in § 34511 with reference to the furnishing of parks, sanitary and other facilities. The powers conferred are "supplemental to the powers conferred by any other law." § 34502. These specific powers were not powers which the city did not theretofore possess when exercising them in relation to local matters. The meaning therefore is clear that the powers conferred by the statute are not those same powers, but are specially granted as supplemental to the local powers. They are to be exercised pursuant to the act by the same local governing body which otherwise would operate in relation to matters primarily of local concern where constitutional rights of compensation for the taking or damaging of private property for use in the project are also observed.

In State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 100 P.2d 915, mandate was sought directing the city to comply with its agreement to rezone areas and vacate or close streets. In issuing the writ the court said, 100 P.2d at page 921: "The refusal of the city council * * * to comply with the requests of the Authority to vacate the streets and re-zone the location was a useless act. The acts of the city council of a contractual nature cannot be repudiated by any subsequent council, whether the membership of the council be the same or not. When the council authorized the creation of the Great Falls Authority it assumed all the obligations involved essential to a perfected project." In declaring, 100 P.2d at page 922, that under the housing act both the city and the housing authority were state agents to achieve the state objectives, the court distinguished municipal and state powers and action, and was careful to admonish that the opinion should not be construed to impair the local self-government or home rule powers of the city. There is no inconsistency or disharmony in the city's functioning pursuant to its fundamental law in respect to municipal functions and powers, and pursuant to the state law as to specific powers granted in matters of state concern. See also State ex rel. Housing Authority v. City Council of the City of Helena, Montana, Mont.1952, 242 P.2d 250.

[6] In Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547, the city of Los Angeles attempted to withdraw from and abandon condemnation proceedings to acquire land and properties of the Times-Mirror Company for use in a contemplated civic center. In the meantime the Times-Mirror had constructed a building on another location. The writ of mandamus issued in effect to prevent abandonment by the city of the pending condemnation proceedings by directing the respondent court to proceed with the trial of the condemnation action. The issuance of the writ was indicated by the application even as against the public body of the equitable doctrine of estoppel. This court, citing City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002, observed, 3 Cal.2d at page 330, 44 P.2d 547, that there are limits beyond which even a city in representing the rights of the public might not go. That and the Cohn case constitute authority that the court is not bound by precedent in determining what facts and circumstances compel the issuance of the writ but that the writ will issue as against a city or other public body or officer wherever law and justice require such action. The present matter involves more than equity and justice. As has been noted the statutory provisions impose the duty upon the city to perform the administrative acts contemplated by the state legislative action in a matter of state concern. The policy of that law is not a matter of judicial concern or control. Both the Congress of the United States and the legislature of this state have provided for the cooperative effort evidenced by the contracts between the city and the housing authority. Each of these entities as governmental agencies of the state was authorized to enter into the contracts here sought to be enforced as a public duty on the part of the city.

In brief, the city's acts and contracts are binding in accord with the statutory purpose and objective; and no provision is indicated which permits the city's attempted cancellation, abandonment and abrogation of its contracts. As noted, the extent to which projects begun with the use of federal funds might be canceled or modified is covered by the provisions of the law as to amendments, modifications or supersedure of existing contracts for federal loans and contributions, none of which is here involved. If it be desirable to include provisions for cancellation by city action, as distinguished from withholding of city approval prior to initiation, the subject is one to be addressed to the respective federal and state legislative bodies for appropriate permissible enactments which would protect the rights of all interested parties. Without such enactment the unauthorized summary action by the city amounts to a failure of recognition of that concert of federal and state action on which the city in fact relies.

It is concluded that the law enjoins upon the city the duty to perform the terms of the agreements entered into with the housing authority and to go forward with the exercise of the powers which it has agreed to undertake in cooperating with that authority. On this record a direction that the city so proceed will afford the relief expedient to accomplish the purpose of the proceeding. It is of no concern that the mandate does not issue directing the specific powers to be exercised—since in many respects the details thereof are subject to the discretionary cooperative action of the city. The city does not contend that it will not go forward with the performance of the contracts if under the law it had no right or power to rescind the approval of the project or to cancel and abrogate the agreements.

Let the peremptory writ of mandate issue directing the respondents to perform the terms of the agreements entered into with the petitioner and to proceed in the fulfillment of its obligations thereunder.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

Rehearing denied; SCHAUER, J., dissenting.

38 Cal.2d 872

DRAKE et al. v. CITY OF LOS ANGELES et al.

L. A. 21998.

Supreme Court of California
April 28, 1952.

Action by C. R. Drake and Bertha Withers against the City of Los Angeles, and others, for an injunction to restrain slum-clearance and low-rent housing project. The Superior Court, Los Angeles County, Julius V. Patrosso, J., entered judgment of dismissal and plaintiffs appealed. The Supreme Court, Shenk, J., held that ordinance approving low-rent housing project and authorizing the execution of a cooperation agreement with housing authority whereupon the latter applied to federal agency for preliminary loans and annual contributions was not invalid because it was not first submitted to the city planning commission for report and recommendation in relation to the established master plan of the city.

Judgment affirmed.

Prior opinion 238 P.2d 1062.

Municipal Corporations 🔑295

Ordinance of the city of Los Angeles which approved low-rent housing project and authorized execution of co-operation agreement with the housing authority whereupon the latter applied to federal agency for preliminary loans and annual contributions was not invalidated by fact that it was not first submitted to the city planning commission for report and recommendation in relation to the established master plan of the city because the statute creating the Housing Authorities Law superseded the local law governing acts and authority of the city council as to slum-clearance and low-rent housing project. Health and Safety Code, §§ 34313, 34326, 34509–34516, 34518.

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Harold W. Kennedy, County Counsel, Los Angeles County, Andrew O. Porter, Deputy County Counsel, Ray L. Chesebro, City Atty., John L. Flynn, Asst. City Atty., Weldon L. Weber, Deputy City Atty., Faries & McDowell, McIntyre Faries, Stanley A. Furman, Loeb & Loeb and Herman F. Selvin, Los Angeles, for respondents.

SHENK, Justice.

The plaintiffs as taxpayers of the City of Los Angeles commenced this action under section 526a of the Code of Civil Procedure for an injunction to restrain the city and the Housing Authority of the City of Los Angeles and other named defendants from proceeding with the 10,000 unit slum-clearance and low-rent housing project and program outlined in the opinion in the companion case of Housing Authority of the City of Los Angeles v. City of Los Angeles, Cal., 243 P.2d 515. The defendants' demurrers to the complaint were sustained without leave to amend. The plaintiffs appealed from the judgment of dismissal which followed. There is also a motion to dismiss the appeal.

The undisputed facts leading to the filing of the complaint herein on December 29, 1950, are stated in the Housing Authority case, and this opinion in effect is a continuation thereof to resolve the issue in controversy here.

By this action the plaintiffs sought a judgment declaring invalid Ordinance No. 95,222 adopted by the city council on August 8, 1949, pursuant to section 8(b) of the Housing Authorities Law, now section 34313 of the Health and Safety Code. That ordinance approved the 10,000 unit low-rent housing project and authorized the execution of the cooperation agreement with the housing authority and the latter's application to the federal agency for preliminary loans and annual contributions. Section 34313, as then in effect and as here material, provided that no low-rent housing or slum-clearance project should be developed, constructed or owned by a housing authority until the city council approved it by resolution duly adopted.

The asserted grounds of invalidity of the ordinance are that it was not first submitted to the city planning commission for report and recommendation in relation to the established master plan of the city; that none of the sites for the project received the approval of the city planning commission; that the project had not been approved by a majority of the qualified electors of the city; and that the contracts for financial assistance in the development of the project entered into by the housing authority and the federal agency have not been approved by the city pursuant to the city charter. The plaintiffs sought an injunction to restrain further action under the agreements until the project had been approved by a majority of the electors of the city and as required by section 97 of the city charter.

The plaintiffs contend that submission of the plans for the proposed location, development and construction of the project to the city planning commission for report and recommendation was required as a condition of valid approval by section 97 of the city charter and by section 73 of the State Conservation and Planning Act.

The charter provision prohibits the adoption of an ordinance or resolution authorizing, ordering, or involving the acquisition of any public building site or the location or appearance of any public building until the ordinance or resolution is first submitted for report and recommendation of the city planning commission. Section 73 of the State act, Stats. 1947, p. 1909, as amended, Act 5211c, Deering's Gen.Laws, provides that when a city has adopted a master plan, no public building or structure shall be constructed or authorized in the area for which the master plan shall have been adopted until the location, character and extent thereof shall have been submitted to and a report received from the local planning commission.

In Housing Authority v. City of Los Angeles it was again pointed out that the powers and duties of the city council and of the housing authority in respect to the proposal, planning, development, location and construction of slum-clearance and low-rent housing projects, derive from the Housing Authorities Law, Sec. 34200 et seq., Health & Safety Code, and the Housing Cooperation Law, Sec. 34500 et seq., Health & Safety Code, and not from local law or other state law unless specifically provided.

Section 34320 of the Housing Authorities Law provides that no law concerning the acquisition, operation, or disposition of property by other public bodies is applicable to the housing authority unless the legislature specifically so states. The provisions of the charter and of the state conservation and planning act apply to the property which is the subject thereof, namely, city acquired, owned and operated public sites and buildings. Const. Art. XI, Sec. 6; see also Riedman v. Brison, 217 Cal. 383–387, 18 P.2d 947. The property and projects contemplated under the Housing Authorities Law are those to be acquired, developed, constructed, owned and operated by the housing authority, and are governed by that statute except as otherwise specifically required. The local law governing the acts and authority of the city council as to slum-clearance and low-rent housing projects has been superseded by the statute. Housing Authority v. Superior Court, 35 Cal.2d 550, 219 P.2d 457.

There is no provision in the statute requiring submission to or report by the planning commission prior to the city's approval of a project. Section 8(b) of the act (now sec. 34313) requires the approval of the city council before a project may be developed, constructed or owned by a housing authority. Approval by the planning commission is not a prerequisite to approval by the city council. Nor is there any warrant or requirement in the statute for the approval of the electorate of the city. The approval of the city council gave the housing authority the signal to proceed to formulate plans for the proposed 10,000 unit project. No contention is made that the action of approval by ordinance instead of resolution was inappropriate. The phrase "duly adopted" modifying the word "resolution" in section 8(b) added nothing insofar as authorized action by the city council was concerned. The quoted phrase was recognized as redundant when it was deleted at the time the provision was codified as section 34313.

Until the city council authorized the project by its approval, there was no project as to which any directed action with respect to plans, surveys, and the like could be taken. Thereupon as to the location, development and construction of the project, section 34326 provides: "All housing projects are subject to the planning, zoning, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the housing project is situated. In the planning and location of any housing project, an authority shall take into consideration the relationship of the project to any larger plan or long-range program for the development of the area in which it functions."

The foregoing provision requires the authority to conform the plans for location, use, sanitary improvements and building restrictions to the laws, ordinances and regulations applicable in the locality selected, and to consider the relationship of the location and planning of the project to the long range or master plan. As an aid in obtaining the required conformity the city is vested with certain powers under the statute, such as to sell or lease its property to the housing authority or the federal government, to provide municipal sanitary and utility services, to furnish new streets or close existing streets, to plan or replan, zone or rezone, make exceptions to building regulations or ordinances, do any and all things necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of housing projects, and to enter into cooperation and other agreements respecting the action to be taken as to any of these matters, Secs. 34509–34516, Health & Safety Code, and incur the expenses thereof, Sec. 34518. The exercise of any of the granted powers is authorized to be taken by resolution of the city council adopted by a majority of the members present at a meeting. The resolution may be adopted at the meeting at which it is introduced, is to take effect immediately and need not be laid over, published or posted. Sec. 34521, Health & Safety Code.

There is no requirement implicit in the language of section 34326 that there must be a report to and recommendation from the planning commission prior to the city's approval pursuant to section 34313. At the time when approval is required by the city council no surveys or plans have been made or undertaken to determine the location or details of construction in connection with the project. In fact no work on a proposal for the development, construction or ownership of the project by the housing authority could be undertaken until the city had given its approval. The housing authority could take no step to conduct surveys and formulate plans until the city approved the project and authorized an application to the federal agency for the preliminary loans and contributions which would enable the authority to proceed. Sites for the project were not acquired nor required to have been selected prior to the city's approval.

As noted in the decision in the companion case of Housing Authority v. City of Los Angeles, the Housing Authorities Law was expressly intended to make available the means for proceeding under the United States Housing Act of 1937. The funds received pursuant to the federal act are the source of financial assistance for the development, construction and ownership of the low-rent housing project by the housing authority. The federal act required as a prerequisite to the granting of the preliminary loan for that purpose the approval of the project by the city and the execution of a cooperation agreement. 42 U.S.C.A. § 1415(7) (a), (b). And section 34313 of the Housing Authorities Law prohibits development—which necessarily includes planning, 42 U.S.C.A. § 1402(5)—until the city approves. It would therefore be a practical impossibility to prepare surveys and plans prior to the time when application with city approval could be made for financing the cost of preparation.

In the concert of action between the federal and the state legislative bodies necessary to obtain the federal assistance, the state legislature unquestionably intended to cause the provisions of the statute to conform with the provisions of the federal act and intentionally included the prerequisites required by the latter with procedural means to execute them. The aproved application required under the federal act for loans to finance the cost of surveys and plans obviously assumes that plans have not yet been formulated.

The procedural requirements under the state statute were intended to achieve uniformity and expedition of action in all localities in the state where a housing authority operates, and thereby to obviate unnecessary detail and delays in the administrative functions exercised by the city and the housing authority on behalf of the state.

There is therefore no merit in the contention that the submission of plans to the planning commission prior to approval of the housing project by the city was required or that the omission to submit plans to the planning commission prior to approval rendered the action of the city invalid.

After the city's approval of the housing project and the granting of the housing authority's applications to the federal agency for federal loans and annual contributions, the housing authority submitted to and obtained reports from the planning commission relative to the location of the sites, conformance of the projects to the master and local plans, and issuance of conditional use permits. There is no indication other than that it will continue to proceed in accordance with the provisions of the statute. If non-conformity to zoning and building restrictions might ensue by failure of the housing authority to recognize the mandate of section 34326, appropriate redress to compel compliance would be available.

No contention is made that in the exercise of their respective powers under the statute the city or the housing authority will not follow the procedures and comply with the provisions thereof. Other contentions have been answered in the companion case of Housing Authority v. City of Los Angeles.

The judgment is affirmed. The motion to dismiss the appeal is denied.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

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110 Cal.App.2d 717

In re HARRISON'S ESTATE.

HARRISON v. KUCHEL, Controller.

No. 15110.

District Court of Appeal, First District, Division 1, California.

May 5, 1952.

Rehearing Denied June 4, 1952.

Hearing Denied June 26, 1952.

Proceeding in the matter of the estate of Richard C. Harrison, deceased, by Robert W. Harrison, heir of decedent, against Thomas H. Kuchel, Controller of the State of California, with regard to Robert W. Harrison's objections to an amended report of the Inheritance Tax Appraiser. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered orders overruling the objections, and Harrison appealed. The District Court of Appeal, Bray, J., held that inheritance tax was properly computed by tax appraiser when he deducted exemptions from first bracket of the clear market value of the property transferred and applied tax at required rates on remainder of property.

Orders affirmed.

1. Taxation 🔑895(6)

Under statutory provisions that inheritance tax is computed upon the clear market value of the property transferred, but only upon that portion in excess of the exemptions, and that in computing the tax, the exemptions allowed are deducted from the clear market value of the property transferred, and the tax is computed on the remainder of the property at the same rates that would have been applicable had the exemptions not been allowed, proper method of computation is to deduct the exemptions from the first bracket of the clear market value and to compute the tax at applicable rates on the balance. Revenue and Taxation Code, §§ 13402, 13403.

2. Statutes 🔑219

The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute.

Robert W. Harrison, in pro. per.

James W. Hickey, Sacramento, Charles J. Barry, Newell C. Barnett, San Francisco, for respondent.

BRAY, Justice.

Appeal on an agreed statement from orders overruling appellant's objection to an amended report of the Inheritance Tax Appraiser and fixing inheritance tax.

Question Presented.

Under our Inheritance Tax Law, shall the statutory exemption be deducted from the total clear market value of the property transferred, and the tax then computed on the remainder of such value, or shall the exemption be deducted from the *first* $25,000 of the clear market value and the tax then computed on the remainder?

Record.

Appellant is the brother and sole heir of decedent. The inheritance tax appraiser filed in the estate his report determining the clear market value of the property transferable to appellant to be $60,558.26. No criticism is made of this value. Following is a computation of the tax as made by the appraiser and the one which appellant claims should have been made:

Appraiser's method:

$2000	exempt
$23,000 at 5%	$1150.00
$25,000 at 7%	$1750.00
$10,558.26 at 10%	$1055.83
$60,558.26	$3955.83

Appellant's method:

$25,000 at 5%	$1250.00
$25,000 at 7%	$1750.00
$8558.26 at 10%	$ 855.83
$2000	exempt
$60,558.26	$3855.83

After a hearing the court overruled appellant's objections to the report and entered its order fixing the tax at $3955.83, or $100 more than appellant claims it should be.

The Law.

[1] The basic sections of the Revenue and Taxation Code involved follow: § 13402. "The tax is computed upon the clear market value of the property transferred, but only upon that portion in excess of the exemptions allowable on the date of the transferor's death, and at the rates which are then in effect." § 13403. "In computing the tax, the exemptions allowed by Articles 1 and 2 of Chapter 5[1] of this part are deducted from the clear market value of the property transferred, and the tax is computed on the remainder of the property at the same rates that would have been applicable *had the exemptions not been allowed.*" (Emphasis added.) Section 13405 provides: "In the case of a transfer to a Class B transferee the rates of tax are as follows: (a) 5 per cent of the clear market value of the property transferred up to $25,000. (b) 7 per cent of the excess value over $25,000 and up to $50,000. (c) 10 per cent of the excess value over $50,000 and up to $100,000. * * *"

Appellant contends that section 13403 requires that the deduction should be made from the total value and the tax computed on the remainder, while respondent contends and the court found that it must be made from the clear market value mentioned in the first or (a) bracket of rates set forth in section 13405. We agree with that contention, for otherwise there is no meaning to the language in section 13403 "at the same rates that would have been applicable *had the exemptions not been allowed.*" (Emphasis added.) If the exemption is to be deducted from the overall value and the tax paid on the balance, the section would have ended with the words "and the tax is computed on the remainder of the property". There would be no reason for adding the words which follow. To make it more clear, assume a net value of property to be transferred to be $30,000. Applying section 13405 without the last clause, the tax would be computed thus:

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[1] These provide an exemption for a brother of $2000.

$25,000 at 5%	$1250
$ 3,000 at 7%	$ 210
$ 2,000	exempt
$30,000	$1460

But to get at the *rate* applicable had the exemption not been allowed it would be:

$ 2,000 at 5% rate
$23,000 at 5% rate
$ 5,000 at 7% rate

While we must disregard the exemption to get at the *rate*, we, of course, in determining the tax, must allow the exemption. So it works out as follows:

$ 2,000	exempt
$23,000 at 5%	$1150
$ 5,000 at 7%	$ 350
$30,000	$1500

This method was the one approved in Estate of Steehler, 195 Cal. 386, 233 P. 972, where the court was considering subdivision 6 of section 6 of the Inheritance Tax Act of 1921, St.1921, p. 1506, which read in substance the same as section 13403. Appellant contends, however, that the decision in that case and the construction therein placed on subdivision 6 was predicated on a provision of section 4 of the 1921 act, which provision was omitted when the present Inheritance Tax Law was codified in 1943. In the Steehler case the court pointed out that while statutes imposing inheritance taxes are to be strictly construed in favor of the individual and against the state, when dealing with the exemptions provided in such statutes, the provisions applicable to exemptions, on the contrary, are to be construed liberally in favor of the state and against those claiming the benefit of such exemptions. It then referred to Estate of Timken, 158 Cal. 51, 109 P. 608, where the court held under the provisions of the Inheritance Tax Act of 1905 that the exemption was deducted from the first $25,000 of property value rather than from the entire value of the property transferred. It stated that there the court was following the rule of computation approved in Estate of Bull, 153 Cal. 715, 96 P. 366. It then stated that since that date and particularly since these decisions the 1905 act had undergone a number of amendments and revisions, but that except in one particular the several succeeding legislatures to and including 1921 seemed satisfied with the provisions of the 1905 act considered in those cases and with the court's interpretation thereof. The particular in which the 1905 act was changed was the adoption in the act of 1921 of subdivision 6 of section 6 which reads identically with section 13403 and which for the first time added the words "had the exemptions not been allowed." In the Steehler case it was contended that these words coupled with the words in the first part of the section "the exemptions * * * shall be deducted from the *aggregate* amount of property transferred" (emphasis added) evinced an intention of the Legislature to do away with the rule for computation of inheritance taxes set forth in Estate of Timken, supra. The court, however, held that there was nothing in this subdivision that conflicted with the earlier provisions of the act nor any intention of the Legislature to change the interpretation theretofore given by the courts.

Appellant contends that the Steehler case is distinguishable because section 4 which was in existence at the time of that case is not included in the present act, and he contends that the Steehler decision was predicated upon the provisions of that section. This, however, is a misconstruction of that decision, for there the court said that its interpretation of subdivision 6 of section 6 "either when read *separately or together,* harmonizes with sections 2, 4, and 5 of the act * * *." 195 Cal. at page 400, 233 P. at page 978. Emphasis added. Section 4 of the 1921 act fixed the tax rate on property transferred which exceeded in value the exemption but not $25,000. A separate section, section 5, fixed the tax rate when the value exceeded $25,000. A reading of the Steehler decision shows that the court was principally concerned with the interpretation of subdivision 6 and that its references to section 4 in nowise constituted a basis of the decision. Section 4 was continued in the Inheritance Tax Act of 1935 but in the codification of the Inheritance Tax Act into the Revenue and

Taxation Code by the Statutes of 1943, its language is not included. Transferees are divided into classes A, B, C and D for tax rate purposes. Instead of stating in each class, as was the effect of section 4, that the primary rate[2] is based on the value of the property between the amount of the exemption and $25,000 and then a secondary rate on the next $25,000, it now gives in each class a primary rate on the first $25,000 and in none of the classes does it mention the exemption. Appellant contends that this indicates an intention of the Legislature to no longer require that the exemption be taken from the first bracket, but from the aggregate. Such a contention overlooks the language of section 13403 heretofore discussed, "the same rates that would have been applicable had the exemptions not been allowed." To adopt appellant's contention would be to require us to find that the mere regrouping of the various classes of taxpayers and the rates to be paid by them and the failure to mention in the provision of their primary rates the fact that the exemption is to be there deducted, indicates a desire of the Legislature to make the new grouping irreconcilable with the language in section 13403 and with the interpretation of the Inheritance Tax Act heretofore approved by the Legislature. As said in Estate of Steehler, supra, 195 Cal. 386, at page 399, 233 P. at page 978, such an intrepretation "ought not to be given application unless and until it shall be made to clearly appear that such irreconcilable conflict between the earlier and the later provisions of the law exists." We can find no such intention, particularly in view of the provisions of section 2 of the Revenue and Taxation Code. The language of the Steehler case, 195 Cal. at page 400, 233 P. at page 978, referring to the adoption by the Legislature of subdivision 6 of section 6 of the 1921 act (identical with the language of section 13403) is particularly applicable to the situation today[3]: "* * * the language of the first clause in * * * [section 13403] does not expressly require that the exemptions allowed under said section, while required to be taken from the 'aggregate' of the estate transferred, shall be taken out of either the first or the middle or the last of the several classes of said estate to be progressively taxed. In any event, whether taken out of the first or the middle or the last of said classifications, the exemptions to the extent thereof diminish the taxable amount of the estate transferred and are therefore taken out of the aggregate of said estate. If the Legislature had intended by the particular clause in * * * [section 13403] to effectuate a change in the amount of the tax to be placed upon the unexempted portion of said estate after allowing such exemptions, it would have said so in the latter clause of said * * * [section]. But when we read the latter clause of said * * * [section] it would seem to express an exactly contrary intention."

Estate of Letchworth, 201 Cal. 1, 255 P. 195, and Estate of Childs, 18 Cal.2d 237, 115 P.2d 432, 136 A.L.R. 333, seem to give both parties comfort. However, in neither case was the court considering the question involved here, and they therefore are not in point.

[2] The conclusion reached by us is in conformity with the interpretation that the State Controller has consistently placed upon the Inheritance Tax Act and the changes thereto. "The construction of a statute by the officials charged with its administration must be given great weight, for their 'substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute.'" Whitcomb Hotel, Inc., v. Cal.Emp.Comm., 24 Cal.2d 753, 756–757, 151 P.2d 233, 235, 155 A.L.R. 405.

The orders are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SHENK, J., dissenting.

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[2] For brevity we refer to the rates provided for the first bracket as "primary rates" without intending any legal significance in the term.

[3] We have paraphrased the language by substituting section 13403 for subdivision 6 of section 6 where the latter appears.

PEOPLE v. GALLARDO et al.

Cr. 4704.

District Court of Appeal, Second District, Division 2, California.

April 28, 1952.

Rehearing Denied May 8, 1952.

Hearing Granted May 26, 1952. *

Two defendants were convicted in the Superior Court, Los Angeles County, Thomas L. Ambrose, J., of conspiring to perform unlawful abortions and they appealed. The District Court of Appeals, Moore, P. J., held, inter alia, that statute prohibiting abortions unless necessary to save life of abortee is not an unreasonable interference with one's guaranteed freedom.

Judgments and orders denying motions for new trials affirmed.

1. Abortion 🔑1

Statute prohibiting abortion was designed to stay activities of meddling agencies bent upon disrupting process of racial reproduction. Pen.Code, § 274.

2. Constitutional Law 🔑81

Legislature may adopt laws in aid of public morals.

3. Abortion 🔑1

Statute prohibiting abortions unless necessary to preserve life of abortee is not an unreasonable interference with one's guaranteed freedom. Pen.Code, § 274.

4. Abortion 🔑1

Fact that statute allows abortion when essential to preservation of life of abortee and denies abortion to pregnant women who are not so afflicted does not render statute discriminatory or unreasonable. Pen.Code, § 274.

5. Constitutional Law 🔑81

Police powers of legislature are not absolute, and personal rights may not be taken away at whim or caprice of lawmakers, but individual liberty may be abridged to benefit public welfare.

6. Criminal Law 🔑13

For a criminal statute to be so certain as to be operative, it requires only such diction as is sufficiently well known to enable those who are affected thereby to understand and apply its provisions.

7. Criminal Law 🔑13

Statute prohibiting abortion unless necessary to preserve life of abortee is not inoperative as being uncertain as to meaning. Pen.Code, § 274.

8. Conspiracy 🔑47

Evidence justified conviction of two defendants for conspiring to perform unlawful abortions. Pen.Code, § 274.

9. Conspiracy 🔑47

When evidence corroborating testimony of abortee in prosecution for conspiring to perform unlawful abortion, creates more than suspicion of guilt of actors, such corroborating evidence is sufficient although considered alone it is entitled to but slight consideration. Pen.Code, §§ 274, 1108, 1111.

10. Criminal Law 🔑507(6)

An abortee is not an "accomplice" to crime of unlawfully performing abortion. Pen.Code, §§ 274, 1108, 1111.

11. Criminal Law 🔑507(1)

An "accomplice" is one who is liable to prosecution for identical offense charged against defendant on trial in cause in which testimony of accomplice is given.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

12. Conspiracy 🔑47

In prosecution for conspiring to perform unlawful abortion, evidence corroborating testimony of abortee is sufficient if it so connects defendants with crime as reasonably to satisfy jury that abortee has told truth and it is not essential to competency of corroborative evidence that standing alone it proved guilt of defendants. Pen.Code, §§ 274, 1108, 1111.

13. Criminal Law 🔑1144(13)

Testimony discredited by jury in prosecution for conspiracy to perform unlawful abortion could not be considered by District Court of Appeal.

14. Abortion 🔑11

Slight acts in furtherance of criminal purpose are sufficient proof of attempt to commit unlawful abortion. Pen.Code, § 274.

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* Subsequent opinion 257 P.2d 29.

15. Criminal Law 🔑1160

Where jury found defendants guilty of conspiring to perform unlawful abortions and trial court approved verdicts, judgments could not be disturbed on appeal unless record showed that sufficient facts could not have been found by jury to warrant inference of guilty.

16. Conspiracy 🔑28

Defendants could be convicted of conspiring to commit unlawful abortion regardless of whether abortee was pregnant when abortion was performed. Pen.Code, § 274.

17. Conspiracy 🔑47

In prosecution for conspiring to perform unlawful abortion, evidence established that no abortions were performed to save life of abortee. Pen.Code, § 274.

18. Criminal Law 🔑823(12)

In prosecution for conspiring to perform unlawful abortions instruction that as matter of law a witness who had arranged for abortion for an abortee and who received part of amount paid for abortion was an accomplice was not prejudicial to defendants as inflating importance of witness in estimation of jury, where following instruction declared that testimony of accomplice should be viewed with distrust. Pen.Code, § 274.

19. Conspiracy 🔑48

In prosecution for conspiring to perform unlawful abortions, trial court was not required to instruct jury that state was required to prove, in addition to proving that abortions were not necessary to save life of abortee, that use of medical instruments, and miscarriage, were not necessary to preserve life of abortee and that if defendant licensed surgeon in good faith believed that miscarriage was necessary to preserve life of abortee and formed such opinion in good faith and acted upon such opinion, such defendant was entitled to presumption of correct judgment and good faith. Pen.Code, § 274.

20. Criminal Law 🔑814(5)

In prosecution for conspiring to perform unlawful abortions, trial court properly refused to instruct that state was required to prove that medical instruments were used by a defendant with intent to procure miscarriage and that it was not necessary to preserve abortee's life, that it is not necessary for abortee to be in actual danger of death, and that defendant may act upon appearances that arouse in mind of a reasonable person belief that abortee is about to die or suffer great bodily harm, where defendants did not attempt to prove defendants operated in belief that abortee was about to die or was seriously endangered. Pen.Code, § 274.

21. Conspiracy 🔑47

When healthy women submitted to surgery of abortionist their good health was sufficient proof in prosecution for conspiring to perform unlawful abortions that abortion was not necessary to prevent death of abortee. Pen.Code, § 274.

22. Criminal Law 🔑698(1)

Defendants charged with conspiring to perform unlawful abortions were deemed to have waived objections to hearsay evidence where defendants made no motion to strike testimony objected to as hearsay. Pen.Code, § 274.

23. Witnesses 🔑287(1)

When witness for state in prosecution for conspiring to perform unlawful abortions, had been confronted on cross-examination with testimony of witness given before grand jury prosecution on redirect examination could introduce entirety of former testimony.

24. Witnesses 🔑287(1)

When a witness in criminal prosecution has on cross-examination been confronted with his testimony of a prior occasion prosecution may on redirect examination read or state to witness entirety of former testimony.

25. Criminal Law 🔑1144(15)

Where trial court in prosecution for conspiring to perform unlawful abortions sustained objections of District Attorney to question directed by defendant's attorney to witness for state on cross-examination, and trial court admonished jury to disregard offending statements made by District Attorney in making objections, admonition would be presumed to have been observed and evil of statements of District Attorney would be presumed to have been erased. Pen.Code, § 274.

26. Witnesses ⚷393(2)

In criminal prosecution district attorney may for impeachment purposes use a typed statement which has been taken by shorthand reporter without allowing defense to inspect it, even though it was never signed by accused, and may have shorthand reporter read from his notes the statement made by witness.

27. Witnesses ⚷393(2)

In prosecution for conspiring to perform unlawful abortions, wherein a witness named as an abortee and who was called by defendants to testify relative to manner in which witness was dealt with by police stated that witness did not remember answers given by witness to questions asked witness before trial at city hall, and that witness did not remember questions asked witness, prosecution was properly permitted to read from purported report of city hall conversation which was not signed by witness, even though no foundation was laid.

28. Witnesses ⚷379(1)

It is never error in criminal prosecution to question a witness concerning prior inconsistent statements for purpose of impeachment.

29. Criminal Law ⚷627½

Prosecution cannot be required to produce a typed report of a witness' statement where witness had never agreed that such writing was correct report of his oral statements.

30. Criminal Law ⚷1136

Where questions asked witness in prosecution of several defendants for conspiring to perform unlawful abortions, and answers to questions, were admitted against one defendant only, and jury were so advised, other defendants could not complain on appeal of admission of such questions and answers. Pen.Code, § 274.

31. Witnesses ⚷255(2)

In prosecution for conspiring to perform unlawful abortions, a police officer who had delivered marked bank notes to a defendant as compensation for abortion to be performed on person whose identity as police woman was concealed from defendants could refresh his memory from list of serial numbers he had taken from bank notes before delivering them to a defendant, and officer was not required to scour his memory for numbers on bank notes in order to identify them as bank notes delivered to a defendant. Pen.Code, § 274.

32. Witnesses ⚷255(10)

In prosecution for conspiring to perform unlawful abortions, a witness who refreshed her memory from notes prior to testifying was properly not required to produce notes while testifying where such notes were not actually used by witness while testifying. Pen.Code, § 274; Code Civ.Proc. § 2047.

33. Conspiracy ⚷45

In prosecution for conspiring to perform unlawful abortions, testimony of alleged abortees that they were each pregnant and gave certain defendants that information and their desire to be aborted was relevant to prove conspiracy.

34. Criminal Law ⚷680(1), 1153(3)

Discretion of trial court in regulating order of proof in criminal prosecution is broad and will not be disturbed except where showing is clear that such discretion has been abused.

Glenn A. Lane, Los Angeles, for appellant Henry J. Glynn.

Fred N. Howser, Los Angeles, for appellant Oswald Pierre Gallardo.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Albert K. Lucas, Deputies Dist. Atty., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

The four indictments adjudicated herein accused appellants Glynn and Gallardo of having performed unlawful abortions upon a number of women. No appeal was taken by any of the convicts except the two appellants. Two buildings sheltered the performance of the acts denounced as criminal abortions, namely the Southwest Hospital on Manchester Avenue and a medical building on Hoover Street. Both are situate in the suburbs of Los Angeles and only a short distance separates them. References will be made to the Palms Motel and the Tulips Motel. Both furnished convenience and rest, are near the medical building and were visited by a number of those who sought the services of appellants.

The indictments bore large numbers, each with six digits. They will be referred to in each instance by the last two digits—35, 87, 88 and 90. Indictment 35 contained twelve counts; indictment 87, four counts; 88, three counts; 90, three counts. The first count in each indictment alleged a felonious conspiracy of appellants and other persons for the purpose of aborting certain women. Each conspiracy charge was followed by allegations of specified overt acts committed in furtherance of the alleged conspiracy. The conspiracy counts in indictments 87, 88 and 90 were dismissed. But in accusation 35, it was not dismissed but was tried. However, no proof was offered as to three of the seven alleged overt acts; three were established. One was not tried. Verdicts were returned against appellants convicting them on all or some of the counts in each of the four indictments. Judgments were entered accordingly. After their motions for new trials had been denied, they lodged their appeals here demanding outright reversals of each judgment and order on the several grounds about to be discussed.

The Abortion Statute is Valid.

The statute under which appellants were accused is section 274 of the Penal Code[1]. Appellants in effect contend that the care of one's corporeal tenement concerns no one but himself; that the forceful withdrawal of a fetus from the womb of a woman is a matter which should be governed by "natural law" and not by an artificial statute rudely conceived by man for the purpose of interfering with and controlling the conduct of society and the individuals who compose it. Under American jurisprudence the State has but little to say as to the manner of a person's care of his body. He is restricted in his movements when stricken with a contagious or communicable disease. Otherwise, he is free to go unshaved, unshod or unbathed. In such matters his behavior is deemed not to affect the welfare of society. But as to the interference with a woman's natural process of procreation, the whole of society asserts a protest. The State confides to its legislature the power and discretion to enact statutes for the purpose of conserving the race even in the stream of gestation.

The realm of statecraft acknowledges no such thing as a "natural law." While certain proposed laws have been in the midst of crises so designated, such terms were then plausibly applied in the orator's zeal to achieve his aim of enacting a law which he deemed sacred. Indeed, the principles embodied in the Bill of Rights are so allied to the happiness and freedom of people as to persuade many men to believe they were the direct gift of the Deity. Not so. They are the products of the human brain after a long travail of freedom. Had they not been conceived we would still have had a social order, a state.

A people is not restricted in the establishment of rules and laws for the welfare of the mass to any greater extent than in legislating for the individual. When they impose limitations upon society for the general welfare their acts are not to be thwarted by those rebellious agencies who deny the existence of the right of the people to regulate and govern themselves. The state is the paramount creation of man. It derives from the family. The evolutionary processes by which it evolved afford no basis for discount of the power and the obligation of the modern state to discipline, preserve and perpetuate the race. It has supplanted the tribe and the clan and succeeded to all the privileges and duties of the family. Either through a monarch, a dictator or a legislature, the modern state maintains the office of the patriarch who had succeeded to the functions of the primaeval father to prescribe rules and to regulate and administer family affairs. Laws created by its lawmakers have the absolute control of society except to the extent abridged by its organic law.

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[1] "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

[1, 2] Section 274 is such a statute. It was designed to stay the activities of meddling agencies bent upon disrupting the process of racial reproduction. Anderson v. Commonwealth, 190 Va. 665, 58 S.E.2d 72, 75, 16 A.L.R.2d 942; Dykes v. State, 30 Ala.App. 129, 1 So.2d 754, 757. The legislature is authorized to adopt laws in aid of public morals. 1 C.J.S., Abortion, § 44, p. 341. Especially should it by legislation prohibit the encouragement of the sales of commodities or services calculated and designed to interfere with the procreation of the species. See 1 Am.Jur., p. 133, sec. 6.

[3, 4] Appellants misconceive the purpose of section 274. It does not, in the slightest degree, deny a pregnant woman's right to receive appropriate medical service and to be relieved of a fetus if such relief is "necessary to preserve her life". The statute does not say or imply that the relief may be effected only where the danger is immediate. It is predicated upon the concept that the body of a woman is a holy temple and that one who desecrates it with instrumentalities or medicaments with intent to cause a miscarriage is a felon. It cannot fairly be said that such a statute is an unreasonable interference with one's guaranteed freedom. It protects the frantic woman from the butcheries of incompetent barbarians as well as from the skilled surgeon of undeveloped morality. The fact that the statute allows the abortion when essential to the preservation of life and denies it to pregnant women who are not so afflicted is not good cause for declaring the statute discriminatory or unreasonable. The classifications indicated relate substantially to a legitimate object, to wit, to save the lives of incipient embryos or fully formed fetuses, that is to forward the propagation of the race. The statute is general in its application and uniformly applies to all gravid women. If they enjoy good health, the abortionist is frustrated. If their lives are in peril by virtue of the pregnancy, the surgeon is free to act to save the life of her who is so endangered. In making such a law the legislature may take into account degrees of harm and restrict those classes of cases in which the need is clearest. Lelande v. Lowery, 26 Cal.2d 224, 232, 157 P.2d 639, 175 A.L.R. 1109.

[5] In support of their contention that section 274 is unconstitutional in that it is an unreasonable deprivation of a pregnant woman's "personal right" to be aborted, appellants cite In re Sumida, 177 Cal. 388, 170 P. 823, and Application of Miller, 162 Cal. 687, 124 P. 427. Neither is pertinent. The Sumida case holds merely that it is a legitimate exercise of the police power where a regulatory statute is non-discriminatory as to all within a single classification so long as such classification is based upon either "some natural, intrinsic, or constitutional distinction between the persons composing it and others not embraced in it." [177 Cal. 388, 170 P. 825.] The Miller decision upholds the validity of an act forbidding the employment of women in certain occupations for more than eight hours a day or more than 48 hours in one week. While it does repeat a cherished principle, to wit, that the police powers of the legislature are not absolute, and personal rights may not be taken away at the whim or caprice of the lawmakers, it is equally as emphatic that individual liberty may be abridged to benefit the public welfare.

The cited authorities do not avail appellants. In enacting section 274 the legislature has made a reasonable finding that the permitting of unrestricted abortion practices is contrary to the public welfare. Its decision that the procreation of the race must not be interfered with except upon the one specified condition cannot be deemed unfair or unreasonable. The progenitors of mankind from the birth of the first of the species to the current generation cry out to the remotest posterity to allow and encourage the normal, instinctive racial processes to unfold as ordained in the heart of nature.

Also, appellants cite Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 19 L.R.A. 727. It held invalid a statute regulating the construction and location as well as the operation of hospitals for the insane. The court held certain restrictions such as (1) that the asylums be constructed only of stone, brick or iron and (2) that they be not located within 400 yards of any dwelling or school building to be "arbitrary and wholly unreasonable." Such matters bear no relation to the problem of race survival. The practice of medicine and surgery, perhaps more so than any other profession, is peculiarly the subject of legislative control. It directly concerns not only the public health, Fuller v. Board of Medical Examiners, 14 Cal.App.2d 734, 741, 59 P.2d 171, but also race survival. While there may be occasions when a surgeon would in the prudent practice of his profession desire to perform an abortion even though the patient's life were not necessarily in danger, yet such fact alone cannot be said to cause section 274 to be deemed void as an unreasonable restraint on the constitutional right to practice medicine. The legislature has in effect weighed the interest of the medical profession in the unrestricted pursuit of the healing art against the interest of the state in the unhampered reproduction of the species. In striking the balance manifested by this statute, it cannot be said that it has erred to such extent as to require this court to declare such legislative conclusion to be unreasonable and the statute void as being in conflict with the organic law of California.

Numerous other authorities cited by appellants (including Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655; In re Raleigh, 177 Cal. 746, 171 P. 950; Matter of Bohen, 115 Cal. 372, 47 P. 55, 36 L.R.A. 618, do not assist appellants on their constitutional argument. Such decisions stand only for settled principles of constitutional law.

[6, 7] There is no uncertainty as to the meaning of section 274. When its words and phrases are construed according to the context and approved usage, and technical words are given their peculiar meaning, Penal Code, sec. 7, subd. 16, the statute is found to be a plain and simple inhibition against the specified act and any person of common intelligence can understand it. People v. Rankin, 10 Cal.2d 198, 202, 74 P.2d 71. For a statute to be so certain as to be operative, it requires only such diction as is sufficiently well known to enable those who are affected thereby to understand and apply its provisions. Lorenson v. Superior Court, 35 Cal.2d 49, 60, 216 P.2d 859.

The Evidence is Sufficient.

Inasmuch as all four indictments were consolidated for trial they are all considered as a single group of offenses on appeal. However, it will be borne in mind that there was but one conviction for conspiracy, to wit, count I of 35. Included with appellants in that conspiracy were defendants Amos and Zipse. Since their participation has been disposed of they will receive no further consideration. The task remaining with respect to the conspiracy is to show that the proof is substantial that appellants agreed to work with each other and with their codefendants in effectuating the purpose of the conspiracy. Such evidence is not far to seek in view of the ownership or management of the two buildings by Glynn; his constant, daily presence on the premises; his activities in communicating with women who sought relief under his shelter; his meeting them at the airport; his conducting them in secrecy to his hospital; his large fees collected in advance; his giving none of them a receipt; his payments of $200 to Dr. Gallardo for his surgical services and the doctor's prompt appearance on the arrival of a pregnant woman. Dr. Gallardo is in no better position than Glynn for it was his skillful hand in all instances that guided the instruments that relieved the women of their pregnancies. He was paid for all such services by Glynn who employed Miss Zipsie as their ready assistant at every undertaking.

On December 18, 1949, Miss Edith of Berkeley visited the Southwest Hospital after a telephonic conversation with Glynn and consultation with Dr. Elder in San

Francisco. When she paid Glynn $600 she was in good health and her pregnancy four months advanced. That Gallardo performed the operation was established by her testimony that two days after the abortion Dr. Amos called with Gallardo and stated that the latter had performed the operation. After five days Edith left the infirmary relieved of her pregnancy with an additional surface scar over her pelvic region. Gallardo received $200 from Glynn.

Prior to May 16, 1949, Elice was told by Dr. Zorb that she was three months' pregnant. On that day, accompanied by her father, she called at the Southwest Hospital for the purpose of voiding her pregnancy. By Glynn the father was quoted the price of $500. After Dr. Gallardo had examined and found her to be in good health, he conferred with Glynn who feared that an abortion would imperil Elice's health. He suggested that in order to make it legal, they could remove the girl's appendix. The operation was performed on the day she entered. Later she saw the three-inch scar down the middle of her abdomen and was relieved of her gravid condition. The $500 fee was paid half in cash, half with the check of the father. Glynn paid Gallardo $200.

Jane sought relief at the Southwest Hospital on March 3, 1950. At a previous conference with Glynn, he fixed her fee at $500. Ninety minutes after her arrival, Dr. Gallardo arrived and with the aid of Dr. Amos and two nurses he diagnosed her and performed a Caesarian operation. Dr. Amos administered the anesthetic. She was 22 years of age, in excellent health. After recovering from the wound she found a half-moon scar above her symphysis pubis, five inches long, and she no longer suffered pregnancy. She paid Glynn $550, $200 of which Gallardo testified that he received.

Further corroboration of the conspiracy, if required, and of the overt acts alleged is found in the testimony of officer Jokisch who visited the medical building about 1 p. m. on March 31, 1950. After withdrawing for a conference with fellow officers, he returned to witness Glynn's departure followed by such officers to the Palms Motel. There Glynn conversed with Virginia who within a few minutes entered Southwest Hospital to be aborted. Officer Jokisch and his two aides returned to the medical building. In the forenoon of the same day Jokisch had given officer Meade $250 in marked bills and kept their serial numbers. Those bills were delivered by that officer to Glynn as compensation for an abortion to be performed upon Marie Wischman, a name assumed by police woman Short. Jokisch and his men forcibly entered the medical building about 1:45, took the marked money from Glynn, found Virginia, Ella and Mrs. Short waiting and Dr. Gallardo dressed in surgeon's smock retreating toward the back gate. He saw Patricia lying on a bed, crying, not fully dressed, a reddish brown stain on the back of her skirt. He took from Gallardo $1,178.87. He found officer Graff with Glynn in the "Doctor's Office." They took from Glynn $2310 in currency, bills of various denominations. Also, they took a black looseleaf notebook containing a list of patrons including the ladies present in the building. In addition, Jokisch took 25 surgical instruments and tables later introduced in evidence. At 10:45 p. m., he and other officers visited the Southwest Hospital with Glynn and Miss Zipse. He took the hospital books containing the records of patients Jean, Edith, Martha, Jane, Elice, Margaret, Berna, Eileen and Nancy. He took the checks of Elice, Edith, Jane and Martha. Three cards were found in Glynn's brief case.

The officers had conducted observations of the hospital from a vacant lot commencing about March 1. Officer Graff located his trailer about 320 feet from the hospital. He was accompanied by police woman Statzel. They observed the comings and goings of Glynn. On March 17 Graff followed Glynn to Gallardo's "Santo Nino" clinic on Whittier boulevard at Breed street. At 1 p. m. on March 31, 1950, Graff approached the medical building with officer Statzel. They observed Glynn's Cadillac and two other automobiles nearby. Glynn and two women crossed the street and proceeded up an alley to the rear of the building. As Graff entered the alley he was confronted with Gallardo's blue Cadillac and Glynn who was then arrested. Graff took from him a crumpled paper bearing the names of Berna, Eileen and Nancy. He escorted Glynn into the building and went at once to Miss Zipse's apartment. After some conversation he induced that lady to disclose the whereabouts of the instruments she had brought from the operating rooms, to wit, hypo-syringe and needle, four sponge forceps, two curettes, one sound and four dilators.

Later in the day Graff visited with Gallardo in the "Examining Room" where without any questions the doctor stated: "You know I wasn't as frank with those men in there as I might have been * * * there is a lot I could have told them that I didn't think it was right to tell them, and I don't intend to * * * I should never have come here at all * * * I have tried many times to withdraw from this association * * * it goes back a long way * * * I talked with Henry Glynn about it, and we got together and this is the result of that."

In the early days of Graff's observations, officer Lane assisted. On March 9, 1950, he witnessed the arrival of Mrs. Berna at the Southwest Hospital at 8:20 a. m. She entered Glynn's office with him. She left at 9:15 and returned at 11:47 with an overnight bag. She accompanied Glynn into his office, thence into the hospital at 4:00 p. m. On March 31, 1950, at 7:46 a. m. Lane observed Glynn leave the medical building, enter his Cadillac and depart. At 9:07 he saw Gallardo park on 81st street, return to and enter the medical building.

[8] The foregoing evidence is substantial. It shows appellants to have worked in unison under a plan and agreement to commit abortions upon the women mentioned. Indeed, from such activities as disclosed by the officers, it should require but scant proof of an abortion operation to convince an impartial juror that appellants were engaged in the business of performing abortions. But appellants contend that an abortee is an accomplice, Penal Code, sec. 1111, and that her testimony alone is not competent to prove the crime. Even though she were an accomplice, the evidence above detailed is sufficient corroboration. It places appellants in the lair where they daily met women in search of the abortionist's services; shows them in the company of the women who were served; proves their acceptance of the rewards for such operations and a generous supply of weapons used to practice the abortionist's craft.

[9–11] When corroborating evidence creates more than a suspicion of guilt of the actor, it is sufficient although considered alone it is entitled to but slight consideration. People v. Wilson, 25 Cal.2d 341, 346, 347, 153 P.2d 720. The requirement for the abortee's testimony to be corroborated, see Penal Code, sec. 1108[2] is fully met by the facts last enumerated and by the testimony of the officers and the inferences to be drawn from the testimony of Gallardo and his statement to officer Graff. Ibid.; People v. Dorrance, 65 Cal.App.2d 125, 130, 150 P.2d 10. But the abortee is not an accomplice within the meaning of section 1111, supra. People v. Clapp, 24 Cal.2d 835, 839, 151 P.2d 237. An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." People v. Stone, 89 Cal.App.2d 853, 869, 202 P.2d 333, 342. The abortee is guilty of a different offense. Penal Code, sec. 275.

[12] If the testimony of all the abortees named in the two indictments should be eliminated the residue would be sufficiently inculpatory and therefore is corroborative. Such evidence is sufficient if it so connects the defendant with the crime as reasonably

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[2] "Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of eighteen years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

to satisfy the jury that the abortee has told the truth. People v. Allen, 104 Cal.App.2d 402, 413, 231 P.2d 896; People v. Griffin, 98 Cal.App.2d 1, 23–28, 219 P.2d 519. It is not essential to the competency of corroborative evidence that standing alone it prove the guilt of the accused. People v. Allen, supra. As to the conspiracy, the facts in evidence are sufficient proof. Conspiracies are commonly formed in the dark or behind closed doors. They are usually proved by circumstantial evidence only. Many a prisoner has reflected upon the tragic irony that though he had not spoken a word at the commencement of his venture, the threads of his behavior had been knitted into a perfect pattern of a dark conspiracy to defeat the law. Where a physician's medical building or hospital equipped with a number of sets of three or four surgical instruments of the same design commonly used for curettements and abortions, sundry anesthetics, and tables with stirrups for use in examining and operating upon women; when the accused doctor and his associate communicate by long-distance telephones with women who are in good health residing in remote cities whose own physicians have referred them to the two men under investigation; and when the latter subsequently receive such women at a medical building and keep them for brief periods; and when the two men are for an extended period observed contemporaneously to be congenially co-operating about such building or hospital—such facts with proof of overt acts may be properly found sufficient proof of a conspiracy, see People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17 to engage in unlawful acts.

[13] Appellants deem themselves to be aggrieved because of their belief that the contradictory testimony of Dr. Gallardo acquits them. Their feelings would be justified if the doctor's testimony stood alone or if the jury had adopted it. But they are impotent to bestow veracity upon their own testimony after the fact finders have rejected it as untrue. Since it was discredited by the constitutional triers of the facts, it has passed into limbo and cannot be considered by the reviewing court. People v. Allen, supra, 104 Cal.App.2d at page 414, 231 P.2d 896. It is as dead as the ashes of ancient Troy. Not only does the evidence prove the conspiracy of appellants alleged in count I of indictment 35, but it proves the performance of criminal abortions upon the women named in the allegations of overt acts and upon the other women named in the indictments. The proof of the conspiracy is supplemented by the evidence received in support of the other three indictments. People v. Allen, supra, 104 Cal.App.2d at page 411, 231 P.2d 896. In considering them it should be borne in mind that Mr. Glynn was not a physician. Evidently he had engaged in the business of providing facilities for the practice of the abortionist as a game for profit. From Glynn's silence, and the locations and appearances of his two successful institutions, the jury were justified in drawing inferences unfavorable to him.

The Enterprise was Profitable.

Miss Jean of Berkeley, in good health, entered the Southwest Hospital November 14, 1949. (Count II, 35.) She had one child twenty months old. When Glynn observed her youthful years he required her mother to come to consent to an operation. She paid Glynn $470 in travelers checks and $130 by her own check. Neither to her nor to any other abortee did Glynn give a receipt. The mother's signature on the hospital records was established. When the patient told Dr. Amos that she had undergone an appendectomy in 1946, he said: "For the records we will put down complications of appendix." Within 30 minutes after her examination, she underwent an operation. Thereafter Gallardo examined her. Later she found a 3½ inch semi-circular scar above her pelvic region and was relieved of her pregnancy. She was referred to Glynn by the physician in Berkeley who found her pregnancy had advanced five months.

The evidentiary accounts of the operations by Gallardo upon Jean, Edith and Elice (Counts II, III and VI) have been given in the discussion of the conspiracy.

Jane (Count V, 35) was referred to Glynn by a physician of Long Beach. She was in excellent health but was three months' pregnant. Accompanied by her mother, she entered Southwest Hospital March 3, 1950. Her history was taken by Gallardo who arrived after the women. The mother witnessed the passing of money by Jane to Glynn who had told her the operation would cost $500. Gallardo testified Glynn gave him a personal check for $200. During the operation two nurses were present with Dr. Amos who administered the anesthetic. Gallardo testified he made the examination. Jane was 22; had undergone an appendectomy at 12 years leaving a vertical scar just below the navel. Gallardo's incision made a half-moon scar below the pubic hairline five inches long. The girl paid Glynn $550. She was relieved of her pregnancy.

Marjorie (Count VII) telephoned Glynn from Fresno in March, 1950. Pursuant to arrangements with him, she went to Los Angeles and stopped at the Coliseum Hotel, March 24, 1950. Two days later she was examined by Gallardo at an office distant from the hospital and medical building. She then paid Glynn $500 cash. She signed the admission sheet March 28 as she entered the hospital. Gallardo testified that he performed the surgery. On her return to Fresno she observed the horizontal scar on the hairline. It was her first incision. Her health had been good. Three weeks after the surgery her menstrual flow resumed. She had sought the operation in order to remove a fetus from her.

March 31, 1950, Nancy (Count X) met Glynn at the Palms Motel at 9 a. m. She brought $200 as he had required. She was in good health but believed she was pregnant. She followed him from the motel parking lot. He was accompanied by a large woman. They went in a zigzag fashion to the medical building. Nancy had few words with Glynn after following him in. She signed the admission sheet and paid Glynn the $200. Miss Zipse directed her to the operating room where fully dressed she lay upon a table with feet in the stirrups. A doctor entered, gave Nancy an injection in her vagina. She felt nothing more than the sting of the needle. Gallardo testified that he saw Nancy on March 31 and performed a physical examination. On leaving the table she had a discharge of blood from her vagina. The nurse gave her a shot, and provided her with a suppository. She made the visit to effect an abortion. Thereafter her menstrual flow returned. She had had an operation for the same purpose six months previously.

March 8, 1950, Jane No. 2 (Count XI–35) went from Fresno to Los Angeles. Officer Lane saw her arrive with Glynn at the Southwest Hospital on the 9th. She gave Glynn $300 cash as he directed her to a room. Zipse assisted her onto the surgical table. Gallardo stood in a position whereby he was able to operate upon her genital organs. She suffered an unpleasant sensation, something inserted. Gallardo testified that he inserted a vaginal speculum. The nurse gave her pills and suppositories to be used as directed. The girl left at 4:30 p. m. and returned to Fresno. Before going to the hospital she was in good health, but believed she was pregnant.

March 31, 1950, a friend of Virginia (Count XII) telephoned Glynn to ask if he would afford a curettement for a young matron. He promised it would be done for $250. On that day Virginia and her husband, pursuant to instructions, met Glynn at the Palms Motel. At the same time Ella and her husband were there. The two couples accompanied Glynn to a point on Hoover street and all parked near a church. He escorted the two women into the rear entrance of the medical building where policewoman Short was waiting. Virginia paid Glynn $250. She had two children, was in good health but believing she was pregnant had come to Glynn to be aborted. She saw Dr. Gallardo in a white surgeon's coat as the police broke in. He ran out to the rear. She saw him throw some object into the washroom. She looked in and saw the instrument on the floor. She saw Patricia whose slip was bloody.

Indictment No. 87

Patricia entered the medical building about 1:00 p. m. March 31, 1950. On being admitted by a woman, she talked with Glynn to whom she paid $225 as she signed her admission card. She was directed by

Zipse to the operating room where she was told to remove her underclothing and lie upon the operating table. Gallardo made a vaginal inspection and inserted a vaginal speculum and a uterine sound into the external os to hold down the cervix. Other instruments also were used. But just then Zipse cried, "Someone is coming," and the instrument was snatched away from the patient. As she left the table she was bleeding from her vagina. She crossed to another room from which she was soon conveyed to the Receiving Hospital. There the police surgeon found that her vulva was covered with blood, the cervix had been recently bruised and lacerated and blood was flowing. He opined that she was the victim of a probable attempt at abortion; a tenaculum could have made the bruises on the cervix which is immobilized by that instrument. Also, the trauma of the cervix could have been caused by the dilator. Both of the instruments with many others of similar character were taken from the offices of appellants.

Ella had been pregnant six weeks when on March 27, 1950, she decided to have an abortion. Three days later she communicated with her physician, Dr. Kagan. On that day she received a telephonic call from Glynn who indicated a willingness to serve her for $250. As he directed, she met him at the Palms Motel about 1:20 p. m. March 31. Her drive to the medical building has been described in the narrative of Virginia's experience. She sat in the doctor's office near officer Short. After Glynn filled out her admission card she paid him $250 and remained in the room with Mrs. Short. As the police entered she saw Gallardo toss an object into a room as he ran toward the rear. This she later identified as a speculum. Before they left for the Receiving Hospital she saw Patricia.

Mrs. Short was a member of the police department of Los Angeles. Pretending to be pregnant she called upon Dr. Kagan March 23, 1950, and told him she had had a positive reply to a rabbit test. After writing her information on a folder, he absented himself from his office for five minutes and then announced that he had a doctor that would help her. After giving her "shots" for $30, he told her if they proved ineffectual he would refer her to a doctor who would abort her. He knew of a small hospital where she could receive the correct care at a price of $200 to $250. When she reported that the shots had failed to produce results, Kagan again commented upon the fine work done by the man to whom he had referred others and not to worry. He then gave her the card of the Southwest Hospital and told her to write the name of Mr. Glynn upon it and to ask for him as he was the owner, but not the doctor who did the surgery and whose name she would never know. He then attempted to reach Glynn by telephone but did not succeed. Thereafter Dr. Kagan informed Mrs. Short that he had conferred with the abortionist; that she would not be anesthetized but would get just a shot and a couple of pills; it would not hurt—a little cramping only. She should go to the medical building and ask for Glynn. She called at the time set for her appointment in company with officer Meade at 1:03 p. m. as Patricia left her car to enter the medical building. She was admitted by Zipse and was ushered into Glynn's office. He wrote the personal data on Mrs. Short's admission card and told her the charge would be $250. After Meade counted out the currency to Glynn, he was told to return for Mrs. Short at 2:30 on a side street. As she waited, Zipse reassured her that since she had given birth to a child, the operation would not be so bad. Gallardo arrived. Mrs. Short saw Zipse and Patricia enter the surgery room followed by Gallardo. Soon came the police and the breaking glass; Zipse ran into the hallway; as Gallardo ran from the washroom toward the rear, he threw an object to the floor. Mrs. Short entered the surgery room, saw Patricia clothed in a bloody slip climb off the operating table and lie down on a cot. Later she engaged Zipse in conversation with officers Jokisch and Burton participating.

Officer Meade took the $250 from Sergeant Jokisch. The latter had made a record of the serial numbers on the bills. As Mrs. Short was about to sign her admission card Zipse opened the door to ask her whether she had the money. When Mrs.

Short replied that he (Meade) had it, Zipse said, "Come inside. I don't see why we have to do business with the men." Meade and Mrs. Short entered the room and engaged Glynn in conversation when she told him that she was Marie Wischman. To this Glynn responded: "Oh, you are Dr. Kagan's patient." Thereupon Mrs. Short gave her answers to Glynn and the money was passed as heretofore related. When Meade expressed his anxiety about "this girl" Glynn replied, "Don't worry, don't worry. It is all right; it has worked plenty of times before."

Meade left but returned as the officers broke in. Jokisch brought Glynn into the doctor's office and took the money from Glynn's pocket. The numbers on the bills taken were checked against the numbers on the list of bills Meade had given Glynn.

Indictment No. 88

Eileen, a young Chinese matron, lived in San Francisco. She wished to have an abortion. Accompanied by defendant Mrs. Schroeder, a physician, she arrived in Los Angeles, March 31, 1950, and went at once to the Palms Motel. At 9:30 a. m. Glynn called for her and conveyed her to the Southwest Hospital. She was sent by Zipse to the operating room where she found Dr. Gallardo. He examined her with a speculum as she lay upon the operating table. She bled from the vagina. Zipse gave her pills and a suppository to be used. She had paid Dr. Schroeder $450. Whether that money reached Glynn is not made clear. From his aggressiveness on other occasions, the jury might well have deduced that he took part of the money from Dr. Schroeder. But Gallardo testified that the value of the service he performed for the Chinese mother did not exceed $25. She was 23 years of age, had three children and enjoyed good health. Her regular physician had advised her that she was with child. That opinion was supported by her dizziness and vomiting sickness. She was relieved of her pregnancy by the hand of Gallardo.

Martha was three months pregnant, and also knew Mrs. Schroeder. On September 12, 1949, the two women left San Francisco and arrived in Los Angeles the following day. They stopped first at a motel and after the lapse of a few hours were driven to the Southwest Hospital. Martha registered with Glynn. She had paid Dr. Schroeder $450 on the way. Dr. Gallardo examined her and recommended surgery. That event occurred within nine hours after she registered. She was given a spinal anesthetic, was by Gallardo opened across the abdomen and taped. She remained there 36 days. Her scar was a crescent four inches long below the hairline. There was some difficulty, requiring a second incision during her detention. Relieved of her pregnancy, she returned home about October 19. After a physician found an enlarged mass in her pelvis, she flew back to Los Angeles, was met at the airport by Glynn and underwent a laparotomy by Gallardo. He told her that her appendix had been pretty bad. But prior to her first visit to the Southwest Hospital she had worked regularly, suffered no pain in her back, teeth or skin. Although Glynn paid Gallardo $200 for his service to Martha, the $450 was all that was ever paid by her.

Indictment No. 90

Berna (Count II), a healthy matron of the Bay City, had one child. Her doctor told her on March 12, 1950, that she was pregnant. She had been suffering from sick stomach and vomiting and had no menstrual flow. She met defendant Chelini on March 28 in Daly City. That lady told her she could arrange for an abortion at Los Angeles for $450 and all expenses. They met at the depot in San Francisco on March 30 and went to the southern metropolis. They stopped on the 31st at the Tulips Motel where the girl paid Mrs. Chelini $450. At 9 a. m. Glynn called and drove her to the medical building. After she registered with the assistance of Miss Zipse, she entered the operating room furnished with an operating table with stirrups, a sheet and lights. She was directed by the nurse to lie upon the table on her back, head low, legs in stirrups. Zipse stood by her head. Some person Berna could not see entered the room and inserted a sharp needle near the patient's vagina. She felt a piece of cold metal inserted but it caused no pain. While her private parts were exposed she felt the strange person between her legs. He left before she arose from the table. After Zipse helped her up, she remained in the waiting room five minutes when Glynn entered and took Berna back to the Tulips where Mrs. Chelini awaited their coming.

Prior to leaving San Francisco, Berna enjoyed fine health. As she was going home, nurse Zipse told her to wear a sanitary pad, gave her instructions for self-care and how to use the penicillin suppositories and tablets supplied her. Her menstrual flow was resumed. Dr. Gallardo testified that he entered the building at 9:07 a. m. on March 31, 1950; that he inserted a vaginal speculum in Berna and used a Hegar Sound to dilate her external os. He said he did not know whose patient she was, but his services were of the reasonable value of $25.

Orsolina Chelini (Counts II and III), gave testimony that duplicated that of Berna concerning all that occurred outside the medical building except the following: she paid Glynn $300 of the $450 she had received from Berna; she had brought another pregnant woman from the northern city in 1949 and paid Glynn $300 when he told her that if she purposed to profit by such transactions she would have to charge more; also, in February, 1950, she accompanied Frances from San Francisco and paid Glynn $300, left the girl at the Southwest Hospital while she waited at the Palms Motel; took her patient home on the following day.

Frances' First Visit and Abortion

Frances (Count III) first saw Glynn and Gallardo in August 1949. At that time she was in good health and lived in Daly City. She sought the services of Chelini for a second time in 1950. The latter then demanded $400 which was paid by check. Thereupon, Chelini employed defendant Schroeder to make the trip with Frances for $350. On arriving at Los Angeles the girl registered at the hospital with Miss Zipse. She was then pregnant, seven weeks. Gallardo was there in his white coat as she was placed on the table. She was not examined. Gallardo performed an operation. She felt instruments inserted into her vagina and a scraping. The performance finished, she went to bed. The next day she returned with Mrs. Schroeder to San Francisco, taking the pills and a suppository furnished by Zipse. She was no longer pregnant. She made that visit to the Southwest Hospital because of her belief that she was pregnant. Her pregnancy was relieved.

The foregoing is a summary of the evidence adopted by the jury on all four indictments. No plausible argument can be made that it is insufficient to support the verdicts. As heretofore demonstrated, the testimony of the abortee is sufficient if corroborated by evidence that tends to connect the accused with the crime. Who would say that the evidence received other than the testimony of the abortees here involved does not connect appellants with the crimes? The visits of the several women from San Francisco; their checks given in payment for the abortions; Glynn's meeting them at the airport or at one of the motels customarily used by him for contacting a patient; the observations by the police as early as March 3, 1950, of the movements of appellants, the arrivals and departures of the women who sought abortions, some for a day, some for less time, some for longer periods; the exorbitant fees collected for work whose value in some instances Gallardo testified was not 10 per cent of such sums. The testimony of Virginia, Ella, Mrs. Short, as to the occurrences in the Medical building when Gallardo was operating upon Patricia as Glynn sat in his office was inculpatory, if not conclusive. Not only did Gallardo's regular appearances at the hospital and the medical building constitute overt acts, People v. Stevens, 78 Cal.App. 395, 405, 248 P. 696 but he testified in the case of each woman of having made an "examination" or an incision to correct some condition to which he gave a name. The overt act is corroborated when proof is made of the first or some subsequent step toward the consummation of the defendant's criminal scheme. People v. Gibson, 94 Cal.App.2d 468, 470, 210 P.2d 747.

[14, 15] The evidence in the record generously demonstrates that appellants had an intention to do either some acts of charity or some crimes. Certainly it was not an eleemosonary institution that they maintained. Their purpose was a question of fact for the jury and finding could be made from circumstances relevant to the issues. Slight acts in furtherance of one's criminal purpose are sufficient proof of an attempt to commit an abortion. People v. Gibson, supra, 94 Cal.App.2d page 476, 210 P.2d 747. Now that the jury has found the guilt of appellants and the trial court having approved of the verdicts, the judgments cannot be disturbed on appeal unless it can be held that the record shows that "sufficient facts could not have been found by the jury to warrant the inference of guilt." It must be clear that "upon no hypothesis whatever is there sufficient substantial evidence" to support the judgment. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779.

Pregnancy is not Essential to a Conviction.

Appellants assert that a reversal is imperative because the court refused to give an instruction that "if you find that the woman was not pregnant with child at the time the alleged abortion was done, you must find the defendants not guilty" etc.

[16] Such instruction would have been error. The statute, sec. 274 makes guilty him who procures a woman to take a drug or employs upon her an instrument *with intent* thereby to procure the miscarriage of such woman. Such was the interpretation given by the court in People v. Crain, 102 Cal.App.2d 566, 568, 228 P.2d 307. The Supreme Court refused a hearing. The same holding is found in People v. Pollum, 97 Cal.App.2d 173, 177, 217 P.2d 463; People v. Ramsey, 83 Cal.App.2d 707, 717, 189 P.2d 802. In the latter case we cited other decisions to the same effect.

No Abortion Necessary to Save Life

[17] It is contended that no competent evidence was introduced to prove that the abortions were not necessary to preserve the life of the woman aborted. They argue that the only evidence upon the subject is the answers of the women that they were in good health. That is evidence. The testimony of the several abortees, the detailed circumstances of their behavior and the conduct of appellants are sufficient proof that there was no operation performed by appellants for the purpose of saving life. People v. Ramsey, 83 Cal.App.2d at page 718, 189 P.2d 802; People v. Malone, 82 Cal.App.2d 54, 58, 185 P.2d 870.

No Errors in Refusing Instructions

[18] Appellants list the instructions[3] given on the subject of corroboration with the complaint that the court should have told the jury outright that all abortees were accomplices. Such contention is not supported. The law of this state was followed by the court below. Its instructions given and its refusal to give others are supported by People v. Clapp, 24 Cal.2d 835, 839, 151 P.2d 237; People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; People v. Allen, 104 Cal.App.2d 402, 413, 231 P.2d 896; People v. Stone, 89 Cal.App.2d 853, 868, 202 P.2d 333. They say they were prejudiced by the instruction that under the evidence and as a matter of law the witness Orsolina Chelini was an accomplice. Nothing in that instruction could have misguided the jury. But if the court's naming that witness as an accomplice could have inflated the importance of the lady in the jury's estimation, it was promptly deflated by the very next instruction which declared that "the testimony of an accomplice ought to be viewed with distrust." Mrs. Chelini was not in the same class with the abortees. Not only did she accompany Berna to Los Angeles for the purpose of having her aborted, but she paid Glynn $300 out of the $450 she had received for his work. All her acts showed her intention to "facilitate the commission of the crime." The last cited authorities

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[3] No. 593. "Corroboration Required by Law."

No. 592–D. "Corroboration Alone Not Sufficient."

No. 592–C. "Requirements of Corroborating Evidence."

No. 821. "Testimony of Accomplices Must be Corroborated."

No. 829. "Testimony of Accomplice to be Viewed With Distrust."

No. 830. "How to Determine Whether Corroborative Evidence Sufficient."

make it emphatic that an abortee is not an accomplice.

[19] Appellants assign as error the court's refusal to instruct (1) as to the responsibility of a physician to his patient and (2) as to the meaning of the clause, to wit, unless the same is necessary to preserve her life. They urge that the rejection of Glynn's proffered instructions numbers 9, 2 and 5 prejudiced their cause. In instructions given the court set forth the substance of each count and stated the law as declared in Penal Code, section 274. Such instructions covered the law contained in Glynn's proposed instruction which added many things not required. He would have had the court instruct that the State is required to prove also that the use of the instruments and said miscarriage were not necessary to preserve the life of the woman; that "if you find that Dr. Gallardo or such other licensed * * * surgeon in good faith believed that such miscarriage was necessary to save the life of the woman and formed such opinion in good faith * * * and acted upon such opinion, then" he was entitled to the presumption of correct judgment and good faith. For additional reasons the instruction was erroneous. Glynn was not a surgeon. Gallardo testified that only one of the women he cared for was pregnant and as to her he reached no definite diagnosis; that he did not perform a single therapeutic abortion. In that state of the record, the quoted rejected instruction would have been error.

[20] Likewise it would have been error to instruct that the State must prove that Gallardo used instruments with intent to procure a miscarriage and that it "was not necessary to preserve her life"; that it is not necessary for the woman to be in actual danger of death, that the defendant may act upon appearances that arouse in the mind of a reasonable person the belief that the woman is about to die or suffer great bodily harm. Such instruction would have been erroneous. Appellants made no attempt to prove that they operated upon any woman in the belief that she was about to die, or that she was seriously endangered. Also, the law does not authorize an abortion to prevent harm or suffering. The proof in every case was that the woman was in good health.

[21] Glynn's contention that the court should have given his instruction on the meaning of the clause, to wit, "unless the same is necessary to preserve her life," sec. 274 is without support. The instructions (Glynn's 5 and 8) do not define the quoted clause. They are mere arguments. Inasmuch as the women all testified without contradiction that they were in good health at the time of their operations, a definition of the quoted words could have availed nothing. When a healthy woman submits to the surgery of the abortionist, her good health is sufficient proof that the employment of his instruments was not necessary to prevent her death. People v. Malone, 82 Cal.App.2d 54, 58, 185 P.2d 870.

Hearsay Evidence

While Berna was testifying, she was asked to repeat her conversation with Mrs. Chelini at Daly City. She had asked Mrs. Chelini if she could arrange to have an abortion for the witness. Upon objection the prosecution promised to "connect it up." The conversation and their trip to Los Angeles, to the Tulips Motel, their conversation there alone and with Mr. Glynn, their drive to some street and entrance into "a building" and other incidents were all related by Berna. Thereafter Mrs. Chelini having pleaded guilty to the indictment testified to all the facts covered by Berna.

[22] The same objection was made to Mrs. Short's detailing her conversations with Dr. Kagan whom she had consulted with reference to her feigned pregnancy and his referral of Mrs. Short to Glynn. In neither instance was motion made to strike the testimony so objected to as hearsay. In such event, appellants are deemed to have waived their objections. People v. Benenato, 77 Cal.App.2d 350, 361, 175 P.2d 296.

Miscellaneous Assignments

[23, 24] Appellants on cross-examination developed from Marjorie that she had testified before the grand jury to the effect that she went to the Southwest Hospital to find out whether she was pregnant; that

she did not know but assumed that she was pregnant; and that she went there for the purpose of terminating "this pregnancy assuming I was pregnant." On re-direct, the prosecution over appellants' objections directed her attention to a specified page of the transcript of the testimony before the grand jury where her own testimony was that when she returned to the hospital after having spoken to Dr. Gallardo her purpose was to have her pregnancy terminated. Appellants say that the court's act in overruling their objections was arbitrary and "the grand jury testimony of this witness should not have been introduced in evidence as she was then present to testify." It is the ubiquitous rule on the trial of criminal actions that when a witness has on cross-examination been confronted with his testimony of a prior occasion the prosecution may on re-direct read or state to the witness the entirety of the former testimony. People v. Dye, 81 Cal.App.2d 952, 957, 185 P.2d 624.

Neither was the trial court arbitrary in sustaining the objection of the District Attorney to the argument of Glynn's counsel to the jury that the condition of Theresa and Marjorie was such that it was necessary to preserve the life of those women to have an operation. The ruling was correct. There was no evidence of a therapeutic operation on Marjorie. Theresa was a defense witness.

[25] Appellants assign as prejudicial certain objections of the District Attorney to a question directed by Mr. Lane to Jane on cross-examination. The court sustained the objection and admonished the jury to disregard the offending statements. Such admonition is presumed to have been observed and the evil to have been thereby erased. People v. Harris, 219 Cal. 727, 732, 28 P.2d 906. The overruling of such objections are not such as to justify a reversal. People v. Sturman, 56 Cal.App.2d 173, 183, 132 P.2d 504.

Complaint is made of the court's ruling upon the defense objections to questions propounded to the witness Theresa who had been named as an abortee of appellants in Count IV of indictment 35 upon which count no evidence had been offered. Having been called by appellants to testify as to the manner in which she had been dealt with by the police, the District Attorney on cross-examination inquired whether she remembered the officers present at the meeting and the blonde girl with the stenotype machine. Over Glynn's objection that "the transcript ought to be produced here; has not yet been identified," the court allowed the District Attorney to read from a purported transcript of questions asked her and answers given at the City Hall conference. The answer ascribed to her by the document was to the effect that she asked his charges for an operation; that he named the price of $550 and she told him she would try to get it; that she tried to get it cheaper but could not.

[26–29] Her answer was, "I don't remember if I gave those answers or they asked me those questions." She gave the same answer to other questions as to that conference. Glynn now assigns as prejudicial the ruling which permitted the prosecution to read from the report of the City Hall conversation on the ground that no proper foundation was laid and it was not identified. The objections were properly overruled. The writing was not signed by the witness. She effectually denied giving the answers ascribed to her and of course they could not be used to impeach her. The law is that the District Attorney may for impeachment purposes use a typed statement which has been taken by a shorthand reporter without allowing the defense to inspect it, even though it was never signed by the accused. Also, it is not error to direct the shorthand reporter to read from his notes the statement made by the witness. People v. Sherman, 97 Cal.App.2d 245, 254, 217 P.2d 715. It is never error to question a witness concerning prior inconsistent statements for the purpose of impeachment. Although a foundation was laid, it was not necessary. People v. Vollmann, 73 Cal.App.2d 769, 789, 167 P.2d 545. The witness' inability to remember the conversation at the City Hall was sufficient ground to use it for impeachment. People v. Bjornsen, 79 Cal.App.2d 519, 534, 180 P.2d 443.

[30] Appellants called Mr. Lucas, deputy district attorney, to the stand to relate the conversation between Gallardo and the officers at the time of his arrest. Defense counsel asked Mr. Lucas to take the stenographic record of the conversation, refresh his memory and give the conversation "word for word." An objection to that question was sustained. The statement had already been used by the prosecution to impeach Gallardo. Glynn complains that since some of the witness' statement had been given he was entitled to all of it. The answer to such contention is that *no* part of the writing was introduced by the prosecution. Since the entire conversation had no relevancy to the point as to which Gallardo's credibility had been questioned the court properly denied appellants the privilege of inspecting the paper merely to increase their own information. See People v. McCoy, 25 Cal.2d 177–187, 153 P.2d 315; People v. Ratten, 39 Cal.App.2d 267, 271, 102 P.2d 1097; Code Civ.Proc., sec. 1854. The prosecution cannot be required to produce a typed report of a witness' statement where the witness had never agreed that such writing is a correct report of his oral statements. People v. Glaze, 139 Cal. 154, 157, 72 P. 965; People v. Sherman, 97 Cal. App.2d 245, 254, 217 P.2d 715; People v. Meadows, 108 Cal.App. 67, 69, 291 P. 226; People v. Coutcure, 171 Cal. 43, 48, 151 P. 659.

Policewoman Short had testified and been cross-examined. While on redirect she was shown a statement of Miss Zipse taken by a stenotype reporter in the evening following the arrest. Having testified to the names of the persons present, Mrs Short was asked to read the writing which purported to be the typed statement of the nurse and to tell whether it was a fair and accurate transcription of the questions asked of and answered by defendant Zipse. The witness having answered that it was an accurate transcription, appellants now assign as error the court's rulings, which allowed the answers, as "worse than secondary evidence" and no explanation was made as to why the reporter was not produced.

[31] The answer to appellants' contentions are: The questions and answers were admitted against Zipse only, as the jury were advised. Neither appellant may complain. People v. Centers, 56 Cal.App.2d 631, 634, 133 P.2d 29; People v. Bonner, 5 Cal.App.2d 623, 626, 43 P.2d 343. But even assuming appellants could raise the point, it is answered in People v. Zammora, 66 Cal.App.2d 166 at page 224, 152 P.2d 180, where a contention identical with that now made by appellants was denied.

[32] While officer Meade was testifying on direct examination he was asked to produce the list of serial numbers he had taken from the currency given him by officer Jokisch, which money he had given Glynn in payment for the services to be rendered to Mrs. Short. To such question appellants objected on the ground that the court had refused to order the police department to produce certain records for the defense. There was no error in the court's ruling. when Meade testified that he had made a list of the serial numbers of the numerous bills of various denominations he answered that he had the list and it was necessary to refer to it to refresh his memory. Both Jokisch and Meade had made a list of the serial numbers. In proving the money paid to Glynn was the same money Jokisch had given him it was necessary to have Meade testify to the identity of the bills he gave Glynn with those he had received from Jokisch. No witness is required to scour his memory for numbers on bank notes when he had the sense to make a memorandum of the numbers on such bills before they left his hand. Code Civ.Proc., sec. 2047. Meade was there for cross-examination if the defense questioned his accuracy.

[33] Appellants assign as prejudicial the court's refusal to order Mrs. Short while on the stand to produce certain notes which she had made at the time of her visits to Dr. Kagan and which she read prior to testifying but had returned them to her purse where they remained. Inasmuch as she did not read from any notes to refresh her memory while giving her direct testimony the court was not required to order them to be produced. Section 2047 of the

Code of Civil Procedure contains nothing to the contrary. Production of refresher notes is not required unless they have been actually used by the witness while testifying. 58 Am.Jur. p. 335, sec. 601 and authorities cited.

[34, 35] Appellants assert that they were prejudiced by the court's rulings in overruling their objections to testimony given by Berna, Frances, Jean and Martha. The evidence shows that they were each pregnant and gave certain defendants that information and their desire to be aborted. The testimony was competent and relevant in each instance to prove the conspiracy and the general objections thereto were properly overruled. The objection that it was received too soon is answered by the rule that the discretion of the trial court in regulating the order of proof is broad and will not be disturbed except where the showing is clear that such discretion has been abused. People v. Griffin, 98 Cal.App. 2d 1, 48, 219 P.2d 519.

The judgments and the orders denying the motions for new trials are affirmed.

FOX, J., concurs.

McCOMB, J., concurs in the judgment.

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110 Cal.App.2d 655

CARLSON et al. v. SHEWALTER et al.

Civ. 14907.

District Court of Appeal, First District,
Division 2, California.
April 30, 1952.

Carl W. Carlson and Ray Brendlinger sued Clair Lloyd Shewalter and another for damages which resulted when Carlson was turning his automobile left across highway in violation of ordinance and automobile was struck by oncoming vehicle driven by Shewalter and was thrown against Brendlinger, a pedestrian. The Superior Court, County of Santa Clara, William F. James, J., entered judgment in favor of Shewalter and against Carlson and Brendlinger, and Brendlinger appealed. The District Court of Appeal, Dooling, J., held that it was prejudicial error to instruct jury that Shewalter was entitled to rely on presumption that others would not violate the law without qualifying instruction to include that he could not continue to assume that law was being observed after knowing or having opportunity, by use of reasonable care, to know that it was not being observed.

Judgment reversed.

1. Trial 🔑194(16)

In action by pedestrian for injuries sustained when automobile making left turn across highway in violation of ordinance was struck by on-coming automobile and was thrown against pedestrian, court properly instructed that there was no evidence for finding that pedestrian was guilty of contributory negligence.

2. Automobiles 🔑245(6)

In action by pedestrian for injuries sustained when automobile making left turn across highway into driveway in violation of ordinance was struck by on-coming automobile and was thrown against pedestrian, who had observed turning automobile and was waiting at edge of driveway for it to complete turn, whether on-coming vehicle was negligent as to pedestrian was for jury.

3. Automobiles 🔑246(50)

In action by pedestrian against motorist who struck automobile which was making left turn in violation of ordinance and threw it against pedestrian, charge, that motorist driving turning automobile was guilty of negligence as matter of law, without qualification that this was so unless violation was found to have been excusable or justifiable, was proper where no showing had been made of legal excuse or justification for violation.

4. Negligence 🔑6

The fact which will excuse a statute violation, which would otherwise make violator liable for injuries resulting therefrom, is one resulting from causes or things beyond the control of the violator and mere ignorance of the law is not such a fact.

5. Appeal and Error ⚷1066

Trial ⚷253(4), 296(7)

In action by pedestrian against motorist who struck automobile which was making left turn in violation of ordinance and threw it against pedestrian, instruction that motorist was entitled to rely on presumption that others will not violate the law was prejudicially erroneous for failure to include qualification that he could not continue to assume that law was being observed after knowing or having opportunity, by use of reasonable care, to know that it was not being observed, and was not cured by other instruction.

6. Appeal and Error ⚷1064(1)

Instructions that are contradictory in essential elements may warrant the reversal of a judgment on the ground that it cannot be ascertained which instruction was followed by the jury.

7. Automobiles ⚷246(4)

In action by pedestrian for injuries sustained when defendant-motorist struck another automobile and threw it against pedestrian, instruction, that standard of ordinary care was what the jurors themselves would have done if they had been in position of respective drivers, was erroneous.

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Harrett W. Mannina, San Jose, Charles R. Wayland, San Jose, of counsel, for appellant.

Bohnett, Hill Cottrell & Bohnett, Rankin, Oneal, Luckhardt, Center & Hall, and Marshall S. Hall, all of San Jose, for respondent.

DOOLING, Justice.

Appeal by one plaintiff, Ray Brendlinger, from a judgment against two joint plaintiffs and in favor of a single defendant.

[1] This is a personal injury action arising out of the collision between two automobiles in San Jose in 1948. The accident happened on Santa Clara Street just directly east of the subway that runs underneath the Southern Pacific railroad tracks. At this point Santa Clara Street runs approximately east and west. It is a four lane highway. Just a few feet beyond the end of the east side of the subway Cahill Street runs into Santa Clara Street on its south side, but does not cross it. Opposite this entrance to Cahill Street on the north side of Santa Clara is a private driveway which serves as the entrance to two business establishments from Santa Clara Street. Appellant's coplaintiff, Carlson, was on his way to work on the day of the accident and was proceeding in an easterly direction along Santa Clara. He worked at one of the two establishments served by the said driveway. As he came through the subway and reached its easternmost peak or level he made a left-hand turn into the driveway mentioned. There is substantial evidence that Carlson put out his hand signaling such a turn and stopped with his front wheels just over the middle, double lane of Santa Clara Street, let at least two cars pass in front of him and then went through at about 15 miles per hour. Defendant was traveling on Santa Clara in a westerly direction and was in the most outside or northernmost lane of that street. He was seen by Carlson almost a block east of his, Carlson's position, but was looking down Cahill Street when Carlson last looked at him. He was going about 25 miles per hour. As Carlson's car got almost into the driveway defendant hit Carlson's right rear with his left front. Defendant was only 15 to 25 feet away from Carlson's automobile when he first saw it. As a result of this collision both cars were forcibly moved from their respective positions, and Carlson's car struck and injured the appellant who was standing on the east edge of the driveway. She had been on her way to work and just as she reached the driveway that intersected the sidewalk on the north side of Santa Clara she noticed plaintiff Carlson about to make his left turn. She remained standing from that time until the impact. Plaintiff Carlson testified that defendant said to him immediately after the accident: "There is nothing to argue about, I am all wrong. I wasn't looking." Defendant denied this.

The court properly instructed the jury that there was no evidence from which the jury could find that appellant Brendlinger was guilty of contributory negligence. Hence the verdict must rest upon the jury's finding that respondent was not guilty of any negligence which was a proximate cause of appellant's injuries.

[2] Appellant argues that the evidence shows that respondent was guilty of actionable negligence as a matter of law. We cannot so hold. While the evidence as a whole perhaps preponderates in favor of appellant on this issue the jury might (for example) find from respondent's testimony that Carlson suddenly made his left turn when respondent's automobile was very close to him. Such a finding would be sufficient to support the conclusion that respondent was not guilty of negligence.

Appellant points to Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A.L.R. 555 and like cases holding that evidence that an automobile left the street and struck a pedestrian on the sidewalk establishes a prima facie case of negligence. No case is cited that this prima facie case extends to a second automobile which does not leave the street, but in any event if the jury found respondent free from negligence as we have held that it might under the evidence any prima facie case to the contrary would be rebutted.

Defendant introduced a city ordinance which made it unlawful for a driver to execute a left turn into any private driveway in a business district. There is a sign at this location facing the westbound traffic directing that no left turns be made across the eastbound traffic but there is no such sign facing eastbound traffic. A police officer testified that he did not know that it was unlawful to make a left turn into this driveway.

[3, 4] The court instructed the jury that the section of the highway where the accident occurred was in a business district and gave the following instruction:

> "I instruct you * * * said Ordinance No. 3141 of the City of San Jose prohibited any person from making a left hand turn from or into any driveway within the business district. A violation of such Ordinance constitutes negligence. I instruct you if you find Carlson made such a left turn in the business district * * * he was guilty of negligence as a matter of law. * * *"

Appellant complains that this instruction omitted the necessary qualification "unless such violation is shown by the evidence to have been excusable or justifiable." While the instruction should be so qualified if there is any evidence of legal excuse or justification for the violation, Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279; Combs v. Los Angeles Railway Corp., 29 Cal.2d 606, 177 P.2d 293, there is no showing of such excuse or justification in the evidence in this case. Appellant points to the fact that a police officer testified that he did not know a left hand turn at this point was illegal and to the fact that while there was a "No Left Turn" sign facing westbound traffic at this point there was none facing eastbound traffic. Although a witness, Carlson did not testify that he was misled by the presence of the one sign or the absence of the other, nor whether or not he knew of the ordinance in question. The ordinance required no sign-posting to make it effective and, conceding without deciding, that if Carlson had been actually misled by the presence of the one sign and the absence of the other that would have been a legal excuse or justification for his violation of the ordinance no such showing was made. Mere ignorance of the law is no excuse and even that was not shown as to Carlson but only as to a police officer witness. "(T)he fact which will excuse the violation of a statute has been defined by the court as one resulting 'from causes or things beyond the control of the person charged with the violation.'" Ornales v. Wigger, 35 Cal.2d 474, 479, 218 P.2d 531, 534.

[5] The court further instructed the jury: "One lawfully using a public highway is entitled to rely on the presumption that others will not violate the law, and no negligence can be predicated on the failure to anticipate an unlawful movement in another on the highway."

The instruction should have included the qualification: "One may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed." Angier v. Bruck, 56 Cal.App.2d 55, 58, 131 P.2d 876, 878; Roller v. Daleys, Incorporated, 219 Cal. 542, 544–548, 28 P.2d 345; Corbin v. Bedel, 69 Cal.App.2d 60, 67, 158 P.2d 221; Poe v. Lawrence, 60 Cal.App.2d 125, 132, 140 P.2d 136; Passarelli v. Souza, 37 Cal.App.2d 1, 4, 98 P.2d 809; Angelo v. Esau, 34 Cal.App.2d 130, 137–138, 93 P.2d 205; Edlund v. Los Angeles Ry. Co., 14 Cal.App.2d 673, 675, 58 P.2d 928.

The failure to so qualify this instruction was under the facts of this case prejudicial error. The jury had been instructed that in making the left hand turn Carlson had violated the law. They were then instructed without qualification that negligence of the respondent could not be predicated on his failure to anticipate that Carlson would make an unlawful movement on the highway. The jury could have found on ample evidence that Carlson was stopped with the front of his car turned across the center line of the highway and started across it slowly when respondent's car was almost one block away, and that from that time until respondent was only 25 feet from Carlson's car he did not once look in the direction in which he was driving or see Carlson's car although it was at all times in plain view crossing his path. If the jury had been specifically instructed that respondent could not continue to rely on Carlson's obedience of the law after having the opportunity by the use of reasonable care to discover its violation we cannot say that their verdict would not have been for appellant under the evidence.

[6] Respondent points to a general instruction that each driver must exercise ordinary care to look about him, "to see what can be seen, look for what is to be seen, observe what can be observed" as curing the omission in the other instruction. This was a general instruction not pointed to, and we cannot say that the jury would understand it as a qualification of, the defective instruction. At best the two instructions were confusing and contradictory. "Instructions that are contradictory in essential elements may warrant the reversal of a judgment on the ground that it cannot be ascertained which instruction was followed by the jury." Sebrell v. Los Angeles Ry. Corp., 31 Cal.2d 813, 817, 192 P.2d 898, 900.

[7] We may add that it was also error for the trial court to instruct the jury that the standard of ordinary care was what the jurors themselves would have done if they had been in the position of the respective drivers. Freeman v. Adams, 63 Cal.App. 225, 218 P. 600; Warrington v. New York Power & Light Corp., 252 App. Div. 364, 300 N.Y.S. 154; Mayor and Council of Americus v. Johnson, 2 Ga.App. 378, 58 S.E. 518; Louisville & N. R. Co. v. Gower, 85 Tenn. 465, 3 S.W. 824.

Judgment reversed.

NOURSE, P. J., and GOODELL, J., concur.

KEIDATZ et al. v. ALBANY et al.

Civ. 18681.

District Court of Appeal, Second District, Division 3, California.

May 9, 1952.

Hearing Granted July 7, 1952. *

Robert J. Keidatz and Marion W. Keidatz brought action against vendors of realty to recover for damages resulting from alleged fraudulent representations by vendors. The Superior Court of Ventura County, Walter J. Fourt, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Wood, J., held that doctrine of res judicata was not applicable.

Judgment reversed.

Judgment 🔑589(1)

Judgment of dismissal of action by purchasers against vendors to rescind contract for purchase of house, on ground of alleged fraud by vendors representing that house was well built with good grade materials, was not res judicata in subsequent action by purchasers against vendors to recover for damage resulting from alleged fraudulent representations by vendors.

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* Subsequent opinion 249 P.2d 264.

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D. Wendell Reid, Los Angeles, for appellants.

William T. Selby, Ventura, for respondents.

WOOD, Justice.

Action for damages allegedly resulting from fraudulent representations of defendants whereby plaintiffs were induced to purchase real property. Defendants' motion for summary judgment was granted. Judgment was that the complaint be dismissed, that plaintiffs take nothing and that defendants recover costs. Plaintiffs appeal from the judgment.

On May 6, 1949 (prior to filing the present action), plaintiffs commenced an action (No. 35238) against these defendants. In the second amended complaint in that action there were two purported causes of action. In the first cause of action therein it was alleged that defendants sold and conveyed certain real property (house and lot) to plaintiffs for $6,500; that at the time plaintiffs agreed to buy the property the house was incomplete; that defendants promised to complete the house according to recognized building standards; defendants failed to complete the house; defendants fraudulently made said promises to induce plaintiffs to purchase the property; plaintiffs were damaged in the sum of $2,775, being the amount paid on the purchase price; plaintiffs relied upon said promises; plaintiffs demanded rescission of said contract and offered to restore to defendants everything of value they had received from defendants; defendants refused to rescind the contract. In the second cause of action it was alleged that defendants fraudulently represented to plaintiffs that defendants were expert builders and that the house was constructed in a superior manner with good grade materials and in accordance with standard practice; plaintiffs relied upon said representations; that within about one and one-half years after the property was purchased plaintiffs discovered several latent defects in the construction of said house (which defects were specified in the second amended complaint); plaintiffs relied upon said representations; that plaintiffs offered to rescind said contract and to restore to defendants everything of value they had received from defendants; defendants refused to rescind the contract. In the prayer therein plaintiffs asked that the contract be rescinded. Defendants demurred to the second amended complaint therein on the grounds that it did not state facts sufficient to constitute a cause of action; that the purported causes of action were barred by laches; and that the complaint was uncertain. The record on appeal does not include the order which was made upon the hearing of the demurrer. An affidavit of the attorney for defendants, in support of the motion for summary judgment, states that the demurrer was sustained with leave to amend; that on November 1, 1949, judgment was entered in favor of "defendant and against plaintiff"; that attached to the affidavit is a "correct copy" of the judgment. (According to said copy, the judgment was not signed.) The judgment stated that the demurrer to the second amended complaint was sustained on September 12, 1949, with leave to amend within 10 days, and that plaintiffs had not filed an amended complaint; and that plaintiffs take nothing and that defendants recover costs. Plaintiffs' motion to set aside the judgment, made under section 473 of the Code of Civil Procedure, was denied. No appeal was taken from the judgment or the order denying said motion.

Thereafter, said defendants (Albany) purchased the property at a trustee's sale under a trust deed given to secure the payment of the purchase price.

Subsequently, on December 15, 1949, an action was commenced by the defendants herein (Albany) against the plaintiffs (Keidatz) to recover possession of said property. Judgment by default was entered against Mr. Keidatz on February 17, 1950. The judgment was that Mr. Keidatz restore possession to plaintiffs, that plaintiffs recover $300 damages for detention of the premises, and recover costs.

On February 20, 1950, plaintiffs herein (Keidatz) commenced the present action for damages resulting from fraudulent representations of defendants (Albany) in connection with the sale of said property. There were three causes of action in the first amended complaint. In the first cause of action it was alleged that in July, 1947, defendants sold real property (house and lot) to plaintiffs for $6,500; that defendants fraudulently represented that the house was built according to the best approved building standards, the workmanship on the house was all first-class, and only the best materials had been used therein; that plaintiffs relied upon said representations; said representations were not true and defendants made them for the purpose of inducing plaintiffs to buy the property; the concrete part of the house was not properly constructed; the structure was inadequate to support the roof; the roofing material had not been installed properly; the tile in the kitchen fell to such an extent that a portion of the kitchen was unusable; as a result of said false representations plaintiffs were damaged in the sum of $2,775 (the total amount paid by them on the purchase price); the property conveyed by the defendant was worth no more than $3,500. In the second cause of action it was alleged that in July, 1947, defendants sold said real property to plaintiffs for $6,500; that prior to said sale defendants, with intent to induce plaintiffs to buy the property, represented that they were the owners of the land on which the house was built and that the house was located on the land purchased by plaintiffs; said representation was false in that the house was not on said land but, with the exception of a minute portion, was on an adjoining parcel of land not owned by defendants; prior to learning the facts as to the location of the house, plaintiffs paid $2,775 to defendants; and plaintiffs were damaged in said sum. In the third cause of action it was alleged that in February, 1949, defendants received $2,775 for the use of plaintiffs, and defendants have paid no part thereof. In the prayer plaintiffs asked that they recover damages in the sum of $2,775.

Defendants filed an answer in which they denied the material allegations of the amended complaint herein, and they alleged as separate defenses to each cause of action: (1) that on November 2, 1949, in an action in said court, wherein these plaintiffs were plaintiffs and these defendants were defendants, "for the same cause of action as that set forth in the complaint herein," judgment was duly made that plaintiffs take nothing, and the defendants recover costs; (2) that on February 17, 1950, in an action in said court between said Albanys, as plaintiffs, and said Robert and Marion Keidatz, as defendants, "for the possession of the same property" as that described in the amended complaint herein, judgment was duly made in favor of said plaintiffs Albany against said defendants Keidatz; (3) that each cause of action is barred by the provisions of section 339, subdivision 1, of the Code of Civil Procedure (within two years).

Thereafter, the defendants herein (Albanys) filed a notice of motion for summary judgment wherein they stated that said motion would be made on the ground that "plaintiff has no cause of action against defendant"; and that the motion would be be based upon the affidavit of defendants' attorney, the files in the present action and the files in the other said actions. The affidavit of said attorney, in support of the motion, states in part: that on May 6, 1949, an action (No. 35238) was commenced in said court by plaintiffs Keidatz against defendants Albany (referring to the action wherein plaintiffs Keidatz asked for rescission); the second amended complaint therein "to recover purchase money and for rescission of contract" was the last complaint filed in the action; defendants' demurrer to the second amended complaint was sustained with leave to amend; thereafter, on November 1, 1949, judgment was entered "in favor of defendant and against plaintiff"; no appeal was taken from said judgment and it became final; plaintiffs' motion to set aside the judgment was denied, and no appeal was taken from that order; the facts alleged in said action (No. 35238) filed on May 6, 1949 (wherein plaintiffs Keidatz asked for rescission), and in the present action "are the same facts and the relief sought is essentially the same"; the "former action is res judicata of all matters" in the present action.

In opposition to said motion, the attorney for plaintiffs filed his affidavit which stated in part: that plaintiffs Keidatz in said action No. 35238 (wherein they asked for rescission) pursued what they thought was their proper remedy, that is, to enforce rescission of the contract; that plaintiffs herein were unable to redeem the property at the time of the foreclosure, and the foreclosure was a subsequent action which had no bearing on the transaction in which the fraud was committed and which is the subject of the instant action.

Defendants' attorney filed his supplemental affidavit which stated in part: that the said demurrer in the former action (No. 35238) was sustained on the grounds that said complaint did not state a cause of action and that the rights of plaintiffs therein "were barred by the laches of the Plaintiffs."

The first action (No. 35238) was for rescission of the agreement to purchase the property. In that action the plaintiffs were not standing on the contract and seeking damages for a breach of it or damages resulting from fraudulent representations made in connection with the execution of it, but they were attempting to disaffirm the contract, were offering to return everything they had received under it, and seeking the return of the money they had paid. The only judgment that could have been rendered therein was one determining whether or not the agreement was rescinded. A judgment for damages, resulting from the alleged fraudulent representations, could not have been rendered therein. The demurrer was sustained upon the grounds that a cause of action was not stated and the rights of plaintiffs were barred by laches. That ruling, in view of the allegations of the complaint, is to be interpreted to mean that a cause of action for rescission was not stated and the right of plaintiff to rescind was barred by laches.

Respondents (Albany) assert that the present action is "on" the same cause of action as the first action, and that under their plea of res judicata the judgment in the first action is a bar to this action. The causes of action are not the same. The first cause of action was for rescission and the present one is for damages. The judgment against plaintiffs in said action for rescission is not res judicata as to the issues in the present action for damages. The fact that plaintiffs, acting under the erroneous belief that the remedy of rescission existed, attempted unsuccessfully to maintain an action for such relief does not preclude them from pursuing a different remedy which does exist, namely, an action for damages. In Herdan v. Hanson, 182 Cal. 538, 189 P. 440, which was an action for damages based upon fraudulent representations made in the exchange of property, the plaintiff recovered judgment, but previously the plaintiff therein had commenced an action to rescind the transaction, and the judgment against plaintiff in that prior action had become final. On appeal in that damage action it was contended that since plaintiff had elected to proceed in an action for rescission, he was precluded from resorting to an action for damages. The court therein said, 182 Cal. at page 542, 189 P. at page 442: "[W]here a party makes a mistake in election of remedies, he is not estopped by his abortive election from subsequently resorting to and pursuing a remedy to which he was really entitled." In Papenfus v. Webb Products Co., 48 Cal.App.2d 631, 120 P.2d 60, which was an action to declare a trust in the assets of defendant, judgment in the trial court was for defendant upon the theory that plaintiff had elected his remedy in a former action. In the former action plaintiff had sought rescission of a contract whereby he had transferred his assets to the defendant, and judgment therein was against plaintiff on the ground that the remedy of rescission was not available to him. On appeal in said action to declare a trust the judgment for defendant was reversed, the court stating, 48 Cal.App.2d at page 634, 120 P.2d at page 61: "It is clear that the remedy of rescission was not available to plaintiff when he instituted his former action. As he mistook his remedy in his former action the doctrine of election of remedies cannot bar this action." In Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, at page 672, 155 P.2d 24, at page 29, it was said: "The fact that he [plaintiff] failed to establish his right to rescission did not preclude him from any other relief that might be open to him."

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

110 Cal.App.2d 660

SOLOMON v. SOLOMON.

Civ. 15319.

District Court of Appeal, First District, Division 2, California.

April 30, 1952.

Action for separate maintenance by husband. From an order of Superior Court, County of San Mateo, Edmund Scott, J., requiring wife to pay temporary alimony, the wife appealed, and application for writ of supersedeas and order restraining enforcement of order for temporary alimony and order for attorneys' fees and costs on appeal was filed in Supreme Court and was transferred to District Court of Appeal. The District Court of Appeal issued an alternative writ but held that the allegations of the petition was insufficient for the issuance of a writ of supersedeas.

Petition denied and alternative writ discharged.

1. Appeal and Error 🔑458(2)

The power of appellate court on supersedeas can be exercised only with respect to a judgment or order then before the court on appeal.

2. Appeal and Error 🔑458(1)

A "supersedeas" is the suspension of the power of the trial court to issue an execution upon a judgment appealed from, or, if a writ of execution has issued, it is a prohibition emanating from a court of appeal against execution of the writ.

See publication Words and Phrases, for other judicial constructions and definitions of "Supersedeas".

3. Appeal and Error 🔑458(2)

Where undertakings had been filed which stayed the execution of certain orders of trial courts, appellate court would not issue supersedeas writ restraining enforcement of such orders.

4. Appeal and Error 🔑479(1)

Where no appeal had been taken from order of trial court for attorney fees and costs, appellate court would not issue a supersedeas writ restraining enforcement of order.

Henry C. Clausen, San Francisco, for appellant.

Mueller & McLeod and Charles N. Douglas, all of San Francisco, for respondent.

PER CURIAM.

This is an application for a writ of supersedeas.

In an action in the Superior Court of San Mateo County wherein the respondent, husband, sued his wife (petitioner herein), for separate maintenance, an order was made on January 2, 1952 after notice and hearing, requiring her to pay him $75 a month "as temporary alimony until the further order of this court, commencing on the 28th day of December, 1951."

On January 10 petitioner appealed and filed an undertaking for $1350 to stay the execution thereof.

On February 25, over a month before the record was certified or filed herein, petitioner filed in the Supreme Court an application for supersedeas which was transferred to this court on March 4, whereupon this court issued an alternative writ, returnable on April 14, which temporarily stayed all proceedings. The matter was then argued and submitted.

The clerk's transcript shows that on February 8 a minute order was made in the

Superior Court reading as follows: "Order to show cause re fees & costs * * * Both sides having filed a notice of appeal, it is hereby ordered that defendant pay $250.00 on account of costs and $2000.00 attorney fees to be split equally on account of each appeal."

While that order indicates that *both sides* had appealed, it apparently was a slip of the pen; it undoubtedly meant that of the $2000 so allowed, $1000 was allocated to this appeal (No. 15319) and $1000 allocated to appeal numbered 15,332, which had been taken by petitioner from an order made on October 24, 1951 by the Superior Court at San Francisco (Judge Morris) before the cause had been transferred to San Mateo County on appellant's motion for change of venue.

The clerk's transcript in 15,319 certified by him on March 25th and filed herein on the 31st, contains a copy of his register of actions which fails to show *any appeal from the order of February 8.* Moreover, the petition contains no allegation that such appeal had been taken.

The petition contains the following allegation:

> "9. Defendant cannot afford to continue filing further appeal bonds or to expend further costs to resist the repeated unjustified motions and orders to show cause which plaintiff persists in filing. Defendant believes such proceedings have been filed for the purpose of harassing defendant and for the purpose of enforcing the orders upon which her stay bonds have prevented plaintiff from having execution."

The prayer of the petition reads: "3. That the Superior Court * * * be ordered to desist and refrain from enforcing or attempting to enforce said order for support, dated January 2, 1952, or said order for attorneys' fees and costs on appeal, dated February 13, 1952, or any of the terms or provisions of either of them * * *."

The net result of petitioner's application as it now stands is as follows:

1. An appeal is pending in this court (Civ. No. 15332) from Judge Morris' order of October 24, 1951, in which the record on appeal has been filed. When that appeal was taken an undertaking for $4725 was filed which stayed the execution of the order of October 24.

2. There also is *this* appeal (Civ. No. 15,319), likewise pending in this court, taken from Judge Scott's order of January 2, on which an undertaking for $1350 was filed which stayed the execution of the order of January 2.

3. *There is no showing of any appeal having been taken from the order of February 8.*

[1] It is well settled that the power of an appellate court on supersedeas can be exercised only with respect to a judgment or order *then before the court on appeal.*

In the In re Imperial Water Company No. 3, case, 199 Cal. 556, 557, 250 P. 394, 395, the court said: "It has been repeatedly held by this court that a supersedeas will issue only to restrain the court below or its officers from proceeding to enforce *a judgment pending appeal* and that such writ is limited to restraining any action under the authority of the court *upon the judgment appealed from*". (Emphasis added.)

In McCann v. Union Bank & Trust Co., 4 Cal.2d 24, 25, 47 P.2d 283, 284, the court said: "The operation of that writ is limited to the issuance thereof by an appellate court in aid of its appellate jurisdiction to stay proceedings *on the judgment or order from which the appeal is taken.* Rosenfeld v. Miller, 216 Cal. 560, 15 P. 2d 161; Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 P. 123." (Emphasis added.)

[2] In Stewart v. Hurt, 9 Cal.2d 39, 42, 68 P.2d 726, 727, the court quotes 23 Cal. Jur. 983 as follows: "A supersedeas, properly so called, is a suspension of the power of a trial court to issue an execution upon *a judgment appealed from,* or, if a writ of execution has issued, it is a prohibition emanating from a court of appeal against the execution of the writ." (Emphasis added.)

See, also, Whittell v. Renz, 32 Cal.App. 2d 282, 89 P.2d 668.

[3, 4] The orders of October 24, 1951, and January 2, 1952, are both before this

court on appeal but since a stay bond was filed as to each of them nothing remains for this court to do with respect to either.

The order of February 8, 1952 is *not* before this court since, as far as the present record shows, it has not been appealed from.

For these reasons the allegations of the petition are insufficient to call for the issuance of a writ in this case.

The petition is denied, and the alternative writ heretofore issued is discharged.

110 Cal.App.2d 797

JULSON v. JULSON.

Civ. 18818.

District Court of Appeal, Second District, Division 3, California.

May 8, 1952.

As Corrected May 13, 1952.

Hearing Denied July 7, 1952.

A wife brought an action against her husband for separate maintenance and the husband filed a cross complaint for divorce. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered a decree granting defendant a divorce on cross complaint, and dividing the community property, and plaintiff appealed from the judgment and from an order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that evidence corroborating testimony of husband was insufficient to support finding that wife was guilty of extreme cruelty entitling husband to a divorce.

Judgment reversed and attempted appeal from order dismissed.

1. Divorce 🔑127(4)

Corroboration of testimony of plaintiff in divorce action charging defendant with cruelty is sufficient if it goes to some of the accusations which, if established, would justify a finding of cruelty, or otherwise lends substantial support to testimony of the plaintiff.

2. Divorce 🔑127(4)

A favorable or unfavorable impression created by courtroom appearance cannot supply corroboration of plaintiff which is required in divorce action.

3. Divorce 🔑127(4)

Evidence corroborating testimony of cross complaining husband was insufficient to support finding that wife was guilty of extreme cruelty entitling husband to a divorce.

◆

William Mayhew and Gerald R. Edgington, Los Angeles, for appellant.

William Kinley, Long Beach, for respondent.

SHINN, Presiding Justice.

Helen Julson brought this action for separate maintenance, charging extreme mental and physical cruelty.

Defendant filed a cross complaint for divorce, with similar allegations. Findings were against plaintiff upon the complaint and the cross complaint. She appeals from a decree awarding defendant a divorce and dividing the community property.

The grounds of appeal are that the finding of extreme cruelty is not supported by the evidence and that the court failed to find whether defendant had deserted plaintiff.

When the court directed judgment for defendant on his cross complaint the terms of the decision were entered as a minute order, which read, in part: "Cross-complainant is ordered to pay to the cross-defendant for her support and maintenance, the sum of $100.00 per month until the further order of the Court. Counsel for cross-complainant is to prepare judgment and findings." The minute order in other respects stated the terms of the judgment that was thereafter signed. The conclusions and judgment, prepared by defendant's attorney, provided for the payment to plaintiff of the sum of $100 per month until the further order of the court. These provisions were crossed out and the findings, conclusions and judgment were signed. The conclusion is inescapable that the provision for plaintiff's support was an integral part and condition of a judicial decision of the issues in the case in favor of the defendant. But although the minute order was a judicial act, it was superseded by the findings and conclusions, which, alone, constitute the final decision of the issues upon which the judgment rests. The attempted award of support to the wife, when the husband was granted a divorce, although unauthorized, and of no legal effect, since it was superseded by the judgment, was nevertheless a factor which influenced the judgment of the court in the dissolution of the marriage. Plaintiff made a motion for a new trial, which was denied.

The claim of insufficiency of the evidence to justify the finding of cruelty is addressed solely to the absence of any substantial corroboration of defendant's testimony.

The parties have been married for 25 years. Plaintiff is 51 years old; she earns, net, $117 per month as a department store clerk; she has had several operations. Defendant is employed by a telephone company and earns net $430 per month. The community property, according to somewhat vague estimates of the parties, is worth about $15,000. Only minor items of personal property were awarded to the respective parties, the remainder being left in community ownership.

Defendant left the family home in March, 1948; plaintiff brought suit three months later; the action was tried in March, 1951. The case went to trial with little or no preparation on either side. Defendant was not represented by his present counsel. Plaintiff had no witness other than herself. Defendant testified to two incidents when plaintiff lost her temper, produced one witness whose testimony we shall discuss, and failed to produce any one of a dozen or more friends of the parties who, he testified, witnessed the occurrences.

Defendant's chief complaint was that plaintiff continually nagged him. His testimony on this subject was of a vague, general nature and in his cross examination he was not asked to expand upon it. It was sufficient however, if believed, to prove that plaintiff was given to criticism, but it was in no respect corroborated. None of defendant's three witnesses, one of whom was his sister, Mrs. Van Hook, mentioned any instance of nagging or harsh or unkind words spoken to defendant. She had visited in the home and testified, enigmatically, that she had observed in plaintiff's conduct "nothing out of the ordinary." Complaint was made that plaintiff was neglectful in preparing defendant's meals, in making his bed and in placing garbage in the garbage pail. This neglect, defendant testified, commenced after plaintiff had had her operations, one of them for hernia. There was no corroboration of any of these charges, although Mrs. Van Hook described plaintiff's housekeeping as "not very neat, I would say." Defendant testified that he became nervous, ill and unhappy, and that plaintiff's complaining ways compelled him to spend his evenings away from home, playing cards, and his weekends hunting. A careful reading of the transcript furnishes no satisfactory answer to the question whether defendant's regular absences from home were due to plaintiff's critical attitude, or the cause of it. Spending his evenings playing cards and his weekends hunting was not distasteful to defendant. Upon the contrary, he seems to have enjoyed it. If he was driven to it, he drove easily. Defendant testified that he lost 35 pounds while living at home, implying that plaintiff was in some manner responsible, but he also testified that the weight was lost while he was on a six months soft diet. He regained the weight. He testified that his card sessions lasted until 1:00 a. m. and that the late hours undoubtedly affected his health. Defendant's sister and one of his hunting companions testified that defendant appeared healthier and happier after he left home. Although this improved condition may have been due to defendant's new way of life, the fact that there appear to be, or are, greener pastures elsewhere is not regarded, in law, as a sufficient reason for breaking up a home.

We now come to the only specific instances of plaintiff's loss of temper to which defendant testified. One evening, Cecil McKitrick, his wife, his mother and brother, came in to play cards. They had drinks. According to Cecil, during the game plaintiff's temper flared up, she said she wasn't going to play and would appreciate it if the guests left, which they did. Cecil could not remember what was said to start the incident. Defendant testified that plaintiff thought Cecil held too many jokers, became "irate at" him and said: "If that is the way you are going to play, I don't want to play with you." Plaintiff's explanation was that they had all been drinking, that Cecil was intoxicated and became obnoxious, that there wasn't anything she could do or say that she wasn't "needled" about, and that she took it as long as she could. No one disputed plaintiff's testimony that Cecil was "needling" her and making himself obnoxious, although Cecil denied he was intoxicated. We have related the evidence as to the circumstances in which plaintiff became annoyed over Cecil's card table and drinking behavior, and offended the guests, in order to show the utter triviality of the occurrence. After 25 years of marriage this was the one isolated instance of alleged cruelty sought to be proved by the testimony of a third person. Defendant testified there were numerous other occasions when plaintiff was rude to guests but he did not describe any of them.

[1] It is true, of course, that the corroboration which the law requires in a divorce case charging cruelty is sufficient if it goes to some of the accusations which, if established, would justify a finding of cruelty, or otherwise lends substantial support to the testimony of the complaining party. But the rule is not so elastic, nor the law so unrealistic, as to recognize as extreme cruelty a verbal exchange over a card game due to nervous tension induced by alcoholic indulgence and by conduct which, whether reasonably or not, causes one of the participants to find another annoying and obnoxious. Considering alone the only incident as to which corroboration was offered, would it not be making the court a mere instrument of convenience in the dissolution of marriages to hold that it is both lawful and just for a husband to discard a wife of many years rather than give up his card games and drinking?

One other incident was related by defendant. At a dance at a Country Club he left with plaintiff's sister and joined others outside to get a drink from a bottle in a car. When they arrived the bottle was empty. As they were returning to the building plaintiff appeared, struck defendant on the chest and exclaimed he had no right to leave the hall without letting her know about it. Defendant did not testify that plaintiff was angry or loud spoken, but that her tone of voice was "sarcastic and derogatory." There was no evidence that anyone was annoyed or embarrassed by the incident. Everyone then went inside and had a drink, and there appears to have been no more unhappiness upon that occasion. Opinions may differ as to the etiquette of the situation—whether it was not as serious a breach for the husband to ignore his wife as it was for her to express her hurt feelings. Defendant testified that there were about ten persons in the group who witnessed the empty bottle episode. None of them was called as a witness and no explanation was given of the failure to call them. Although defendant testified that plaintiff had on numerous other occasions offended their guests, he described none of these instances and called no witness to describe them. The trial court should have assumed, in view of the necessity for corroborating evidence, that defendant would have called at least some of these persons if their testimony would have been favorable to him, and should have presumed that if they had been called they would not have corroborated defendant's testimony as to plaintiff's conduct. Of a similar situation it was said: "The court was bound to presume under the circumstances that their testimony would be unfavorable and was for that reason suppressed. Code Civ. Proc. § 1963, subds. 5 and 6; section 2061, subds. 6 and 7." Stedman v. Stedman, 179 Cal. 288, 291, 176 P. 437, 438.

[2] It is well understood that the conduct of parties and witnesses in the courtroom and on the stand is often of great assistance to the court in weighing the evidence and deciding the issues. But a favorable or unfavorable impression created by a courtroom appearance cannot supply the corroboration which the law requires in a divorce case.

[3] In view of the extreme weakness of the evidence of defendant and cross complaint, and the presumption which arose from his failure to produce witnesses who could have given material evidence as to the alleged conduct of plaintiff, we conclude that the corroborative evidence was legally insufficient to support the finding of extreme cruelty. It is unnecessary to consider the failure to make a finding as to defendant's claimed desertion.

The judgment is reversed. The attempted appeal from the order denying a new trial is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

LOVINGER v. ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO.

No. 14891.

District Court of Appeal, First District, Division 1, California.

April 25, 1952.

As Corrected on Denial of Rehearing May 24, 1952.

Hearing Granted June 19, 1952. *
Dismissed Aug. 20, 1953.

Action against decedent's estate by woman with whom decedent had lived in meretricious relationship to recover for reasonable value of household and other services rendered to decedent. The Superior Court, City & County of San Francisco, Frank T. Deasy, J., entered judgment on verdict for plaintiff, and order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to warrant jury conclusion that there was agreement to pay woman for her services, that such agreement was apart and independent of the meretricious relationship of decedent and woman, that it was not to make testamentary disposition, and that it was not merely to take care of woman by providing food, shelter, and other necessaries, but instruction which permitted jury inference that there might be recovery on implied agreement was prejudicial error.

Judgment reversed.

1. Appeal and Error 🔑930(1)

In determining question of sufficiency of evidence to sustain verdict for plaintiff, appellate court must view evidence and reasonable inferences therefrom, most strongly in favor of plaintiff.

2. Executors and Administrators 🔑221(2)

One who seeks to recover for reasonable value of services rendered to decedent must prove an express contract, free from any agreement of meretricious relationship, to pay for services, and must establish the rendering of services, and their reasonable value.

3. Executors and Administrators 🔑221(5)

In action against decedent's estate to recover reasonable value of services rendered by plaintiff to decedent, wherein it appeared that plaintiff had lived with decedent and had maintained home for him for period of years, evidence warranted determination of jury that there was agreement to pay plaintiff for her services, that such agreement was apart and independent of the meretricious relationship, and that it was not merely to take care of plaintiff as decedent had, by providing food, shelter, and other necessaries.

4. Executors and Administrators 🔑221(5)

In action against decedent's estate to recover reasonable value of services rendered by plaintiff, wherein it appeared that plaintiff had lived with decedent for period of years, evidence supported implied finding of jury that plaintiff, independent of the meretricious relationship, had rendered decedent valuable services in maintaining his home and in caring for decedent when he was ill.

5. Evidence 🔑18
Executors and Administrators 🔑221(5)

Services performed by woman who had lived with decedent for period of years, consisting of keeping decedent's house, nursing decedent when ill, and driving his automobile for him, are within common knowledge of courts and jurors alike, and no expert testimony of value is necessary for recovery against decedent's estate for reasonable value of services rendered.

6. Work and Labor ⚷30(2)

Where evidence showing facts from which promise to pay may properly be inferred is offered upon trial of general issue in action upon quantum meruit for services of domestic character, and evidence is also offered showing nature and extent of services rendered, case should be submitted to jury, although no witness expresses opinion as to value of services.

7. Account Stated ⚷20(1)

Executors and Administrators ⚷451(2)

In action against decedent's estate by woman with whom decedent had lived for period of years to recover reasonable value of services rendered, wherein it appeared that woman had maintained home for decedent and had performed various services, and there was conflicting testimony as to whether woman had been compensated, whether services were trivial or valuable, whether woman had received full compensation in form of money and gifts, and whether there was account stated between woman and decedent when he gave her sum of money and accepted promissory note secured by deed of trust, were questions for jury.

8. Executors and Administrators ⚷451(2)

In action against decedent's estate by woman who had lived with decedent and had kept house for him for period of years to recover reasonable value of services rendered, wherein it appeared that during period of time for which recovery was sought woman had married and had accepted temporary daytime employment, and had attended school, but had always returned to decedent and was with decedent up until his death, whether continuity of woman's service was broken by such acts was matter for jury.

9. Work and Labor ⚷7(7)

Where man and woman knowingly live together in a meretricious relationship, in absence of an express agreement, oral or written, that woman be compensated for services performed, there is no implied obligation on part of man to compensate woman for household services rendered by her, since presumption of gratuity arises from family relationship of parties.

10. Contracts ⚷112

Express contract by man to compensate woman for services performed as housekeeper may be valid and enforceable even though parties live together in illicit relationship during time services were performed, if such contract was not made in contemplation of such illicit relationship.

11. Contracts ⚷142

Whether express contract by man to compensate woman for services performed as housekeeper during period parties lived together in illicit relationship was made in contemplation of such illicit relationship was question of fact.

12. Executors and Administrators ⚷221(2)

Where woman, who had admittedly been living in meretricious relationship with decedent, sought to recover reasonable value of services rendered to decedent as housekeeper, woman had burden of showing that there was express agreement by decedent to compensate her for household services, and that such agreement was not in contemplation of, or dependent upon, illicit relationship.

13. Appeal and Error ⚷1064(1)

Executors and Administrators ⚷451(3)

In action against decedent's estate by woman who had lived with decedent in meretricious relationship, and who had kept house for decedent, to recover for reasonable value of services rendered, instruction which discussed implied contracts at length, and which failed to inform jury concerning character of agreement between woman and decedent and whether it included illicit service, or contemplated or was dependent upon that relationship, was prejudicial error in that express contract not made in contemplation of illicit relationship was required to be established.

14. Limitation of Actions ⚷200(1)

In action against decedent's estate by woman who had lived with decedent in meretricious relationship and who had kept house for decedent, to recover for reasonable value of services rendered, wherein it appeared that there had been interruption of service by marriages of woman and temporary employment and schooling, instruction that if cessation was caused by wrongful temporary discharge by decedent, and that if he requested resumption of such services, and plaintiff complied, temporary cessation did not break understanding and her services were to be taken as having been continuously rendered was proper.

15. Limitation of Actions ⚷50(2)

Where person is to render services and is to be paid upon death of person benefited, cessations in service caused by capricious or wrongful act of person obligated to pay do not operate to prevent contract from being continuous one within rule that statute of limitations starts to run from date of termination of contract.

16. Stipulations ⚷14(7)

In action against decedent's estate by woman who had lived with decedent in meretricious relationship and had kept house for decedent to recover for reasonable value of services rendered, whether stipulation that there was hiatus in services during period woman was married to another, showed termination of services which commenced running of statute of limitations, was question for jury.

17. Executors and Administrators ⚷221(3)

In action against decedent's estate by woman who had admittedly been living with decedent in meretricious relationship and who had kept house for him, to recover for reasonable value of services rendered, refusal of offered testimony that woman was still married to another at time she commenced relationship with decedent, and that relationship was consequently adulterous, was proper in that fact that woman was married would not make illegal an agreement to perform household services, if that was all that agreement contemplated, and if cohabitation were contemplated, agreement would be no more illegal if woman were married than if she were unmarried.

18. Contracts ⚷136, 140

Where decedent with whom woman had lived in meretricious relationship had agreed to compensate woman for her household services rendered, and woman married another during period of services, if decedent had agreed to pay for divorce if woman would return, illegality of latter agreement would not make original agreement to pay for services illegal, but might have effect of making agreement by decedent to pay for services subsequently rendered void as against public policy.

19. Executors and Administrators ⚷451(3)

In action against decedent's estate by woman who had lived with decedent in meretricious relationship and had kept house for decedent, to recover for reasonable value of services rendered, wherein it appeared that woman had been married and divorced during period of service, instruction should have been given that if jury believed that there had been termination of original agreement for compensation, and that subsequent promise for compensation was based partly on consideration that woman would get a divorce, would return to decedent, and would render the services, provided he would pay for her divorce, woman could not recover.

20. Trial ⚷63(1)

Witnesses ⚷321

Under statute relating to examination of adverse witnesses, and providing that party calling such adverse witness shall not be bound by testimony given, but testimony given may be rebutted, party calling such witness is entitled to consider him as witness called against him within meaning of statute providing that witness may be impeached by party against whom he was called by showing that witness has been convicted of felony, and fact that impeachment by showing of conviction of felony was not brought in until rebuttal does not make it inadmissible. Code Civ. Proc. §§ 2049, 2051, 2055.

21. Trial ⚿59(2)

The court in its discretion may permit introduction of evidence out of order.

22. Appeal and Error ⚿206(1)

Objection to introduction of evidence out of order cannot be raised for first time on appeal.

23. Witnesses ⚿324

While conviction of felony may be shown in impeachment of party called under statute as adverse witness, adverse party may not be called solely for such purpose, and unless evidence testified to by adverse party is of importance in case, his conviction should not be shown. Code Civ.Proc. §§ 2049, 2051, 2055.

24. Witnesses ⚿351

Trial court, before permitting it to be shown that party called as adverse witness has been convicted of felony, must first determine whether main purpose of party calling witness is to show such conviction, and if so, evidence should not be admitted. Code Civ.Proc. §§ 2049, 2051, 2055.

◆

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BRAY, Justice.

In a bitterly contested, protracted trial, the transcript of which is 1923 pages, consisting more of arguments between counsel than testimony (the briefs total 688 pages), a jury rendered a verdict in favor of plaintiff in the sum of $35,000 as the reasonable value of services rendered decedent. Defendant appeals from the judgment thereon, the order denying defendant's motion for new trial, and a number of other orders, all of which are reviewable on the appeal from the judgment and are not separably appealable.

Questions Presented.

1. Sufficiency of evidence.
2. Alleged error in instructions.
3. The statute of limitations.
4. Alleged error in refusal of evidence.
5. What was the effect of Coplin's interference in the Maier marriage?
6. Can a party impeach the adverse party called under section 2055 of the Code of Civil Procedure by showing a felony conviction?

Summary.

The plaintiff, Betty Lovinger, was the mistress of Jacob Coplin, deceased. This relationship started in 1933 and continued with the exception of certain interruptions due to plaintiff marrying a couple of times, until Coplin's death in December, 1947. Plaintiff practiced housewifery such as cooking, cleaning, laundering small items, and acted as Coplin's hostess. She also cared for him as a sort of a nurse when he became ill, for he was not in good health. Coplin made no attempt to hide the fact that Betty was his mistress and stated that he would never get married. But he often stated that he would see that Betty was well taken care of in his will, so that she would not have to worry. (However, there was no provision for her in the probated will.)

The plaintiff sued on an oral agreement to pay the reasonable value of such services and also on an alleged indebtedness arising out of work, labor and services rendered by plaintiff at Coplin's request in the amount of the reasonable value of $62,388. Defendant pleaded that the agreement was illegal because in furtherance of a meretricious relationship and was barred by the statute of limitations.

1. Sufficiency of the Evidence.

[1, 2] In considering this subject we must, of course, take the evidence and the reasonable inferences therefrom, most strongly in favor of plaintiff. Plaintiff admits and defendant concedes that plaintiff was Coplin's mistress. For that reason we are not detailing the evidence showing cohabitation. In actions of this kind plaintiff must prove (1) an express contract to pay for services, which contract must be completely free of any agreement of meretricious relationship, (2) the rendering of the services, and (3) their reasonable value.

1. The Contract.

[3] Plaintiff, barred by section 1880, subdivision 3, Code of Civil Procedure, was incompetent to testify. Plaintiff met Coplin, a bachelor, in 1933. He operated a social card club, and resided in a Pine Street apartment where he lived until his death, December 29, 1947. At the time of their meeting plaintiff was about 25 years old and Coplin about 42 or 43. Betty had been married and divorced from a man named Lovinger and had gone through a ceremonial marriage in January, 1933, with a man named Brassey. Whether she was ever divorced from Brassey does not appear. She "never considered it a marriage." She was using the name Betty Lovinger. In September or October, 1933, according to Irene Digier, Betty's sister, Coplin asked plaintiff "to move up there with him. Being a bachelor, he wanted someone to take care of him and be his hostess, cook some home-cooked meals. * * *" She consented. Shortly thereafter Betty moved to Coplin's apartment. Just prior to Thanksgiving Day there was a conversation between Coplin, Betty and Irene in which Coplin said that now that Betty had moved there and would do the things he wanted her to do, he would see that "she was going to be taken care of, that she would not want." Around Christmas time he said "that he was going to live up to the promise that he had made when she came up there that she would be well taken care of, either before his death if she left him for good, or after his death." Irene said that at various times he repeated that statement and also said that "his arrangement was still standing that she was going to be well taken care of"; "That he had promised to take care of her, pay her well for her services that she would render"; "* * * He was finally living like a man should, except that he said that he would never want to get married and be tied down to a wife. He was going to remain a bachelor. * * * But he was making good money, he was putting a lot of it away in stocks and bonds and different things, that he would be sure that Betty would be taken care of. * * * That he would take care of her after his death, or if she ever left him for good, why, it would be terminated, but he was going to pay her well for the services that she was doing and performing. She was taking good care of him." In describing the services Betty was to render, Coplin said on one occasion that she was going to keep the apartment for him, act as hostess, cook his dinners, take care of his laundry and his clothes, "and be in the same circumstances as a wife would be, but he said that he would never marry, he was going to stay a bachelor."

After he was ill, either in 1940 or 1944, Coplin told Irene that he had made his will in Betty's favor; "She will be well taken care of * * * she is going to be well off one of these days." In the fall of 1945 Betty married a man named Maier. During 1946, according to Irene, Betty stayed at the Coplin apartment about three times for a period of about a week to ten days, each time. On one of these occasions, about November, Coplin said, "* * * you come back and take care of me like you did before, take care of the house. The same thing stands that I told you before, that you will be well taken care of, you won't have to worry." From then on Betty stayed with Coplin until his death.

Kathleen O'Daniel testified that Coplin told her in July, 1942, referring to Betty, "She is doing fine, she will be all right, because I am always going to take care of her. She won't have a thing to worry about." In February of 1944 Coplin was ill, and said, "* * * the doctors had told him that he must have more quiet, more care and he stated then that Betty must stay with him. He again mentioned the fact that she would be secure in her future, that he needed her now more than he ever had. He wanted her to stay there, he expected her to stay there, and that she would be well compensated for taking care of him, that she had always been doing—again I felt assured ———" In January of 1947, Coplin stated to Kathleen, referring to Betty's marriage to Maier, "I intend to break it up. I have already talked with her about it. I told her that I would pay for anything to get her back here, because I have to have her to take care of me.

I want her to take care of me. I never needed her as much as I need her right now." He also said, "Every promise I have ever made to Betty is still good. She will be well taken care of, just as I have always said she would be."

Mrs. Margaret Brilliant testified that in November, 1944, Coplin said "he would take care of her in case anything happened to him, because he really was sick—he realized he was a sick man; and he said, 'If anything happens, I will take care of Betty,' so that she would not have to worry." Coplin stated on one occasion that he was giving Betty "so much a week."

Coplin told Mrs. Anna Lloyd in 1935 that Betty "was working for him and that he was paying her * * * and that she was well paid for her services." He made a similar statement in 1940, and said, "I promised I will take care of her." In 1941 he said, "I told you before Betty is going to be well taken care of * * * She is getting well paid and I am going to provide for Betty, you don't need to worry about that." In September, 1947, Coplin said to Betty in Mrs. Lloyd's presence, "You will have plenty."

Dr. Housman testified that on one occasion he asked Coplin why he did not marry Betty and Coplin replied, "The minute you marry a woman, then she demands things; when you aren't married to her, you split up, you pay them off and that's the end of it." In 1940 Dr. Housman asked if Coplin had taken care of Betty if he should die, and he replied, "Yes, Betty will be taken care of * * *" Several times between 1935 and December 1, 1941, Coplin stated "he was going to take care of Betty if anything happened." Between December, 1942, and December, 1945, Coplin told him on many occasions "she would never want for anything and she knew that, and she knew he was not going to marry her, but she would never have to worry as long as she lived." During the time of Betty's marriage to Maier, Coplin asked Housman to get her back to him and said that if she came back "She will be taken care of, she won't have to worry about anything if she comes back and anything happens to me." Coplin also stated that he had given Betty $2,000 and taken a note and mortgage from her "to protect myself," but "when it is all over" he would tear them up. Housman asked, "'Have you drawn a will?' and he said, 'Never you mind, I will take care of her.' So the next I heard, Betty was back with him."

Thelma Mendenhall testified that in June, 1947, during a period when Betty was temporarily staying at Coplin's apartment, Coplin stated that he hoped she would stay permanently; "if she came back, that he would see that she was well taken care of." August 21, 1947, Coplin said, "Believe me, I am going to see that Betty is going to be taken care of."

Dorothy Akeroyd, daughter of Mrs. Brilliant, testified that from the spring of 1935 to January, 1941, Coplin stated many times, referring to Betty, that "he was taking good care of her, and saw that she had everything she wanted and it would always be that way." He further said "he was taking care of her, paying her for her services and he made no bones about it, everybody knew it." After August, 1947, Coplin stated that Betty was in charge and that he was taking very good care of her. He said "about a thousand times" that "he was paying her for her services."

David Coplin, brother of the deceased Jacob Coplin, testifying for defendant, stated that Coplin had told him that he was giving Betty $200 per month. There does not appear to be any record of such payments. Mrs. David Coplin testified that Betty told her that she and Coplin had been playing house and if Coplin did not marry her she knew some one else who would.

Defendant contends that the foregoing evidence on the question of whether there was an express contract to pay plaintiff for her services conclusively shows that (a) there was no contract; (b) the contract, if there was one, contemplated and included the meretricious relationship and hence was void as against public policy; (c) the contract, if any, was to make a testamentary disposition in plaintiff's favor and the action is not brought on that theory; (d) the contract, if any, was merely to take care of plaintiff and Coplin did that by providing food, shelter, clothing, etc. It is true that the evidence would have supported any of such conclusions had the jury drawn them. But it is obvious that the evidence likewise supports the conclusion that (a) there was an agreement to pay plaintiff for her services; (b) that such agreement was apart and independent of the meretricious relationship; (c) that it was not to make testamentary disposition, and (d) that it was not merely to take care of plaintiff as Coplin did.

2. The Services.

[4] While there is evidence on the part of defendant that the services rendered by plaintiff were primarily those involved in the meretricious relationship, and so far as cooking, housework, nursing, etc., were concerned were very minor, there is ample evidence to support the implied finding of the jury that plaintiff, independent of the meretricious relationship, did render Coplin valuable services. It is not necessary to detail it all. Mrs. Digier testified that plaintiff cleaned the apartment, did the marketing and buying of food, cooked the dinner (Coplin customarily, except when ill, ate breakfast and most meals at a restaurant), took care of his small personal laundry, acted as his hostess in entertaining at the apartment. There was a colored woman who came in for an hour or so a day to do dusting and cleaning. During the times when Coplin was ill plaintiff prepared special diets for him, ran errands for him while he was in the hospital, nursed him when he returned from the hospital, drove an automobile for him on his trips to and from his place of business. Kathleen O'Daniel testified that plaintiff did cooking and household duties at the apartment, drove the car, did the shopping, took care of him while ill. Mrs. Margaret Brilliant testified that from 1934 to 1945 she would be at Coplin's apartment every couple of weeks; that plaintiff did all of the cooking, watched Coplin's diet and kept him on it as best she could. In November, 1944, Coplin told Mrs. Brilliant that plaintiff was "his hostess, his housekeeper; she entertained his friends, and he didn't want anybody but Betty when he was sick * * *" Coplin, on other occasions, said that plaintiff was taking care of him, doing everything he wanted her to do. Mrs. Lloyd testified that in 1935 Coplin told her "that Betty was working for him * * * keeping house for him, being hostess to him * * *" She prepared the meals, including breakfast. Dr. Housman testified that he had meals many times at the Coplin apartment and that plaintiff cooked and served them and washed the dishes afterwards. In 1940 Coplin was in the hospital and stated that he wanted to go home, that plaintiff could nurse him better than the people in the hospital. Coplin said she was an excellent cook and kept the place clean. James Brown testified that in 1945 Coplin borrowed his car for a ten day trip, stating that plaintiff would drive. Thelma Mendenhall testified that from 1934 to 1936 plaintiff was doing the regular duties of any housewife, changing the shelf papers, and buying linens, doing the shopping and cooking. Between March, 1938, and the middle of September, 1945, she saw plaintiff at Coplin's apartment, doing the cooking, cleaning the apartment, making the bed, changing shelf paper, cleaning out cupboards, shopping. From March, 1940, to the end of the year plaintiff was trying to minister to the wants and desires of Coplin who was ill. Coplin told Mrs. Mendenhall, "Betty could take better care of him than all the nurses in the world." In 1940 Dr. Chamberlain treated Coplin for a heart condition, visited him frequently at his apartment. A woman whom he believed to be plaintiff was always there and he gave her instructions as to the patient's diet.

Thus it appears that plaintiff did render substantial services. Whether these were merely services ordinarily rendered by a mistress or were those of a combination housekeeper-nurse-driver, etc., were matters for the jury. We cannot say as a matter of law that the inferences are either way.

3. Reasonable Value.

[5–7] Defendant contends that there is no evidence of the reasonable value of the services. It uniformly has been held that services of the type here being considered are within the common knowledge of courts and jurors alike and no expert testimony, nor evidence of value, is necessary. " 'When, upon the trial of the general issue in an action upon *quantum meruit* for services of a domestic character, the plaintiff offers evidence showing the facts from which the promise to pay may properly be inferred, and also showing the nature and extent of the services rendered, the case should be submitted to the jury, although no witness expresses an opinion as to the value of the services.' " Nylund v. Madsen, 94 Cal.App. 441, 445–446, 271 P. 374, 376. "* * * the jury were entitled to consider the nature of the services rendered as shown by the evidence and draw upon their own judgment and experience in determining the reasonable value thereof * * *." Seedborg v. Lakewood Gardens Civic Ass'n, 105 Cal.App.2d 449, 454, 233 P.2d 943, 946.

Whether the services were trivial or valuable, whether plaintiff received full compensation in the form of money and gifts and whether there was an account stated between plaintiff and Coplin when he gave her $2,000 and accepted a promissory note secured by a deed of trust, were all matters concerning which there was a conflict in the evidence and therefore for the jury to decide.

4. Breaks in Continuity.

For a short period after plaintiff went to live at Coplin's apartment, she worked at a local store. On two separate occasions of short duration in 1935, for short periods in 1933, in 1938 or 1939, 1940, and 1941, she was employed in a store. These employments apparently lasted only a couple of weeks at a time. August 30, 1939, she married Jack Wagner in Nevada. Although her divorce complaint gave the period from marriage to separation as over eight months, apparently it only lasted a month or two and she returned to Coplin. During the entire period of the marriage she would go to Coplin's apartment and do the cooking and household duties. For a period of about 73 days between October, 1942, and March, 1943, she attended a secretarial school. There is no evidence that during the periods of employment and attending school plaintiff was not also looking after Coplin. About June, 1942, she met Maier, who was in the Navy. When his ship was in port he saw her. On one occasion he saw her in Long Beach, where she had gone to visit her brother. In 1945 on a trip with Coplin to Cal-Neva, it appears that plaintiff wanted Coplin to marry her. This was probably August or September. From then on until her marriage to Maier in November plaintiff apparently did not live at the Coplin apartment. During this marriage plaintiff and her husband lived at Paradise. During 1946 and 1947, however, plaintiff on several occasions returned to San Francisco, staying at Coplin's apartment for periods of approximately a week to ten days each. She finally returned to Coplin in June, 1947.

[8] Defendant contends that the continuity of service was broken by the above-mentioned acts of plaintiff. Again, this was a matter for the jury, as the acts of plaintiff in obtaining temporary daytime employment and attending school are completely consistent with her rendering services to Coplin. Even during her marriage to Wagner she continued to perform such services. Whether her residence in Paradise broke the continuity is, at least, debatable, and depends principally upon the jury's determination of the circumstances. On the trip to Reno Coplin said, "You been wanting a home and wanting me to marry you * * * All right, you go out and get somebody else to marry you. * * * Go ahead, I am tired of this," and after comments, he said, "All right, go ahead * * * You will be back, I will get you back, if you do." While, of course, under the contract Coplin had the right to discharge plaintiff at any time, either with or without reason, the jury could have interpreted this language as permission for a temporary discontinuance of the services. The whole history of the relationship between the parties shows that Coplin did not object to temporary discontinuance of services. He made no objection to plaintiff's marriage to Wagner, nor to Maier, nor to the trips she took. He stated, in effect, that he knew she would come back when he wanted her. Whether there was a com-

plete termination of the services relationship or whether it was merely a temporary one was, under the evidence here, susceptible to either conclusion. We are bound by the jury's determination thereof.

2. Instructions.

In examining the sufficiency of the instructions it is necessary to bear in mind the law applicable to a case involving a meretricious relationship.

> [9] 1. "When a man and woman knowingly live together in a meretricious relationship—in the absence of an express agreement, oral or written, that she be compensated for services performed—there is no implied obligation on the part of the man to compensate the woman for household services rendered by her. [Citations.] One reason for the rule is the illegality of the relationship where it enters into the alleged agreement. [Citation.] Another reason is the presumption of gratuity arising from the family relationship of the parties, which family relationship repels the implication of a promise to pay that would otherwise arise from the performance and acceptance of valuable services. [Citations.]" Hill v. Estate of Westbrook, 95 Cal.App.2d 599, 602, 213 P.2d 727, 729. Plaintiff stated at the beginning of the trial that she was not claiming an implied contract.

[10, 11] 2. "Although the parties live together in illicit relationship during the time the services are performed, an express contract to compensate for services performed as a housekeeper has been held valid and enforceable unless made in contemplation of such illicit relationship. [Citations.] Whether the contract was dependent upon the illicit relationship is a question of fact. [Citations.]" Hill v. Estate of Westbrook, supra, 95 Cal.App.2d 599, 602, 213 P.2d 727, 729.

[12] In view, then, of the admitted meretricious relationship in this case, and that there can be no implied contract for services, plaintiff had the burden of showing (a) that there was an express agreement (oral as there is no claim of a written one) by Coplin to compensate plaintiff for household services, and (b) that such agreement was not in contemplation of or dependent upon the illicit relationship. Therefore, it was important that the jury be so instructed.

[13] As to the right to recover on an implied contract there is some confusion in the instructions. The trial court referred to the two causes of action in the complaint, stating that the first alleged a contract made on or about October 1, 1933, for the reasonable value of services to be paid at termination, and the second alleged that within two years prior to his death Coplin became indebted to her for the same work, labor and services referred to in her first count. In referring to the second count the court made no mention of an express contract (although the second cause alleges one). The court's language would indicate that under the second count plaintiff could recover on an implied contract. Then followed several pages of instructions on the difference between an express and an implied contract, the presumption which follows from proof of services rendered and the resulting implied contract, that it does not necessarily follow that "if plaintiff became a member of decedent's household" her services were intended to be gratuitous, whether there was an intention to pay by decedent and an expectation of compensation by plaintiff "or that the circumstances under which the services were performed were such that such expectation was reasonable and natural" and "if you believe from the evidence that the plaintiff rendered the services alleged to decedent, then the burden of proving that she has been paid for her services devolves upon defendant," that if plaintiff and Coplin were strangers to each other, there is no presumption that her services, if any, were gratuitous and in the absence of an agreement to the contrary they should be paid for. After stating that it was not necessary that there be a written agreement in order for plaintiff to recover, the court said: "It is sufficient for proof of her claim to compensation if she establishes to your satisfaction the fact that she rendered services to the time of the death

of Mr. Coplin, with the understanding and expectation that payment was to be made at the termination thereof * * *" The "understanding and expectation" is apparently plaintiff's, and does not tell the jury that the understanding must be also that of Coplin. This instruction is probably based upon language in Lloyd v. Kleefisch, 48 Cal.App.2d 408, 120 P.2d 97, where the court said concerning services that an express contract need not be proved but "'* * * "it is sufficient if from the facts and circumstances it reasonably can be inferred that compensation was in the view and contemplation of the parties." * * *'" 48 Cal.App.2d at page 412, 120 P.2d at page 99 and used the language that the evidence supported the conclusion that the "services were rendered with the expectation and understanding that they would be paid for." That rule, however, does not apply where there is a meretricious relationship. Moreover, even in cases of the Lloyd type, the "expectation and understanding" must be that of *both* parties. The same vice attaches to the instructions immediately following, where the court stated that if the services rendered by plaintiff were continuously performed, with or without any express agreement as to compensation, but with the expectation and understanding that at some time in the future, at the termination of the services or upon the death of Coplin, she would be paid their reasonable value then plaintiff could recover; also that where a person performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of all of the services is implied by law. Further, the court instructed that if the parties by mutual agreement lived and cohabited together in a meretricious relationship *without any previous promise* by Coplin to pay plaintiff for her services, she could not recover; that while the question is one of intention, the relationship may rebut the presumption of a contractual intention and if the evidence shows such meretricious relationship that fact should be considered in determining whether any contract to pay for services is to be implied; that an implied promise to pay does not arise where services are rendered by persons living together in a meretricious relationship; that the law presumes that such services are merely gratuitous favors.

So far there is still no instruction that there can be no implied contract where the illicit relationship is concerned. These last instructions merely state that the relationship may be considered in determining whether or not there was a contract. Later, when instructing concerning the statute of limitations the court gave the period of limitation on actions upon an oral agreement "express or *implied.*" (Emphasis added.) The only reference to the fact that there can be no implied contract in this case follows: "Therefore, if you find * * that the plaintiff * * * [and] Coplin, lived together in a meretricious relationship, and that there was no express agreement, oral or written, that plaintiff be compensated for services performed, I instruct you that there is no implied obligation on the part of the decedent, J. Coplin, to compensate the plaintiff for household services rendered by her, and your verdict must be for the defendant on that issue." It is extremely doubtful if that one reference would offset in the minds of the jury the pages if instructions concerning implied contracts. As plaintiff was not claiming an implied contract, it is difficult to understand why the court instructed so long on the subject, as though she were.

An even more serious question arises concerning the failure to instruct the jury concerning the *character* of the agreement between plaintiff and Coplin. As pointed out heretofore, not only must there be an express contract but it must not be in contemplation of or dependent upon the illicit relationship. With the exception of an instruction hereafter mentioned that barely mentions this, the court did not discuss this subject at all. It gave, in addition to the instructions on implied contract hereinbefore detailed, many instructions concerning an express contract, the burden of proving it, the fact that plaintiff was entitled to a verdict if there was such contract for services, etc. At no time, with the single exception hereafter set forth, did the court instruct the jury that it must concern itself with the *character* of that contract, whether it included the illicit service, or contemplated or was dependent upon that relationship. This exception was the following instruction: "Although the parties live together in illicit relationship during the time the services are performed, an express contract to compensate for services performed as a housekeeper is valid and enforceable *unless made in contemplation of such illicit relationship.*" (Emphasis added.)

The beneficial effect of this instruction was obviated by the sentence which immediately followed it: "Therefore, if you find from the evidence that the plaintiff in this case and the decedent, Jacob Coplin, lived together in a meretricious relationship, and that there was no express agreement, oral or written, that plaintiff be compensated for services performed, I instruct you that there is no implied obligation on the part of the decedent, J. Coplin, to compensate the plaintiff for household services rendered by her, and you verdict must be for the defendant on that issue."

Again, a reading of that instruction with the sentence immediately following it, in view of the voluminous instructions on the subject of whether or not there was a contract, would still leave the jury believing its only duty was to determine the latter fact. In this case, the determination of the character of the contract was extremely important. The evidence on the subject is well susceptible of either the conclusion that Coplin was agreeing to compensate a mistress rather than a housekeeper or that the contract for services was independent of the illicit relationship. It is a close question. Hence, the jury should have been clearly and unequivocally instructed that they must find not only that there was an express contract but one of a character that the law permits. Defendant offered full and fair instructions on this subject and on what were illegal considerations in a contract, etc., all of which were refused. After pages of instructions on implied and express contracts, to refer to this important subject by repeating that an express contract is valid, and then qualifying the statement by remarking more or less in passing that "unless made in contemplation of" the illicit relationship, is not calling the attention of the jury clearly and unequivocally to one of the most important elements of the case. In reciting to the jury the contents of the pleadings the court stated that, among other defenses, defendant alleged that the agreement was void and contrary to good morals in that it was predicated upon unlawful cohabitation between the parties and that any services rendered by plaintiff were incidental to or in contemplation of the meretricious relationship. Plaintiff contends, in effect, that this instruction and the one last mentioned sufficiently informed the jury of the necessity of their determining the *character* of the agreement. Unfortunately the court did not state whether or not such a defense was a valid one, nor did it tell the jury definitely that if the facts were as alleged in this defense plaintiff could not recover. Moreover, the evidence on this subject raises the most debatable element in the case. The evidence that there was an express contract is far stronger than the evidence that its character made it legal. The necessity for clearly instructing on this subject is emphasized by the fact that frequently throughout the trial the court stated, in effect, that the question to be determined was whether it was contemplated by both parties that plaintiff was to be compensated for her services, but made no mention of the character of the agreement on the subject. We dislike to reverse a case on error in instructions, but we must do so here because it is clear that the one reference to this most important subject, buried as it was in a profusion of instructions on the question of express or implied contracts, did not give the jury to understand that they had a positive and definite duty to determine the character of the contract.

3. Statute of Limitations.

[14, 15] Under the first cause of action based on a contract alleged to have been made in 1933 under which the compensation was to be payable upon the termination of her services, the statute would not begin to run until there was such termination. Defendant contends that there were a number of terminations but particularly her marriage to Maier when she went to Paradise to live, constituted a definite termination. Hence, says defendant, the statute of limitations started to run, at least, from then, and that was more than two years prior to the suit. As pointed out in "4. Breaks in Continuity," the evidence is susceptible to the inference that this interlude constituted merely an agreed temporary cessation of services and the statute would not start until the final termination, which was the death of decedent. A similar contention concerning a somewhat similar situation (except for the question of meretricious relationship) was made in Lloyd v. Kleefisch, supra, 48 Cal.App.2d 408, 120 P.2d 97, 98. There plaintiff brought an action against the administrator for services rendered the decedent, consisting of acting as chauffeur, nurse, cooking meals, etc., with "the understanding, expectation and agreement between" him and her that she would be paid the reasonable value thereof upon the termination of the services at or before his death. Defendant in appealing from a judgment in plaintiff's favor entered upon a jury verdict, contended that the services were not continuous. The agreement and start of the services was in 1929. In December, 1934, plaintiff married. Decedent opposed this marriage. Although she was willing and able to act, for the first six months of 1935 he refused to allow her to perform services for him. At the end of that time he asked her to continue with the services. The court instructed the jury that if the cessation was caused by a wrongful temporary discharge by decedent and that if he requested a resumption of such services and the plaintiff complied, this temporary cessation of services did not break the understanding and her services are to be taken as having been continuously rendered. This instruction was held to embody a complete and correct statement of the law. Almost the identical instruction was given in our case. "Where a person is to render services and is to be paid upon the death of the person benefited, cessations in service caused by the capricious or wrongful act of the person obligated to pay do not operate to prevent the contract from being a continuous one within the rule that the statute of limitations starts to run from the date of termination." 48 Cal.App.2d at pages 413–414, 120 P.2d at page 100.

In Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281, the same contention was made that the statute of limitations applied because the continuity of services was broken as "The court further found that on a number of occasions, some of which were for extended periods, plaintiff did not render services to Mrs. Herbst * * *. Defendant contends that the larger part of the sum claimed is barred by the statute of limitations, basing this contention upon the finding of the court that during part of the time plaintiffs did not render services and that 'such cessation of services was without fault of the plaintiff and was caused by the wrongful temporary discharge by the deceased.' This contention cannot be upheld. The contract was for continuous services from 1917 until the death of Mrs. Herbst. The court found that plaintiffs were at all times ready, able, and willing to perform the services. The finding of 'the wrongful temporary discharge' was tantamount to a holding that deceased, during the periods of cessation of services, did not desire the assistance of plaintiffs, especially in view of the fact that after each cessation of services plaintiffs were again requested by deceased to resume their ministrations to her, and they did in fact on each occasion render further services. The statute of limitations did not begin to run until the death of Mrs. Herbst." 10 Cal.App.2d at page 94, 52 P.2d at page 282.

[16] Defendant claims that plaintiff's stipulation that there was a "hiatus" in services during the time plaintiff was at Paradise shows a termination of services. The stipulation, however, does nothing more than show, as does the evidence, that there was an interruption of service. Its character and effect were for the jury to determine. The evidence shows that im-

mediately prior to her marriage to Maier, Coplin was disagreeable and angry. The jury had the right to consider whether if Coplin was not agreeing to a temporary discontinuance of service, he was actually forcing her out. Whether her evident desire that he marry or build a home for her justified his action was also for the jury to determine. In either event, when he requested her to resume the services under the same agreement, and she did so, under the ruling in Seib v. Mitchell, supra, 10 Cal.App.2d 91, 52 P.2d 281, and Lloyd v. Kleefisch, supra, 48 Cal.App.2d 408, 120 P.2d 97, the statute of limitations would not begin to run until his death. Cases like Belletich v. Pollock, 75 Cal.App.2d 142, 171 P.2d 57, where there was a four year interruption of services, and Roberts v. Roberts, 64 Wyo. 433, 196 P.2d 361, 197 P.2d 697, where the interruption was for six or seven years, are not in point as in both cases there was a complete and definite cessation of services with no understanding that it was temporary and entirely due to the desires of the one performing the services and through no fault of the one to be charged. In the Belletich case the court distinguished its facts from those in Seib v. Mitchell, supra, 10 Cal. App.2d 91, 52 P.2d 281, by pointing out that the interruptions of services in the Seib case were caused by the wrongful temporary discharge by decedent, while there was no such element in its case. Laven v. Cowan, 108 Cal.App. 628, 291 P. 877, merely holds that the statute begins to run from the date when services were last rendered. Corato v. Estate of Corato, 201 Cal. 155, 255 P. 825, holds that where there is no agreement as to time or rate of payment or term of service, the hiring is presumed to be by the month and the statute runs from each month. Obviously neither of these cases is in point. The fact that the agreement as alleged in plaintiff's complaint "was subject to termination by either party at any time", see also Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 112 P. 886, 33 L.R.A.,N.S., 1034; 56 C.J.S., Master and Servant, § 31, page 412, does not make any less wrongful in the sense mentioned in the Seib and Lloyd cases, supra, Coplin's terminating it without compensating plaintiff at the time of termination. Defendant's contention that there could not be a wrongful termination which would prevent the statute from running overlooks the decision in the Lloyd and Seib cases, supra, where either side had the right to terminate the agreement, as here, but it was held that the termination was wrongful for statute of limitations purposes.

4. Refusal of Evidence.

[17] As the case is to be retried, the question of whether plaintiff was divorced from Brassey at the time of the agreement will undoubtedly be raised again. Defendant offered certificates from all California county clerks showing that no divorce had been obtained by plaintiff from Brassey in California in 1935, the year that in her application for a license to marry Maier she stated she was divorced in California. Defendant's offer was to show that when she went to live with Coplin plaintiff was still married to Brassey, and hence her relationship with Coplin was adulterous. The court properly sustained objections to the introduction of this evidence. The fact that plaintiff was married would not make illegal an agreement to perform household services for Coplin, if that was all the agreement contemplated. If it contemplated cohabitation then it would be no more illegal if plaintiff were married than if she were unmarried. It was conceded that plaintiff became Coplin's mistress. The meretricious relationship was established, and it made no difference if in addition to being meretricious, it was adulterous.

5. The Maier Marriage.

[18, 19] Defendant contends that Coplin broke up the Maier marriage in consideration of plaintiff's return to him, paid for the divorce, and that made the agreement to compensate plaintiff for her services void. Under the first cause of action, assuming that there was an agreement to pay for the divorce if plaintiff returned, such illegality would not make the original agreement in 1933 illegal. However, it might make an agreement in 1947 so tainted with

illegality as to be void as against public policy. The second cause of action is based on this agreement. The court should have instructed the jury that if it believed that there had been a termination of the original agreement and that the 1947 promise for compensation was based partly on the consideration that plaintiff would get a divorce, return to Coplin, and render services, provided he would pay for her divorce, then plaintiff could not recover under the second count.

6. Section 2055, Code of Civil Procedure.

[20–22] Under that section plaintiff called David Coplin[1] and examined him for the greater part of two days. After defendant rested plaintiff asked permission to call David again under section 2055, in rebuttal. No objection was made. After interrogating for about two pages of transcript plaintiff asked him if he had been convicted of a felony. Defendant objected on the ground that a witness called under section 2055 could not be so impeached. The court overruled the objection. Defendant relies on section 2049 of the Code of Civil Procedure which states, "The party producing a witness is not allowed to impeach his credit by evidence of bad character * * *" and section 2051 of the Code of Civil Procedure, "A witness may be impeached by the party *against whom he was called* * * * it may be shown * * * that he had been convicted of a felony * * *." (Emphasis added.) These two sections, says defendant, only allow impeachment by a felony conviction of a witness by the party *against* whom he was called and therefore plaintiff having called David, plaintiff could not impeach him. This question has never before been determined in California. Labrie v. Midwood, 273 Mass. 578, 174 N.E. 214, held that in Massachusetts a party calling a witness under G.L. c. 233, § 22, providing "A party who calls the adverse party as a witness shall be allowed to cross-examine him", could not impeach him by a felony conviction. Their section 23 provides, the "party who produces a witness shall not impeach his credit by evidence of bad character * * *." (The language is almost identical with that of our section 2049, Code of Civil Procedure.) The court stated that such impeachment was expressly prohibited by the above quoted portion of section 23 and was not admissible under section 22 as it "was something more than cross-examination." 174 N.E. at page 216.

Section 2055 provides that the party called thereunder "may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted * * *." Defendant contends that "subject to the rules applicable to the examination of other witnesses" precludes this type of impeachment because, under section 2051 it can only be used by the "party against whom he was called". The second sentence is not in the Massachusetts section 22, although the decisions of the courts of that state hold that the party calling the adverse witness is not bound by his testimony. The Massachusetts ruling too narrowly restricts the meaning of the section. The very next words in section 2055, "The party calling such *adverse* witness *shall not be bound* by his testimony," (emphasis added) indicates that the cross-examination may be more than the strict interpretation of cross-examination put by the Massachusetts court on their section 22. While section 2051 limits impeachment to the party *against* whom the witness is called, and David was called by plaintiff, still as plaintiff is not bound by his testimony, the witness in a sense is called against plaintiff. However, the problem is not one of semantics but rather of the purpose to be served. Considering the fact that section 2055 contemplates that in the cross-examination of the adverse party the one calling him is not to be bound by his testimony and his testimony may be rebutted, we can see no reason why it was not intended that the one calling such an adverse witness may not be entitled to the type of cross-examination he could have conducted had the party taken the stand in his own behalf. In such event he could have been so impeached. It would seem that section 2055 contemplates that the party calling him thereunder would be entitled to consider him, adverse party as he is, as a witness called *against* him. Showing that the witness has been convicted of a felony adds an additional reason which the trier of the facts may accept for holding that the witness' testimony is not binding on the party examining him. In view of the broad interpretation of section 2055 by the courts of this state we see no reason for applying the Massachusetts rule. The fact that the impeachment was not brought in until rebuttal does not make it inadmissible. The court in its discretion may permit the introduction of evidence out of order. Here there was no objection before the trial court on the ground of the time element. It cannot be raised here for the first time. But if it could, we see no abuse of discretion by the trial court in permitting the question to be asked, where there was no objection as to the timing of the question. It should be pointed out that ordinarily this type of question should not be left until rebuttal. Unless there is some good reason for not using it on the first calling of the witness, it should not be permitted on rebuttal and particularly as the only or main subject of rebuttal. Later plaintiff asked permission to recall Alex Coplin, one of the heirs of decedent, for the purpose of asking him if he had been convicted of a felony. The court refused to grant the permission on the ground that the question should have been asked when he was on the stand before. Perhaps had defendant objected on this ground when David was questioned, the court might have sustained the objection. However, the court's action as to Alex did not demonstrate an abuse of discretion as to David.

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[1] He was the original defendant sued as executor of Coplin's will. Subsequently the bank was substituted as administrator with the will annexed.

[23, 24] In holding that conviction of a felony may be shown by the party calling the adverse party under section 2055, we desire to point out that the adverse party must never be called solely for that purpose. Unless the evidence testified to by the adverse party is of importance in the case, his conviction should not be shown. The trial court, before allowing it to be shown, should first determine whether the main purpose of the party calling the witness is to show the conviction.

Other Contentions.

The fact that the case will have to be tried again makes it unnecessary to consider a number of the contentions made herein, including the alleged misconduct of plaintiff's counsel. However, it may not be amiss to point out that it is almost unbelievable that counsel on both sides (who bear outstanding reputations for ability) would indulge in the childish, inexcusable tactics of which the record shows them both to have been guilty. We would suggest to the judge who presides at the retrial that no such conduct should be permitted in a courtroom.

The appeals from the various orders are dismissed. The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

110 Cal.App.2d 727

ELLSWORTH v. UNITED STATES METALS CORPORATION et al.

Civ. 18883.

District Court of Appeal, Second District, Division 3, California.

May 5, 1952.

Hearing Denied June 26, 1952.

Action by Martha W. Ellsworth against United States Metals Corporation and another to quiet title. The Superior Court of Los Angeles County, Daniel N. Stevens, J., entered order dismissing action as to United States Metals Corporation for failure to bring action to trial within five year statutory period, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that where complaint against individual defendant and corporation was several as against each defendant, and alleged title in plaintiff and that each defendant claimed separate adverse interests, and sought independent relief against each, inability of plaintiff to procure service upon individual defendant did not preclude her from trying action against corporation, and could not excuse failure of plaintiff to bring action against corporation to trial within statutory period.

Affirmed.

1. Dismissal and Nonsuit 🔑60(1)

Dismissal of action for failure to bring same to trial within statutory period of five years after complaint is filed is mandatory, unless plaintiff brings case within statutory exceptions, or implied exceptions engrafted on statute by judicial decisions. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit 🔑60(3)

Where complaint in quiet title action against corporation and individual defendant was several as against each defendant, and alleged that plaintiff had title and that each defendant claimed a separate adverse interest, absence of and alleged inability to procure service on individual defendant did not preclude plaintiff from bringing action to trial against corporation, and afforded no excuse for failure to bring action to trial within statutory period of five years, and dismissal of action was proper. Code Civ.Proc. § 583.

3. Trial 🔑3

In a civil action against two or more defendants, trial court has discretion to order separate trials as between plaintiff and separate defendants. Code Civ.Proc. §§ 414, 579.

John J. McMahon, Los Angeles, for appellant.

Earl Glen Whitehead, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an order of dismissal as to defendant United States Metals Corporation for failure to bring the action to trial within five years after the complaint was filed. Code Civ.Proc. § 583.

The action is to quiet title to mining claims. The complaint was filed August 28, 1945. Plaintiff named two defendants, United States Metals Corporation and O. K. Gilliam. The corporation was served with the summons and complaint and on September 11, 1945, filed an answer. Gilliam has not been served. Not having been brought to trial, the action was dismissed as to the corporation on October 4, 1951. No stipulation was filed extending the time within which to bring the action to trial; nor was it shown that the corporation had been absent from the state or concealed therein, or its whereabouts unknown to plaintiff and not discoverable to him upon due diligence.

[1] The provision for dismissal after the lapse of the statutory time is mandatory, Douglas v. Superior Court, 94 Cal.App.2d 395, 398, 210 P.2d 853, unless the plaintiff brings the case within one of the exceptions named in section 583 or within one of the implied exceptions engrafted on the statute by the decisions.[1]

The motion for dismissal was determined

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[1] Implied exceptions are: where it is impracticable and futile to bring the action to trial because of another action pending which is a bar to prosecution of the action sought to be dismissed, Rose v. Knapp, 38 Cal.2d 114, 237 P.2d 981; where it is impracticable to bring the action to trial because of a statutory reference, City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 916–917, 207 P.2d 17; where one defendant was in military service, a stay could have been granted, and his presence was necessary to properly prosecute the action, Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665; where an appeal was pending from an order granting a change of venue, Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; where time is consumed by an appeal during which the jurisdiction of the trial court is suspended, Kinard v. Jordan, 175 Cal. 13, 164 P. 894; where it would have been impracticable to bring the action to trial because the defendant absented himself from the state, it did not appear that he had any property in the state, and service of summons by publication would have been an idle act, Ojeda v. Municipal Court, 73 Cal.App.2d 226, 166 P.2d 49; Carmichael v. Superior Court, 55 Cal.App.2d 406, 130 P.2d 725; where for all practical purposes going to trial was impossible because coplaintiffs had an appeal pending and the trial could not

in the trial court upon the record in this action, the record in another action between the same parties which is not part of the record on appeal, and voluminous conflicting affidavits. The conflict has to do with the efforts made by plaintiff to locate Gilliam in order to serve him with the summons and complaint, and with whether Gilliam had any interest in the property at the time the action was commenced. These questions have no bearing on whether the court should have dismissed the action. The case does not come within any of the express or implied exceptions. The sole question necessary for us to determine is whether plaintiff has established that the record before the trial court on the motion to dismiss was insufficient as a matter of law to sustain its implied finding that plaintiff could have brought the action to trial as against the corporation without the presence of Gilliam. Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 65, 168 P.2d 665.

There is no factual showing that plaintiff could not have brought the action to trial as against the corporation and have quieted her alleged title as against it without the presence of Gilliam. The only reference to the question in the affidavits is the conclusion that "plaintiff cannot safely proceed to trial without service of summons and complaint first being made on him."

[2] The complaint as against each defendant is several. It alleges title in plaintiff and that each defendant claims a separate, not a joint, adverse interest. It does not appear that defendants have any unity of interest or claim. Independent relief is sought against each. Plaintiff could have sued the corporation alone or have brought separate actions against the corporation and Gilliam. No reason appears from the face of the complaint or from the answer of the corporation why plaintiff could not have brought the action to trial as against the corporation. In Rauer v. Hertweck, 175 Cal. 278, 283–284, 165 P. 946, it was held that in a quiet title action against two defendants a separate judgment could be rendered against one of them. Gilliam was not concerned with, nor a necessary party to, a determination of the issue of title as joined between plaintiff and the corporation. See Bell v. Adams, 150 Cal. 772, 774, 90 P. 118; Cole v. Roebling Construction Co., 156 Cal. 443, 447–449, 105 P. 255; Bell v. Staacke, 159 Cal. 193, 195–196, 115 P. 221; Rocca v. Steinmetz, 189 Cal. 426, 208 P. 964; Trans-Pacific Trading Co. v. Patsy Frock & Romper Co., 189 Cal. 509, 513, 209 P. 357; McNeely v. Superior Court, 36 Cal.App. 602, 173 P. 102; Corbin v. Howard, 61 Cal.App. 715, 718, 215 P. 920; Huntoon v. Southern Trust & Commerce Bank, 107 Cal.App. 121, 130–131, 290 P. 86.

[3] The general rule is that in a civil action against two or more defendants the trial court has discretion to order separate trials as between the plaintiff and separate defendants. Caldwell v. Regents of University, 35 Cal.App. 639, 170 P. 666, an action to quiet title; McArthur v. Shaffer, 59 Cal.App.2d 724, 727, 139 P.2d 959; Hahn v. Walter, 60 Cal.App.2d 837, 839, 141 P.2d 925; 64 C.J. 37, § 8. "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." Code Civ.Proc. § 579. Even when the action is against two or more defendants jointly liable on a contract, and the summons is served on one or more of them but not all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. Code Civ. Proc. § 414.

A notice of the pendency of this action was recorded in Mono County where the mining claims are located. Pendency of

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proceed separately as to the nonappealing plaintiffs, Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405; where contestants in a will contest were induced by fraud to consent to a dismissal of their contest, later had the dismissal vacated, time between the dismissal and reinstatement of the contest was excluded because during the interim the court had no power to proceed, Estate of Morrison, 125 Cal.App. 504, 509–512, 14 P. 2d 102.

the action constitutes a cloud on the title of the corporation. To hold that it is bound to wait until plaintiff effects service on Gilliam is wholly unreasonable and finds no warrant in any provision of law. The court properly held that there was no justification for not bringing the action to trial as against the corporation within the statutory period.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

110 Cal.App.2d 812

ROSE v. ROSE.

Civ. 19011.

District Court of Appeal, Second District,
Division 3, California.

May 8, 1952.

Hearing Denied July 7, 1952.

Proceedings on application by Eva S. Rose against Samuel C. Rose for increase of award for support of minor daughter Jacqueline Rose. The Superior Court of Los Angeles County, Mildred L. Lillie, J., entered order denying application for increase, and Jacqueline Rose filed notice of appeal. On motion to dismiss appeal, the District Court of Appeal, Vallée, J., held that when minor daughter was not named as party to action, did not take appropriate steps to become party to record, and was not ordered to be brought into action by court, minor daughter had no right to appeal from order denying application, even though increase in award would have been of beneficial interest to her.

Appeal dismissed.

1. Appeal and Error 🔑148, 151(2)

Under provision that any party aggrieved may appeal, term "party" includes any person who is party to the record, and person who is not party to record cannot appeal. Code Civ.Proc. § 938.

2. Divorce 🔑312

Where wife applied for increase of award against divorced husband for support of minor daughter, and daughter was not named as party, did not take appropriate steps to become party to record, and court did not order her brought into action, minor daughter, by simple expedient of filing notice of appeal, had no right to appeal from order denying application, and such result was not altered by fact that daughter had beneficial interest in increase of award. Code Civ.Proc. § 938.

Edward Raiden, Los Angeles, for appellant.

Fink, Rolston, Levinthal & Kent, Los Angeles, for respondent.

VALLÉE, Justice.

This is a motion to dismiss the appeal.

On March 8, 1948, Eva S. Rose as plaintiff obtained an interlocutory decree of divorce from Samuel C. Rose, by which Samuel was ordered to pay Eva $75 a month for the support of their minor daughter, Jacqueline. On April 7, 1950, Eva applied for an increase of the award, for costs, and attorney fees. After a hearing the application was denied. The court did not order that Jacqueline be brought into the action nor did she take any steps to be made a party to the record. She did not appear in the action by a general guardian or by a guardian ad litem.

Eva did not appeal from the order denying her application. Jacqueline, a minor, within the time prescribed by law, filed a notice of appeal from the findings and order made on Eva's application. Samuel has made a motion to dismiss the appeal on the ground that Jacqueline has no right to appeal from the order. An appeal does not lie from the findings and that appeal must be dismissed.

May Jacqueline, a minor, not a party to the record in the superior court, not brought into the action by order of the court, without a general guardian or a guardian ad litem, appeal from the order?

[1, 2] Any party aggrieved may appeal. Code Civ.Proc. § 938. The term "party" includes any person who is a party to the record. Pacific States Savings &

L. Co. v. Mortimer, 70 Cal.App.2d 811, 814, 161 P.2d 684. A person who is not a party to the record cannot appeal. Eggert v. Pacific States S. & L. Co., 20 Cal.2d 199, 200–201, 124 P.2d 815. One may become a party to the record by taking appropriate steps to be made such. Pacific States Sav. & L. Co. v. Mortimer, supra. Jacqueline is a minor. She could appear in the action only by her general guardian or by a guardian *ad litem* appointed by the court. Code Civ.Proc. § 372. Since Jacqueline was not named as a party to the action, did not take any appropriate steps to become a party to the record, and since the court did not order her brought into the action, she has no right to appeal from the order. The fact alone that Jacqueline has a beneficial interest in an increase of an award of support money does not entitle her to appeal. Braun v. Brown, 13 Cal.2d 130, 133, 87 P.2d 1009. She did not become a party simply by filing a notice of appeal.

Appeal dismissed.

SHINN, P. J., and WOOD, J., concur.

110 Cal.App.2d 667

In re DENNIS' ESTATE.

LOWRY v. DENNIS.

Civ. 18686.

District Court of Appeal, Second District,
Division 3, California.

April 30, 1952.

Proceedings in the matter of the estate of Eva Ridenour Dennis. From part of the judgment of the Superior Court of Los Angeles County, Orlando H. Rhodes, J., decreeing, on William Lowry's petition, final distribution of the estate, William Austin Dennis, contestant, appealed. The District Court of Appeal, Shinn, P. J., held that the decedent's funeral expenses should have been paid by her estate and were improperly deducted from the contestant's legacy.

Order reversed in part with directions.

1. Executors and Administrators 🔑214
Husband and Wife 🔑151(7)

The expense of burial, which under common law rested upon surviving husband, has been shifted by statute to estate of deceased wife, if there be estate, but husband, and if none, other relatives, are liable if there be no estate or insufficient estate. Health and Safety Code, §§ 7009–7013; Probate Code, §§ 950, 951.

2. Executors and Administrators 🔑214
Husband and Wife 🔑151(7)

Probate court should not approve funeral expense claim for more than amount which is reasonable in view of manner in which decedent lived, her station in society, and condition of her estate; and if greater expense is incurred, those who incurred it, rather than estate, should bear excess above reasonable amount. Health and Safety Code, §§ 7009–7013; Probate Code, §§ 950, 951.

3. Executors and Administrators 🔑214
Husband and Wife 🔑151(7)
Wills 🔑731

Where testatrix, by her will, disposed of estate of some $18,000, which was her separate property, her estate should have been charged, in absence of showing of unreasonableness, with funeral expenses consisting of payment of $563.38 to a mortician and $776.42 to a mausoleum company, and it was improper to deduct such sums from a legacy made by testatrix in favor of the husband from whom she held an interlocutory decree of divorce. Health and Safety Code, §§ 7009–7013; Probate Code, §§ 950, 951.

◆

Charles C. Morrison, West Los Angeles, for appellant.

Hector P. Baida, Santa Monica, for respondent.

SHINN, Presiding Justice.

By her will Eva Ridenour Dennis disposed of an estate of some $18,000, her separate property. She held an interlocutory decree of divorce from William A. Dennis, appellant herein, and bequeathed him $3,000. The will made no provision for the payment of funeral expenses. These expenses being unpaid, her executor and appellant were sued and judgment given against them jointly for $563.38 in favor of Pierce Brothers, the mortician, and $776.42 in favor of Inglewood Park Mausoleum Company. These sums were paid from estate funds but upon final distribution were ordered deducted from the husband's legacy. The husband appeals.

We are of the opinion that the expenses should have been paid by the estate and were improperly deducted from appellant's legacy.

The question whether the funeral expenses of a deceased wife should be borne by her husband or her estate has been directly presented to a reviewing court, as far as we know, in but two cases. Respondent contends that In re Weringer, 100 Cal. 345, 34 P. 825, decided that the husband must bear the expense. As we read the opinion the court expressed the opposite view. It is true the court said, 100 Cal. at page 346, 34 P. 825, at page 826: "At common law the husband was bound to bury his deceased wife in a suitable manner, and was bound to defray the necessary funeral expenses", but the court did not impose that duty upon the husband. It was said, 100 Cal. at page 347, 34 P. 825, at page 826: "The court allowed an item of $670 for 'funeral expenses and monument.' It does not appear how much of the item was for the monument. Whether or not the administrator ought to have been allowed anything on account of the monument depends upon circumstances. * * * If the husband be poor, and the deceased leave a considerable estate, the former ought not to be expected to contribute much to a monument; and it would be proper in such a case, we think, for the court to fix a reasonable amount to be allowed for that purpose. *The amount allowed for the expenses of the funeral and a monument should be governed by the custom of people of like rank and condition in society; a distinction being made in this respect, however, between solvent and insolvent estates* ." (Emphasis added.) The allowance of the entire expense of the funeral and monument as a charge against the estate was reversed for further proceedings. Notwithstanding the statement as to the husband's liability under the common law, the court clearly indicated that the funeral expenses, exclusive of the charge for the monument, should be paid by the estate and the cost of the monument be fairly apportioned.

In Estate of Mathewson, 181 Cal. 452, at page 453, 184 P. 867, at page 868, the court said of the Weringer case: "That case, in our opinion, justifies an allowance to the husband, as administrator of the wife's estate, of funeral expenses, if, when the circumstances of the parties, their mode of living, and the amount of the estates of the wife and husband, respectively, are taken into consideration, it is reasonable to do so." An order charging the wife's estate with funeral expenses of $512.50 was affirmed upon a showing that the husband had property of the value of some $9,000 but insufficient income to pay the funeral expenses. We are aware of no holding to the contrary.

Former section 292 of the Penal Code provided in part: "If the deceased was a married woman, the duty of burial devolves upon her husband". Failure to obey was made a misdemeanor. The duty was to the State and had nothing to do with the husband's right to reimbursement from the wife's estate. It is important, however, to consider what was and is embraced within "the duty of the burial". Merely placing a body in a grave would have constituted technical compliance with section 292, and yet no one of normal sensibilities would expect a burial to be conducted, except in some emergency, without the preliminary arrangements and preparations which are universally regarded as an inseparable part of a decent funeral. Section 292 was repealed when the General Cemetery Act was enacted, Stats.1931, Ch. 1148, Amended Stats.1937, Ch. 367. In 1939 the pertinent provisions of the act were codified as sections 7100 and 7101, Health and Safety Code.

> "7100. The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, vests in, and the duty of interment and the liabil-

> ity for the reasonable cost of interment of such remains devolves upon the following in the order named: (a) The surviving spouse * * *. The liability for the reasonable cost of interment devolves jointly and severally upon all kin of the decedent in the same degree of kindred and upon the estate of the decedent."
>
> "7101. Cost of interment. When any decedent leaves an estate in this State, the reasonable cost of interment and an interment plot of sufficient size to constitute a family plot and memorial * * * shall be considered as a part of the funeral expenses of the decedent and shall be paid as a preferred charge against his estate as provided in the Probate Code."

"Interment" is defined as cremation, inurnment (placing cremated remains in an urn and placing it in a niche), entombment (placing remains in a crypt or vault), and burial (placing remains in a grave). Secs. 7009–7013.

Sections 950 and 951, Probate Code, give a claim against an estate for funeral expenses preferred status. These sections, and section 7101, Health and Safety Code, by implication recognize funeral expenses as a proper charge against an estate. The joint liability of the relatives and the estate under section 7100 gives protection to the creditor if the estate is insufficient.

[1] Liability for the expense of burial, which formerly rested upon the surviving husband, has been shifted to the estate of the deceased wife, if there be estate, although the husband, and if none, other relatives are liable if there be no estate, or insufficient estate. This accords with long established custom, as we understand it.

It is clear, then, that appellant husband should not have been charged with the amount that had been paid to the cemetery ($776.42). And we can discover in the record no reason whatever for deducting from his bequest the charges of the mortician ($563.38).

[2] It is true that the court in probate should not approve a claim for funeral expenses for more than an amount which is reasonable in view of the manner in which the decedent had lived, his station in society and the condition of his estate. Estate of Malgor, 77 Cal.App.2d 535, 176 P.2d 66. If a greater expense has been incurred those who incurred it, not the estate, should bear the excess above a reasonable amount. It is not claimed that the charges of the mortician or the cemetery were unreasonable.

Although "burial" is given a narrow definition in section 7013, this was for the obvious purpose of making certain that the reasonable cost of burial, including a burial plot, be treated as a part of the funeral expenses for which payment is provided in section 950, Probate Code. If, under the rule of In re Weringer and Estate of Mathewson, reasonable burial expense as a charge against the estate of a deceased wife was a matter of discretion with the court in probate, it is no longer so. And in view of this clearly expressed policy of the State it logically follows that the estate of a deceased wife, if reasonably ample, should be charged with the reasonable expense of interment, by whatever method, including all items which are customarily regarded as funeral expenses. It would be incongruous from the standpoint of law, reason and convention, to divide the responsibility between the relatives and the estate. Even without the change in the statutory law, proper application of the rule of the Weringer and Mathewson cases would have required that the estate of Mrs. Dennis be charged with the expenses.

[3] In view of the size of the estate and the absence of any claim of unreasonableness, it was error to charge appellant with any of the funeral expense.

The order for distribution is reversed with respect to the debts in question, with directions to allow them as claims against the estate.

WOOD and VALLÉE, JJ., concur.

110 Cal.App.2d 640

CRANE v. CITY OF UKIAH et al.

Civ. 8129.

District Court of Appeal, Third District, California.

April 29, 1952.

Frank Myrl Crane sued the City of Ukiah and Horton Whipple, seeking to recover from the city the amount of engineering charges deducted from the sum due plaintiff under a contract with the city and to have Whipple adjudged to have no interest in or lien on the sum so withheld. The Superior Court, Mendocino County, Lilburn Gibson, J., rendered judgment in favor of plaintiff, and Whipple appealed. The District Court of Appeal, Van Dyke, J., held that Whipple had not been a third party beneficiary entitled to enforce an agreement between the city and plaintiff.

Affirmed.

1. Contracts ⚷187(1)

Where general contractor had agreed to construct reservoir for city within fixed period of time and consulting engineer had contracted with city to provide all necessary engineering services in connection with construction of reservoir, and subsequently, as consideration for extension of time permit, general contractor agreed that city should have right to charge him for all or any part of engineering and other charges accruing during period of extension, consulting engineer was not third party beneficiary entitled to enforce latter agreement. Civ.Code, § 1559.

2. Contracts ⚷187(1)

Third party who is merely incidentally benefited by contract may not enforce it. Civ.Code, § 1559.

3. Judgment ⚷208

In general contractor's action against city and its consulting engineer, to recover engineering charges deducted by city from amount due plaintiff under contract and to have engineer adjudged not entitled to any interest in or lien on such unpaid balance, city and consulting engineer were not "adversaries," and a judgment in favor of plaintiff adjudged no issues as between the two defendants. Civ.Code, § 1559.

See publication Words and Phrases, for other judicial constructions and definitions of "Adversaries".

Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for appellants.

Mannon & Brazier, Burke & Rawles, all of Ukiah, for respondent.

VAN DYKE, Justice.

On October 15, 1948, plaintiff and respondent Crane entered into a contract with defendant City of Ukiah, a municipal corporation, whereby Crane undertook, as general contractor, to construct a reservoir for the city. On October 27, 1948, defendant and appellant Whipple and the city entered into a contract whereby he was employed as consulting engineer to furnish and provide all necessary engineering services in connection with the construction of the reservoir for a fee of $7,250. Crane's contract with the city required that he complete the work of construction in 120 working days, which requirement he did not comply with. Upon his application the city granted two extensions of time and the reservoir was finally completed on January 4, 1950. The first extension of time was granted April 20, 1949, and the minutes of the council showed that the application for extension was granted "with the provision there is no further expense to the City of Ukiah" and the recital that "Councilman Hughes stated Mr. Crane had agreed to pay the additional engineering fees at the time the extensions of time were granted." Upon this subject Crane testified at the trial that he appeared before the city council on April 20th, requested the extension of time, was asked by the council whether or not, if the extension was granted, there would be additional expense to the city for engineering services, and that he had agreed that if there were any extra engineering costs incurred by the city he would bear them; that the second extension was made upon the same condition; that he was acquainted with the provisions of Whipple's contract with the city for engineering; and that when he told the council he would bear any extra engineering costs that might accrue because of the extensions granted him he had in mind and had read the Whipple contract which provided that Whipple would receive a fixed fee for doing the work and that in view of that provision he could not see where there could be any additional charges. Appellant Whipple rendered the engineering services called for, not only during the initial period of 120 days working time, but through the various extensions. Up to April 18, 1949, which approximately measured the 120-day work period, Whipple billed the city at various times and was paid the full fee of $7,250 specified in his contract as the amount which he was to be paid for all necessary engineering. Thereafter and through the periods of the extensions granted he continued to render engineering services and continued to submit bills. For the period between April 18, 1949 and June 30th of the same year he billed the city and was paid a total of $2,936.32, and for the period from July 31st to December 30th of that year he billed the city for an additional total of $4,657.60, which claims were approved by the council, but were not paid. It thus appeared that, after an agreed credit of $202.92 upon these claims against the city had been given, appellant Whipple had been allowed payments and approved claims totaling $7,391 in addition to the contract fee of $7,250.

Crane's contract with the city contained a provision that if the city should decide to extend the time limit for the completion of the contract it should have the right "to charge to the Contractor, * * * and to deduct from the final payment for the work, all or any part, as it may deem proper of the actual cost of engineering, inspection, superintendence, and other overhead expenses which are directly chargeable to the contract, and which accrue during the period of such extension." The contract contained the further provision that upon completion of the work the city should pay the entire sum due "after deducting therefrom all previous payments and all amounts to be kept and all amounts to be retained under the provisions of the contract." Purporting to act under these provisions, the city in its final settlement with Crane claimed a credit against the final payment of the amount it had paid and allowed Whipple for extra engineering services directly chargeable, as it contended, to the contract, and accruing during the period of extensions granted. Crane, claiming that under Whipple's contract and the facts as related, no engineering charges were properly chargeable and therefore deductible, brought action against the city for the sum withheld. He joined appellant Whipple as a party, it being alleged as to him only that he, without right, claimed a lien or interest on the unpaid balance. Crane asked the trial court to adjudge that the city owed him the balance sued for and that Whipple's claims thereto were without right. The city and Whipple each separately answered. The city set forth its claim of right to withhold the money. Whipple asserted an interest and a lien upon the withheld fund for the stated reason that the contract between Crane and the city contained the provisions as to the city's right to withhold from Crane and charge to him engineering costs arising from extensions of time granted. His theory was that those provisions constituted a contract made expressly for his benefit. The trial court found in favor of Crane. It found that Whipple had no claim upon the funds and that he had been fully paid for his services by the payment to him of the expressed fee of $7,250. More specifically, the court found that Whipple had not performed any services directly or indirectly chargeable to Crane by reason of the extensions and that the city, therefore, had no authority to withhold from the final payment due Crane any sum whatever. It arrived at this result by construing the contract between Whipple and the city as being a flat fee contract. Judgment was accordingly rendered in favor of Crane against the city for the balance of the full contract price. From this judgment Whipple has appealed. The City of Ukiah did not appeal.

[1-3] The contract between Crane and the city in respect of the right of the city upon granting an extension to charge to Crane and deduct from the final payment for the work actual cost of engineering ac-

cruing during the period of the extension is claimed by appellant to have been expressly for his benefit and he argues that he is entitled to rely upon it even to the extent that he would have a right of action against the city to enforce the beneficial interest he claims accrued to him if the city had not withheld the funds. These contentions of Whipple cannot be sustained. First, the city did not undertake to deduct any sums. By its contract with Crane it did no more than to reserve to itself the right, should it elect to do so, to make engineering and other charges against Crane. It agreed with Crane that it should have the right to charge him for all or any part as it might deem proper of the cost of engineering and other costs accruing during the period of extension. Whipple is not named nor does the contract purport to obligate the city to make such deduction for the benefit of the engineer who might become the city's engineer on the work. To be sure, some incidental benefits might flow to Whipple if the city did elect to exercise its right to withhold any amount which it thought proper to charge against Crane, but "While section 1559 of the Civil Code provides that 'a contract, made expressly for the benefit of a third person, may be enforced by him * * *', there is no law whereby one who is incidentally benefited by a contract may enforce it." Balkins v. City of Los Angeles, 81 Cal.App.2d 42, 49, 183 P.2d 137, 141, and cases cited. No portion of the contract between Crane and the city was for the benefit of Whipple. When the city determined to make the disputed charges against Crane, purporting to act pursuant to the provisions of its contract with him, it exercised the right for its own benefit, and no right, interest or lien upon the funds so withheld vested in Whipple. Whatever his rights were against the city for additional engineering fees by reason of the extensions granted Crane, they must be determined alone by his contract with the city and upon a controversy between them. Crane's complaint tendered no issues with respect to these rights. He sued only to recover from the city an alleged balance due him for completion of his contract and to have it determined that whatever claim Whipple might make to an interest in his cause of action was without right. Whipple by his answer set up the provisions of the Crane-City contract we have discussed, but in doing so and for the reasons we have set forth he stated no claim or right or interest in law to any money due Crane. The city, on the other hand, by its answer set up the same provisions of the contract between itself and Crane and alleged that it had, pursuant thereto, rightfully withheld the disputed fund. It claimed a credit equal to the balance sued for. The issues thus tendered were litigated solely between the city and Crane. The trial court found against the city upon the issues so tendered and the city has not appealed. That judgment, therefore, has become final. In so far as Whipple's appeal challenged the trial court's judgment that he had no right or interest in any matters at issue between Crane and the city, his appeal must fail for the reasons above stated. He had no such interest. These considerations completely dispose of the appeal, and the judgment must be affirmed. While the briefs discuss the trial court's construction of the Whipple contract, it is unnecessary to consider the matter because, as to Whipple, the judgment appealed from adjudges no issues thereon as between Whipple and the city. They were not adversaries in the action. 49 C.J.S., Judgments, § 37, p. 94. They, by their pleadings, tendered no issues as to each other. Indeed, as we have said, Whipple, by his pleading, tendered no issues at all. The judgment appealed from by Whipple will not impede either party to it if hereafter the interpretation of the contract between Whipple and the city becomes matter at issue between them.

The judgment is affirmed.

PEEK, J., and SCHOTTKY, J. pro tem., concur.

110 Cal.App.2d 598

PEOPLE v. PIERCE et al.

Cr. 4765.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1952.

Hearing Denied May 29, 1952.

Defendants were convicted by the Court, Thomas L. Ambrose, J., sitting without a jury, on six counts of grand theft and one of conspiracy to commit grand theft, and certain defendants appealed from the order denying their motion for a new trial. The District Court of Appeal, Fox, J., held, inter alia, that the evidence sustained the convictions.

Order affirmed.

1. Embezzlement 🔑1

Embezzlement is included within grand theft. Pen.Code, §§ 484, 503.

2. Trusts 🔑30½(1)

Whether a trust relationship arises from a particular transaction is to be determined from any written agreement plus acts and declarations of the parties, and determination of intention of parties to create trust relationship is not limited to a construction of the writing, especially in the criminal field, in view of fact that prosecution is not bound by any such contract. Pen.Code, §§ 503, 506; Civ.Code, §§ 2215, 2216, 2221, 2222.

3. Trusts 🔑25(1)

No particular language or terminology is needed to create a trust and the words "trust" or "trustee" need not be used. Civ.Code, §§ 2215, 2216, 2221, 2222.

4. Trusts 🔑31, 33

A trust exists where property or funds are placed by one person in the custody of another, as in the case of a deposit of money to be retained, or where legal title of property is conveyed for a limited purpose, as, for example, the securing of performance of an obligation by transferor. Civ.Code, §§ 2215, 2216, 2221, 2222.

5. Trusts 🔑44(3)

In order to establish a trust, it is necessary to offer clear and convincing proof thereof, but such proof may be indirect, consisting of acts, conduct, and circumstances, and the question whether the showing is clear and convincing is primarily one for the trial court. Civ.Code, §§ 2215, 2216, 2221, 2222.

6. Embezzlement 🔑10

Contract which state alleged showed that defendants had been trustees would be construed more favorably to prosecuting witnesses in prosecution for grand theft by embezzlement, in view of fact that defendants had prepared the contract.

7. Embezzlement 🔑44(5)

In prosecution for grand theft and conspiracy to commit grand theft based upon breach of alleged trust relationship, evidence established that such relationship had existed. Pen.Code, §§ 484, 503, 506.

8. Embezzlement 🔑11(1)

Where sum of $10,000 was deposited with manufacturers by distributor of plaster to guarantee acceptance of manufacturers' product, such sum was held in trust and manufacturers would be criminally liable for conversion of such sum, and such liability would remain unaffected by subsequent transaction whereby distributor loaned $46,000 to manufacturers by instrument in which initial $10,000 deposit was stated to be a part of the loan. Pen.Code, §§ 484, 503, 506; Civ.Code, §§ 2215, 2216, 2221, 2222.

9. Trusts 🔑33

Fact that money deposited by individual distributors of plaster with manufacturers to secure performance of distributors drew 4% interest was merely one factor to be considered in determining character of the transactions, whether trusts or loans, and did not itself nullify the creation of trusts in such funds. Civ.Code, §§ 2215, 2216, 2221, 2222.

10. Trusts 🔑33

Provision in dealer-contracts requiring written notice of cancellation and giving company 30 days thereafter in which to refund deposits by dealers to secure performance did not necessarily indicate that such deposits created debtor-creditor relationships, rather than trust relationships. Civ.Code, §§ 2215, 2216, 2221, 2222.

11. Embezzlement ⇨11(1)

Use of funds, which had been deposited with manufacturers to secure performance of distributors, in construction and operation of manufacturers' plant, for the purchase of leases, and in the usual course of business was a wrongful use of trust funds and constituted "embezzlement." Pen.Code, § 506.

See publication Words and Phrases, for other judicial constructions and definitions of "Embezzlement".

12. Embezzlement ⇨23

Any diversion of funds held in trust constitutes embezzlement whether there is direct personal benefit or not so long as owner is deprived of his money, and therefore fact that defendants did not personally profit from diversion of trust funds was no defense to prosecution for grand theft. Pen.Code, §§ 484, 506.

13. Embezzlement ⇨44(2)

Evidence supported implied finding that defendants acted fraudulently in diverting trust funds to general promotion of their business venture. Pen.Code, §§ 484, 506.

14. Embezzlement ⇨11(1)

Where defendants acted fraudulently in diverting trust funds to general promotion of their business venture, they were guilty of grand theft. Pen.Code, §§ 484, 506.

15. Conspiracy ⇨47

The existence of an agreement necessary for conviction of conspiracy may be shown by circumstantial evidence. Pen. Code, §§ 182, 184.

16. Conspiracy ⇨27

In order to sustain conviction for conspiracy, it is not essential that the overt act required for conviction was a criminal act, but it is only necessary that such act was done in furtherance of the conspiracy. Pen.Code, §§ 182, 184.

17. Conspiracy ⇨27

The overt act, which State, in order to convict of conspiracy, must show to have been taken in furtherance of conspiracy, may be such as was accomplished by only one of the conspirators. Pen.Code, §§ 182, 184.

18. Conspiracy ⇨41

The members of a conspiracy are bound by all acts of all members done in furtherance of agreed plot. Pen.Code, §§ 182, 184.

19. Criminal Law ⇨422(6)

Once conspiracy is established, all evidence of substantive crimes become admissible against all participants, even though other conspirators were not present. Pen.Code, §§ 182, 184.

20. Conspiracy ⇨47

Evidence sustained convictions for conspiracy to commit grand theft. Pen. Code, §§ 182, 184.

21. Indictment and Information ⇨86(2)

Where overt acts alleged in conspiracy count were based upon substantive counts charging grand theft in Los Angeles County, defendants were not misled or prejudiced by failure of conspiracy count to reallege specifically where each overt act took place. Pen.Code, §§ 182, 184, 960.

22. Criminal Law ⇨1023(8)

Order denying motion in arrest of judgment was not "appealable order". Pen.Code, §§ 1185, 1237.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

23. Criminal Law ⇨1023(10)

Where judgment was not pronounced but proceedings were suspended and defendants were placed on probation, purported appeal from judgment and sentence would be dismissed. Pen.Code, §§ 1185, 1237.

◆

Daniel Schnabel and Royal M. Galvin, Beverly Hills, for appellants.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

FOX, Justice.

The defendants Pierce and Morse were convicted, by the court sitting without a jury, on six counts of grand theft and one of conspiracy to commit those crimes. A motion in arrest of judgment and a motion for a new trial were made and denied. Judgment was not pronounced but proceedings were suspended and defendants were placed on probation. They have appealed from the order denying a new trial and have purportedly appealed from the order denying the motion in arrest of judgment, and also from the nonexistent judgment and sentence.

In 1946 one William M. Schultze, Jr., a distributor for a prefabricating company, was in need of a bookkeeper. He contacted Pierce and Morse, who operated a bookkeeping service. A short time later the three men discussed the prefabricated home business and decided to go into the manufacture and sale of such homes. Ultimately a partnership agreement was entered into and they started operations under the name "Pre-Bilt Homes Company." Three or four months later Schultze hired defendant Rhylick as office manager. Some time thereafter it appeared advantageous to form a construction concern to erect the houses and the Great Western and Southern Construction Company was formed and articles of incorporation were filed in which the three defendants, Schultze, and one Smedley were the incorporators. During the operation of these ventures a scarcity of gypsum products, specifically plaster and button board, was encountered. They began a search for gypsum deposits. Properties containing such deposits were located and leases taken thereon. One such lease covered a claim near Taft, California, the lease being executed by the five men. A corporation known as Gypsum, Inc., was formed by these same individuals to mine and process the gypsum. A grinding plant near Rosamond was purchased and attempts were made to convert it to the production of plaster. Smedley assisted as engineer to get the plant into operation but the resulting product was not of a consistent quality and only a small amount of usable material was produced. The gypsum used in this operation was not obtained from any of the leased mining claims but was shipped in from a firm in Nevada. Schultze was principally concerned with Pre-Bilt's lumber supply. Neither he nor Smedley became involved in the financing of the gypsum enterprise.

Defendants Rhylick, Pierce and Morse developed a plan to market that portion of the output which was not needed in the construction of their prefabricated houses. To that end contracts were entered into with several persons who were to be distributors, each to have his own territory. Each distributor was required to put up a specified amount of cash to be held as "a bond of faithful performance." Gypsum, Inc., failed and went into bankruptcy. The money thus placed with Gypsum, Inc., was neither returned nor repaid. The defendants are charged with the theft of those respective deposits.

The first grand theft count (Count 3) involves the transaction with Charles F. Hoffar, who was a dealer for the Pre-Bilt Homes Company. He was contacted by Pierce in November, 1946, and was told about the shortage of plaster. Pierce explained that defendants were entering this field and offered him a distributorship; he was told that he could obtain all the plaster he wanted up to 5,000 bags a month, but that a bond for faithful performance of the contract would be required. Hoffar thought the premium on such a bond would be about $30. He also talked to Rhylick about the proposal. The next day Pierce called Hoffar in and showed him a form contract and told him that he "would have to put in a $5,000 cash surety instead of a bond." Hoffar was surprised at the cash requirement and replied that $5,000 was a lot of money to put up. He was informed his money was to be put into a bank or reserve and not used; that he was to get it back at any time after giving a thirty-day written notice. While he knew he was to be paid four percent interest, he did not intend to invest the money and he did not know defendants intended to use the money in the business. He was also told his money was to go into a reserve so that if he did not pay for the plaster delivered to him "they could take the money out of my $5,000 * * *." No discussion was had as to where the defendants would deposit the money. Hoffar later delivered his check for $5,000 to Pierce, payable to Gypsum, Inc., in accordance with Pierce's instructions. It was on this occasion that Hoffar signed the standard distributor contract which had been prepared by defendants. It was signed by Pierce on behalf of Gypsum, Inc. It contained, among others, the following provision: "It is further agreed that the party of the second part [the distributor] shall place with the party of the first part [Gypsum, Inc.] $5,000, to be held by said party as a bond of faithful performance; said amount shall draw interest at the rate of four per cent (4%) per annum, and shall be returnable to the party of the second part thirty days after the expiration of this agreement." The contract was to remain in effect until one of the parties gave a ninety-day written notice of cancellation, provided, however, the company could cancel it on seven days' notice in the event Hoffar committed certain specific acts. Being unable to get any useable plaster, Hoffar asked Pierce if he could get his money back and was told he could but it was not forthcoming. He then made demand upon each of the defendants for its return but to no avail. Rhylick entered a plea of guilty to this count.

The transaction with Mr. Griffin and Mr. Kuebler of the Palomar Lumber Company is the basis for count four. They were told by Rhylick that it would be necessary to post a deposit as a bond to be held for faithful performance on their part in ordering plaster and button board, and it would be returned according to the terms of the contract. Rhylick further stated "it would be kept in trust as a deposit." The contract, after certain revisions, was signed by Pierce and Rhylick for Gypsum, Inc. The lumber company made the $5,000 deposit. Shortly thereafter Griffin ordered ten carloads of plaster products but none was delivered. Demand was then made upon the company to refund the deposit of $5,000. The money was never returned.

The Berry deal is the foundation of the fifth count. He was told by Rhylick that if he signed the contract he would get certain quantities of hard wall and button board. It would be necessary, however, for him to put up $5,000 "to be held as a bond" to insure performance. He signed the contract and delivered his check for $5,000. Pierce and Rhylick signed for Gypsum, Inc. Berry knew he was to receive four percent on the money but he was not interested in that feature of the transaction. He wanted to obtain material. From reading the contract it was his understanding that his specific $5,000 would be returned to him. Mrs. Berry questioned the necessity of depositing $5,000 cash as a bond and asked Rhylick "Why can't we put it in escrow and trust if it is just like a bond, you know, performance bond"? He refused to consider such an arrangement. After receiving 100 sacks of plaster that were unusable Berry demanded the return of his $5,000, or, if the defendants were unable to perform, he was willing to take a quantity of lumber or a house. At this, Pierce became angry, tore off his tie, and declared, "Give us time, give us time, you are trying to pin something on me." Morse told Berry it was impossible to give him any lumber or a house.

The Brunson and Bunch transaction forms the basis of Count 6. This firm was buying and selling building materials with emphasis on plaster, button board and nails. Bunch was told by Rhylick "They required a cash bond to be put up" to guarantee their acceptance of plaster for which the firm would be billed on an open account. The firm's check for $10,000 was delivered and the contract signed on January 8. Deliveries were promised by February 1st, but none was forthcoming. Bunch and his partner took a trip to the plant; they discovered some plaster had been produced but it was not satisfactory because it would not "jell properly." Pierce explained there had been a mixup and they were trying a new process. He then approached Bunch with an offer of an exclusive distributorship of button board in exchange for an investment of $56,000 to complete the work of the plant. As a result another agreement was executed on February 28, 1947. The $56,000 included the $10,000 deposit originally made. The firm of Brunson and Bunch was given security in the form of a promissory note in the sum of $56,000 with an assignment of 40 percent of the shares of stock in

Gypsum, Inc. This agreement provided in part as follows: "That the distributors [Brunson and Bunch] shall loan and pay to Gypsum, Inc., a corporation, or cause to be loaned and paid to Gypsum, Inc., inclusive of the said sum of $10,000 * * * the total sum of $56,000 * * * and Gypsum, Inc., agrees to repay $56,000 on demand * * * with interest at * * * four percent per annum * * * and upon receipt of said $56,000 Gypsum, Inc., * * * shall make, execute and deliver to said W. B. Brunson and Deon Bunch, copartners, * * * as evidence of said indebtedness, its promissory note for said sum of $56,000 * * *." Bunch later took over the operation of the company for a period of approximately 45 days. The attempt to produce plaster and button board was not successful and the company went into bankruptcy in September, 1947, and operations came to a close.

The Plunkett transaction is Count 7. Pierce and Rhylick told him they had a good proposition to offer him; that a bond would be required. When he was told this bond would have to be in the form of a cash deposit he expressed wonderment as to what it was for and was told the purpose of the bond was to guarantee payment in full for his allotment of materials; the regular form of contract was executed. He was able to raise only $1,000. Arrangements were made through Rhylick for him to put up his note for $4,000 in addition to the cash. He received 200 sacks of plaster but it was worthless. When the note matured he was unable to pay it, so he deeded certain real property to Pierce. Thereafter the note was cancelled and Plunkett received an additional two or three hundred dollars. Although he later obtained quitclaim deeds to his property, Plunkett never received repayment of the $1,000.

The transaction with John Hollenbeck is Count 8. He was told that the normal bond would be $5,000 but in his case Schultze would assume a portion of it. Hollenbeck only put up $1,000, although the signed agreement called for $10,000. He did not receive any products called for in the contract. His understanding was that he was to receive the $1,000 back, but repayment was never made. He was later employed as pilot for the company. Thereafter the dealership contract appears to have been abandoned.

Count 1 charges conspiracy to commit grand theft and alleges the receipt and acceptance by the defendants of the various sums of money referred to in the previously delineated transactions. The trial court found each of these alleged overt acts to have been committed by the defendants and found defendants Pierce and Morse guilty of the conspiracy. It was stipulated that the deposits made by the Gypsum distributors were used in the purchase of Gypsum leases, the development and operation of the plant, and for salaries, materials and office expenses.

Neither defendant testified.

Defendants contend that the evidence is insufficient to sustain the conviction of grand theft on any of the counts. It is their theory that the transactions with these distributors created only a debtor-creditor relationship in which event defendants could use the funds without being guilty of a conversion. The People, however, contend a trust relationship was established as to these deposits and that their use by the defendants in the Gypsum enterprise violated the trust and constituted embezzlement and therefore grand theft under section 484 of the Penal Code, which provides that "Every person * * * who shall fraudulently appropriate property which has been entrusted to him, * * * is guilty of theft." The position of the People must be sustained.

[1] "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted." Penal Code, sec. 503. The crime of embezzlement is included within the broad terms of Penal Code section 484. People v. Mason, 86 Cal.App.2d 445, 452, 195 P.2d 60; People v. Myers, 206 Cal. 480, 483, 275 P. 219; People v. Robinson, 107 Cal.App. 211, 221, 290 P. 470. It is further provided in section 506, Penal Code, that "Every trustee, * * * or person otherwise entrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not

in the due and lawful execution of his trust, * * * is guilty of embezzlement, * * *."

[2-5] A trust is either voluntary or involuntary. Civ.Code, sec. 2215. A voluntary trust arises out of the personal confidence reposed in, and voluntarily accepted by, one for the benefit of another. Civ. Code, sec. 2216. Further, a voluntary trust is created by the words and acts of the trustor and trustee, indicating with reasonable certainty the intention of the trustor to create a trust, the intention of the trustee to accept it, and the subject, purpose, and beneficiary of the trust. Civ.Code, secs. 2221 and 2222. Whether a trust relationship arises from a particular transaction is to be determined from any written agreement plus the acts and declarations of the parties. The determination of the intention is not limited to a construction of the writing. This is particularly true in the criminal field since the prosecution is not bound by any such contract. People v. Sidwell, 27 Cal.2d 121, 126, 162 P.2d 913; People v. Robinson, supra, 107 Cal.App. at page 221, 290 P. 470; People v. Martin, 102 Cal. 558, 566, 36 P. 952. It is well settled that no particular language or terminology is needed to create a trust, and that the words "trust" or "trustee" need not be used. Weiner v. Mullaney, 59 Cal.App.2d 620, 631, 140 P.2d 704. As stated in 25 Cal. Jur., pp. 140-141, § 17, "Contractual relations are creative of trusts in infinitely varying circumstances * * * a 'trust' exists where property or funds are placed by one person in the custody of another,—e. g., a deposit of money to be retained * * *—or where the legal title of property is conveyed for a limited purpose, as, for example, the securing of performance of an obligation by the transferor." In order to establish a trust it is necessary to offer clear and convincing proof thereof. Such proof, however, may be indirect, consisting of acts, conduct, and circumstances, and "the question whether the showing is clear and convincing is primarily one for the trial court." Hansen v. Bear Film Co., 28 Cal.2d 154, 173, 168 P.2d 946, 958.

[6, 7] Applying the foregoing principles it is clear that a trust was established in each of the enumerated transactions. In each instance a contract was signed; it provided that the dealer "shall place with" Gypsum, Inc., a stated amount of money; it also provided that this money was "to be held by said party [Gypsum, Inc.,] as a bond of faithful performance"; it further provided "said amount shall draw interest at the rate of four percent (4%) per annum, and shall be returnable to the party of the second part [the dealer] thirty (30) days after the expiration of this agreement." It will be noted that the money was "to be held" by the company; that it was to be held "as a bond",—"a bond of faithful performance." It is also to be noted that the dealer agreed to "place with" the company this money and that the amount was "returnable" to him. The agreement does not say the money was a loan, or that it was an investment. The choice of the language used in the contract is significant and revealing. Since the contract was prepared by defendants it should be construed more favorably to the dealers. These written agreements together with the negotiations, both before and at or about the time of their execution, furnish ample evidence of an intention on the part of the dealers that a trust relationship existed and a recognition on the part of defendants of such fact.

It is a reasonable inference that defendants could not have induced the dealers to relinquish the funds without assurance that they would be kept intact. Hoffar, for instance, believed the performance bond would be in the usual form, that is, by the payment of a premium to a bonding company therefor. When he was told that the "$5,000 surety" would have to be in cash he expressed surprise at such requirement. The inference is clear that Hoffar would not have parted with his $5,000 unless he had been given to understand that his money would be held in trust. He testified that he was told his money would be paid into a bank or reserve and not used. He further testified that he did not intend to invest the money, and he did not know that defendants would use the money in their business. When he asked about the return of his $5,000 no explanation was ever made to him that his money had been used; he was repeatedly told that he could get his money back. However, it was never returned because it had been used in the business and was finally lost through the concern's bankruptcy.

In the Palomar Lumber Company transaction the president was told that the money to be put up by the lumber company was a deposit, posted as a bond to be held for faithful performance in ordering plaster and button board, and would be returned according to the terms of the contract. Specifically, defendant Rhylick told Griffin that the money "would be kept in trust as a deposit." No disclosure was made to Griffin that his company's money was to be used in the business.

The Berry transaction again reveals the understanding of the parties and throws further light on defendants' intent. While the negotiations were in progress Berry was told the $5,000 was necessary as surety to insure performance. He believed from reading the agreement that his specific $5,000 would be returned to him. While his understanding from reading the contract may have little significance, still the defendants did nothing to dispel this understanding. During the course of the negotiations an inquiry by Mrs. Berry adds clarity to defendants' intent. She asked why the money couldn't be put into an escrow in trust as a performance bond. Rhylick would not consider such a proposal and represented that the money would be held intact. The purpose of defendants and their consciousness of guilt is further revealed when, in response to Berry's demand for the return of his $5,000 or repayment in materials, defendant Pierce became angry and declared, "Give us time, give us time; you are trying to pin something on me." At this point defendant Morse informed Berry that repayment was impossible in any manner.

The same general type of representations were made both orally and contractually in the Plunkett and Hollenbeck transactions.

[8] Defendants insist that in the Brunson and Bunch transaction there was clearly a loan of $10,000 at the outset because in a later transaction they loaned $46,000 to defendants by an instrument in which the initial $10,000 deposit was stated to be a part of that loan, making the total of $56,000. The subsequent contract is immaterial if there already was a conversion of the deposit held in trust. People v. Braiker, 61 Cal.App.2d 406, 412, 143 P.2d 89. At the beginning of the negotiations Bunch was told that their $10,000 would be used as a bond to guarantee their acceptance of plaster. This representation was incorporated in the contract as in all the other transactions.

Defendants' method of operation, their handling of other deposits, their difficulty in getting their enterprise financed and their urgent need for additional funds, support an inference that the $10,000 had already been converted. However, it appears that Brunson and Bunch were not apprised of this conversion and undoubtedly believed their $10,000 was still being held in trust. If it had been a loan there would be no reason to include it in the later transaction. On April 9, 1949, however, the parties, by a new written agreement, expressed an intention to include the $10,000 as a part of a loan transaction. It is significant that in this subsequent transaction the agreement contained specific language disclosing it was a loan. It was also evidenced by a promissory note, secured by a pledge of 40 percent of the capital stock of the company.

[9] Defendants place great emphasis on the provision in the dealer-contracts providing that the various amounts placed with the company by the dealers shall draw interest at the rate of four percent per annum. In the absence of any explanation by the defendants as to its purpose, the interest provision may be considered as an inducement to the various dealers to put up a deposit. They might well have been reluctant to be deprived of the use of their money without some return thereon. Consequently, the agreement to pay interest may have been considered an important factor in consummating these contracts. It is thus apparent that such a provision does not nullify the creation of a trust in these funds. It is merely one of the facts

for consideration in determining the character of these transactions.

[10] Defendants suggest that the provision in the dealer-contracts requiring ninety days' written notice of cancellation and giving the company 30 days thereafter in which to refund deposits indicates a debtor-creditor relationship since a period of 120 days would give the company time to get the funds in hand to reimburse the dealer. Again, in the absence of any explanation by the defendants, a more likely reason for such a period is to enable the company to fill orders that have been placed and adjust the accounts between the parties, and also to enable the company to find another dealer to take the place of the one who was quitting and thus keep their business moving on an even basis. This latter idea finds support in the provision in the contract giving a right of cancellation to the company on seven days' written notice for certain specified acts on the part of a dealer.

[11] It is clear from the evidence and in fact, stipulated by defendants, that "all deposits" received by Gypsum, Inc., for franchises were expended in the construction and operation of the Gypsum plant, for the purchase of Gypsum leases, and in the usual course of business, such as salaries, materials and general office expenses. The funds were thus applied to a use and for a purpose entirely different from that for which they were received. Because they were trust funds they could not be used for the development and carrying on of the Gypsum enterprise. As trustees defendants had no legal right to make such use of the funds. As a consequence defendants fall squarely within the provision of section 506, Penal Code, which provides that every trustee who fraudulently appropriates property entrusted to him "to any use or purpose not in the due and lawful execution of his trust," is guilty of embezzlement. People v. Applegate, 91 Cal.App.2d 163, 204 P.2d 689; People v. Fleming, 220 Cal. 601, 32 P.2d 593; People v. Fewkes, 214 Cal. 142, 4 P.2d 538. The principle here applied is illustrated in People v. Bratton, 125 Cal. App. 337, 14 P.2d 125. There "the complaining witness deposited with both defendants money which they were to hold as security for the faithful performance by Ferrari of the duties of his employment. Both defendants admitted they had spent this money in paying hotel bills and on a trip to Los Angeles, and that they did not have the money in their possession prior to their arrest. This evidence is amply sufficient to support the verdict and judgment, * *." 125 Cal.App. at pages 341–342, 14 P.2d at page 126.

[12] The suggestion is made that since the defendants did not personally profit from these funds, they cannot be guilty of grand theft. This proposition is not sound. Any diversion of funds held in trust constitutes embezzlement whether there is direct personal benefit or not as long as the owner is deprived of his money. People v. Talbot, 220 Cal. 3, 28 P.2d 1057; People v. Braiker, 61 Cal.App.2d 406, 143 P.2d 89.

[13, 14] There is ample evidence to support the implied finding that defendants acted fraudulently in diverting these trust funds to the general promotion of their Gypsum venture. They were the persons principally interested in Gypsum, Inc., and were in charge of its management and policies; they were without funds to develop the plant and product and place it on the market; they deliberately used these trust funds for that purpose; they made it possible for the corporation to use the money these dealers had deposited as a bond for faithful performance, and they did the various acts knowingly and voluntarily. In People v. Jones, 61 Cal.App.2d 608, 623, 143 P.2d 726, 732, it is said, "The moment he appropriated the funds belonging to his clients to the use of his corporations the crimes of grand theft were committed." So here, the moment the defendants appropriated the funds that had been placed with them by the dealers to the development of the Gypsum enterprise through their corporation they embezzled the funds and were consequently guilty of grand theft. Penal Code, sec. 484.

[15–20] The conviction based upon a conspiracy to commit grand theft (Count 1) must also be sustained. Besides a criminal agreement, the prosecution must allege and prove some overt act done in the furtherance of the objects of the conspiracy. Penal Code, secs. 182, 184. The existence of the agreement may be shown by circumstantial evidence. People v. Bucchierre, 57 Cal.App.2d 153, 163, 134 P.2d 505; People v. Ragone, 84 Cal.App.2d 476, 480, 191 P.2d 126. It is not essential that the overt acts be criminal. People v. Gordon, 71 Cal. App.2d 606, 628, 163 P.2d 110. Nevertheless, if such innocent acts are done as a step toward the furtherance of the conspiracy they are sufficient. People v. Gilbert, 26 Cal.App.2d 1, 23, 78 P.2d 770. Further, the overt act may be accomplished by only one of the conspirators and yet be sufficient, for the members of the conspiracy are bound by all acts of all members done in furtherance of the agreed plot. People v. Creeks, 170 Cal. 368, 374, 149 P. 821; People v. Benenato, 77 Cal.App.2d 350, 356, 175 P.2d 296. Once the conspiracy is established all evidence of the substantive crimes become admissible against all participants, even though the other conspirators were not present. People v. Temple, 15 Cal.App.2d 336, 339, 59 P.2d 417; People v. Gordon, supra, 71 Cal.App.2d at page 627, 163 P.2d 110. Applying these principles it is clear that the trial court was amply warranted in drawing the inference that all defendants were parties to the agreement and the plan and that each of them wilfully participated in the execution thereof and in each overt act.

[21] Defendants' final point is that Count 1 (the conspiracy count) does not state a public offense. This contention is based on the failure of that count to reallege specifically where each of the overt acts took place. An examination of the indictment discloses that defendants are accused of entering into a criminal conspiracy to commit grand theft "within three years prior to the finding of this indictment *at and in the County of Los Angeles, State of Calif.*, * * *." (Emphasis added.) The italicized words may well be understood as applying to the whole of count one and not merely to the portion alleging the making of the agreement. This allegation was certainly sufficient to put defendants on notice of the acts with which they were charged. In People v. Gordon, supra, 71 Cal.App.2d at page 611, 163 P.2d at page 116, it is said "No indictment is insufficient by reason of any defect or imperfection of its form so long as no substantial right of the accused is prejudiced upon the merits of the case * * *", and "In no event shall a judgment be reversed because of an error in the form of the indictment 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" Penal Code, sec. 960. The comment of the court in People v. Goscinsky, 52 Cal.App. 62, 198 P. 40, is particularly appropriate here. At page 64 of 52 Cal.App., at page 41 of 198 P., the court said: "The point that the information was defective in not stating the county in which the offense was committed may * * * be dismissed with the comment that the evidence showed where it was committed—i. e., where the defendant resided and practiced medicine—and certain it is that the defendant suffered no injury and was not hampered in his defense on account of this omission." In this case defendants could not possibly have been misled or prejudiced because the overt acts alleged in the conspiracy count are based upon the substantive counts charging grand theft in which these acts are all described as having occurred in Los Angeles County, California.

[22] Defendants' purported appeal from the order denying their motion in arrest of judgment is dismissed, as such an order is not appealable. People v. McGee, 31 Cal. 2d 229, 232, 187 P.2d 706; Penal Code, secs. 1237, 1185.

[23] The purported appeal from the judgment and sentence must also be dismissed since no judgment or sentence was pronounced. People v. D'Elia, 73 Cal.App. 2d 764, 766, 167 P.2d 253.

The order denying the motion for a new trial is affirmed.

MOORE, P. J. and McCOMB, J., concur.

30 Cal.2d 30

Ex parte KATCHER.

Cr. 5319.

Supreme Court of California, in Bank.

May 13, 1952.

In the matter of the application of L. J. Katcher for a writ of habeas corpus to secure his release from custody under an extradition warrant. The Supreme Court, Spence, J., held that a requisition of the Governor of Arizona, showing that petitioner was charged with violating an Arizona statute by delivering to another two sight drafts on a bank with knowledge that he did not have sufficient funds therein to pay the drafts, was sufficient as against the contention that it showed on its face that petitioner committed no crime in Arizona in that addressing of the drafts thereon to petitioner at such bank showed conclusively that they were not drawn on a bank for payment of money within such statute.

Writ discharged, and petitioner remanded to custody.

1. Extradition ⚷34

Addressing of sight drafts in lower left hand corners thereof to drawer at named bank did not show conclusively that they were not drawn on bank for payment of money within Arizona statute declaring person drawing or delivering to another a draft on bank for payment of money, with knowledge that he has insufficient funds therein to pay draft, guilty of crime, so that Arizona governor's extradition requisition, showing that drawer was charged with violating such statute, was not insufficient as showing on its face that drawer committed no crime in Arizona. A.C.A. 1939, § 43–2613.

2. Extradition ⚷29, 39

In extradition proceeding, question is whether fugitive from demanding state has been in fact charged with crime therein, and court does not go beyond his indictment by grand jury and requisition of governor of such state after his flight is established, unless there is no reasonable basis for indictment and requisition or indictment is so frivolous or contradictory as to be a presentment of innocence rather than crime.

3. Banks and Banking ⚷144
Evidence ⚷35

Under California rule, which Supreme Court may take judicial notice is also Arizona rule, an instrument payable at bank is equivalent to order to bank to pay it for account of principal debtor thereon. Civ. Code, § 3168; Code Civ.Proc. § 1875, subd. 2; A.C.A.1939, § 52–163.

4. Extradition ⚷39

A reasonable doubt as to whether sight drafts, addressed thereon to drawer at named bank, were payable at such bank and hence drawn on bank for payment of money within Arizona statute declaring person drawing or delivering to another a draft on bank for payment of money, with knowledge that he has insufficient funds therein to pay draft, guilty of crime, must be resolved by courts of Arizona as demanding state, in proceeding for extradition of drawer from California. A.C.A. 1939, § 43–2613.

◆

Samuel Reisman and Bertram H. Ross, Los Angeles, for petitioner.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Ralph F. Bagley, Deputy Dist. Attys., all of Los Angeles, for respondent.

SPENCE, Justice.

Petitioner, who is held by virtue of a warrant of extradition issued by the Governor of this state, seeks his release on habeas corpus.

Petitioner's sole contention is that "the requisition of the Governor of Arizona * * * on its face shows that * * * petitioner committed no crime in the State of Arizona * * *." The requisition shows that petitioner is charged with two counts of violating section 43–2613 of the Penal Code of Arizona which provides: "Every person who * * * wilfully, with intent to defraud, makes or draws or utters or delivers to another person any check or draft on a bank, or depositary for the payment of money, knowing at the time of such making, drawing, uttering, or delivery, that he * * * has not sufficient funds in, or credit with such bank or depositary, to meet such check or draft in full upon its presentation is guilty of a crime * * *."

[1] The charges against petitioner are based on two instruments which petitioner allegedly delivered to one Mikel Echeverria with intent to defraud. The instruments are two sight drafts signed by petitioner and addressed in the lower lefthand corner:

To L. Katcher
Bank of America
Los Angeles Calif.

It is petitioner's contention that the manner of addressing used on the drafts shows conclusively that they were not drawn on a bank or depositary for the payment of money, and that the requisition therefore shows on its face that no crime was committed in Arizona. This contention cannot be sustained.

[2] The applicable rule was stated by Chief Judge Cardozo in People ex rel. Hayes v. McLaughlin, 247 N.Y. 238, 241, 160 N.E. 357, 358, as follows: "The question is whether 'the fugitive has been in fact, however inartificially, charged with crime in the state from which he has fled', Pierce v. Creecy, 210 U.S. 387, 28 S.Ct. 714, 52 L.Ed. 1113. A grand jury * * * has said that what has been charged against him is there a crime. The Governor has said the same. Unless a reasonable basis for what they say is lacking altogether, unless the indictment is so frivolous or contradictory as to be a presentment of innocence rather than of crime, we do not go beyond the documents when flight is once established. Doubt, if there is any, must be resolved in the demanding State. Hogan v. O'Neill, 255 U.S. 52, 55, 41 S.Ct. 222, 65 L.Ed. 497; Drew v. Thaw, 235 U.S. 432, 439, 35 S.Ct. 137, 59 L.Ed. 302; Munsey v. Clough, 196 U.S. 364, 373, 25 S.Ct. 282, 49 L.Ed. 515." See also Brown v. Fitzgerald, 9 Cir., 39 F.2d 870, 872.

[3] Although some doubt may exist whether the drafts issued by petitioner were drawn "on a bank, or depositary for the payment of money," within the meaning of section 43–2613 of the Arizona Penal Code, it cannot be said that "determined by any standard of penal justice that can rationally be supposed to prevail in the demanding jurisdiction", People ex rel. Hayes v. McLaughlin, supra, 247 N.Y. 238, 242, 160 N.E. 357, 358, the drafts issued by petitioner are outside the meaning of section 43–2613. The rule in this state, and by virtue of Section 1875(2) of the Code of Civil Procedure we may take judicial notice of the fact that it is likewise the rule of the State of Arizona, see § 52–163 of the Code of Arizona (1939), is that "where the instrument is payable at a bank it is equivalent to an order to the Bank to pay the same for the account of the principal debtor thereon." Civ.Code § 3168. Thus in Caine v. Foreman, 106 Cal. App. 636, 640, 289 P. 929, 931, it was held that what purported to be a promissory note payable "at a bank" was "the equivalent of a check," as under section 3168, it became "an order to the bank to pay the same." And in Mt. Vernon National Bank v. Canby State Bank, 129 Or. 36, 276 P. 262, 63 A.L.R. 1133, 1136, a draft addressed by the drawer to itself but payable at a bank was held a check drawn on the bank.

[4] In view of the above authorities it could reasonably be held by the courts of Arizona that the placing of the words "Bank of America, Los Angeles, Calif." below the name of petitioner in the designation of the drawee meant that the drafts were to be payable at the Bank of America in Los Angeles; and that said drafts were therefore drawn "on a bank, or depositary for the payment of money" within the meaning of section 43–2613 of the Arizona Penal Code. In the presence of a reasonable doubt we must allow such doubt to be resolved by the courts of the demanding state. Drew v. Thaw, supra, 235 U.S. 432, 439, 35 S.Ct. 137, 59 L.Ed. 302.

The writ is discharged and the petitioner is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

39 Cal.2d 25

Ex parte BARR.

Cr. 5317.

Supreme Court of California, in Bank.

May 13, 1952.

Original proceeding in the matter of the application of mother on behalf of a minor child, for a writ of habeas corpus. The Supreme Court, Traynor, J., held that under divorce decree awarding custody of child to mother, she was entitled to custody of child pending appeal from order modifying divorce decree by awarding custody of child to father.

Child ordered delivered to petitioner.

1. Appeal and Error 🔑485(1)
Habeas Corpus 🔑25(2)

Supersedeas is the usual remedy when appellant seeks to vacate proceedings taken in lower court in violation of a stay granted by statute, but in child custody actions, habeas corpus is an additional remedy to correct violations of stay provisions.

2. Habeas Corpus 🔑25(2)

Habeas corpus will lie when a person entitled to custody of minor child is denied possession of child.

3. Divorce 🔑312.4

Appeal from order modifying divorce decree by awarding custody of minor child to father suspended the power of trial court to enforce such order. Code Civ.Proc. §§ 946, 949.

4. Habeas Corpus 🔑34

Where mother's motion to stay enforcement of order modifying divorce decree by awarding custody of minor child to father pending appeal from such order was denied by trial court and mother was ordered to deliver child to father, mother's subsequent compliance with modification order was not voluntary so as to prevent her from obtaining writ of habeas corpus to correct trial court's erroneous refusal to stay execution of modification order. Code Civ.Proc. §§ 946, 949.

5. Divorce 🔑312.4
Habeas Corpus 🔑34

Trial court had no jurisdiction to modify its order modifying divorce decree by awarding custody of minor child to father after appeal from modification order had been perfected, and hence subsequent modification of order by granting mother visitation rights did not supersede modification order or prevent mother from obtaining writ of habeas corpus to correct trial court's erroneous refusal to stay execution of modification order pending appeal therefrom. Code Civ.Proc. §§ 946, 949.

6. Divorce 🔑312.4

The welfare of a minor child imperiled by remaining with parent previously having custody of child, pending appeal by such parent from order modifying divorce decree by awarding custody to the other parent may be adequately protected by application to court having jurisdiction over the appeal and fact that leaving child in custody of parent previously having custody pending appeal from modification order would not be in the best interests of child does not authorize extralegal seizure of child by other parent or execution of modification order by trial court pending appeal therefrom. Code Civ.Proc. §§ 946, 949.

7. Divorce 🔑312.4
Habeas Corpus 🔑99(1)

Under divorce decree awarding custody of minor child to mother, she was entitled to custody of child pending appeal from order modifying divorce decree by awarding custody of child to father, and where such appeal was perfected before execution of modification order and child was thereafter forcibly taken from mother and delivered to father, mother was entitled to writ of habeas corpus ordering delivery of child to her pending determination of appeal. Code Civ.Proc. §§ 946, 949.

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Coffey & Velasquez and Jack Coffey, all of San Francisco, for petitioner.

Paolini & Paolini and Mario G. Paolini, all of San Francisco, for respondent.

TRAYNOR, Justice.

On November 17, 1947, a final decree of divorce was entered dissolving the marriage of Frances Barr and George Barr. The decree awarded custody of their minor child to Frances. On January 10, 1952, upon application by George, the court modified the decree to award him the custody of the child. On January 14th, Frances filed notice of appeal from the modification order, and her appeal is presently pending in this court. Frances also filed a motion in the trial court to stay enforcement of the modification order. On January 24th her motion was denied and she was ordered to deliver the child to George. Later that day she complied with this order.

On February 5, 1952, upon application by Frances, the court modified the order of January 10th to grant her visitation rights. On March 16th, while the child was with Frances pursuant to the visitation provisions of the February 5th order, she refused to return the child to George and informed him that she intended to keep the child. Later that day George and police officers entered her home and forcibly took the child. Frances commenced the present habeas corpus proceeding in this court on March 21st. She contends that her appeal stayed the January 10th modification order and that she is therefore entitled to custody of the child pending appeal.

[1, 2] The first question presented is whether this court can properly issue habeas corpus in this case. Supersedeas is the usual remedy when an appellant seeks to vacate proceedings taken in the lower court in violation of a stay granted by statute. Southern Pac. Co. v. Superior Court, 167 Cal. 250, 252, 139 P. 69; Romine v. Cralle, 83 Cal. 432, 437, 23 P. 525; Holcomb v. Juster, 39 Cal.App. 462, 463, 179 P. 445; see also In re Estate of Dabney, 37 Cal.2d 402, 411, 232 P.2d 481. In child custody actions, however, habeas corpus is an additional remedy to correct violations of stay provisions, In re Lukasik, 108 Cal.App.2d 438, 239 P.2d 492; In re Browning, 108 Cal.App. 503, 507, 291 P. 650; In re Dupes, 31 Cal.App. 698, 701, 161 P. 276, since the writ will lie when a person entitled to custody of a minor child is denied possession thereof. In re Mathews, 176 Cal. 156, 158, 167 P. 873; see 37 Cal.L.Rev. 455, 473–474; 13 Cal.Jur. 251–252.

[3] Turning to the merits of the petition, it is clear that the appeal suspended the power of the trial court to enforce the order modifying the custody provisions of the divorce decree. Code Civ.Proc. §§ 946, 949; Lerner v. Superior Court, 38 Cal.2d 676, 242 P.2d 321; Ex parte Queirolo, 119 Cal. 635, 636, 51 P. 956; In re Dupes, 31 Cal.App. 698, 700, 161 P. 276. "[A] perfected appeal in an action for the custody of a child automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as it existed at the time of appeal." Foster v. Foster, 5 Cal.2d 669, 672, 55 P.2d 1175, 1176; see In re Lukasik, 108 Cal.App.2d 438, 239 P.2d 492.

[4] George contends that the foregoing cases are not controlling here on the ground that Frances voluntarily complied with the order appealed from. In his return to the petition for the writ, however, George admits: "That on the 24th day of January, 1952, this Petitioner through her attorney representing her at that time made a motion before the said Superior Court to stay and suspend all proceedings and enforcement of its Order of January 10th, 1952, awarding custody to the father; that the Superior Court denied said motion and instead *ordered the Plaintiff to deliver said child to the father in conformity to said Order.*" (Emphasis added.) Frances telephoned George on the evening of the 24th and told him to come to her house and take the child. Under these circumstances, it cannot be said that her compliance with the order of the court was "voluntary." It was not necessary to resist until she was cited for contempt. Cf. Reitano v. Yankwich, 38 Cal.2d 1, 237 P.2d 6.

George relies on De Lemos v. Siddall, 143 Cal. 313, 315, 76 P. 1115. In that case this court held that habeas corpus would not lie when the order appealed from was executed *before* the appeal was perfected, on the ground that an appeal preserved the status quo at the time of appeal and did not operate to undo action taken before the appeal. In the present case the order was executed by the trial court some ten days after Frances perfected her appeal.

[5] Frances's right to habeas corpus is not affected by the February 5th order granting her visitation rights. Since the trial court did not have jurisdiction to modify its order after an appeal had been perfected, Lerner v. Superior Court, 38 Cal.2d 676, 242 P.2d 321; Vosburg v. Vosburg, 137 Cal. 493, 70 P. 473; Browne v. Browne, 60 Cal.App.2d 637, 642, 141 P.2d 428, the order of February 5th did not operate to supersede the order of January 10th. Accordingly, Frances is not prevented from obtaining habeas corpus to correct the trial court's erroneous refusal to stay execution of the January 10th order.

Cases will undoubtedly arise where it would not be in the best interests of the child to remain for the duration of the appeal with the parent previously having custody. For instance, the very reason for modification of an earlier custody award may be that the parent having custody has been mistreating the child. In that situation it would obviously be undesirable to leave the child with the appellant. But this possibility does not authorize extralegal seizure of the child by the other parent or execution of the modification order by the trial court in violation of the express provisions of the Code of Civil Procedure. Otherwise, litigants would be encouraged to seize possession of the child pending appeal in the hope that in subsequent habeas corpus proceedings they could persuade an appellate court that their action was in the best interests of the child and that it should ratify their conduct by refusing to issue the writ. As colorfully pointed out in In re Browning, supra, 108 Cal.App. 503, 507, 291 P. 650, 651, the child would be "in the category of a human football whose possession by either parent depends upon the agility, activity, and determination of each."

[6] The welfare of a child imperiled by remaining with the parent having custody thereof may be adequately protected by application to the court having jurisdiction over the appeal, Gantner v. Gantner, 38 Cal.2d 691, 242 P.2d 329 or to the Juvenile Court. In re Lukasik, 108 Cal. App.2d 438, 239 P.2d 492. There is no contention in the present case that the child may not safely remain with the mother pending the appeal.

[7] It is ordered that the child be delivered to the petitioner, who, pending determination of the appeal, is entitled to his custody pursuant to the terms of the final divorce decree.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

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39 Cal.2d 1

EBERHARDT et al. v. BASS et al.

Sac. 6139.

Supreme Court of California, in Bank.

May 7, 1952.

Action by R. L. Eberhardt and others against Arthur C. Bass and Stokely Foods, Inc., to determine ownership of asparagus crops grown on land owned by defendants and extent of defendant's lien, if any, thereon. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Carter, J., held that termination by lessor of lease for default did not end security interest of defendants in crops when agreement between plaintiffs and defendants expressly provided for subordination of claims of owner to those of defendants who had refinanced lessee and gave company right in event of lessee's breach of lease, to take possession of crops for period not exceeding term of lease.

Judgment affirmed.

Prior opinion, 231 P.2d 144.

1. Landlord and Tenant 🔑330(1)

Where lease of asparagus land for ten year period with option for two renewals of one year provided for rental in amount of 25% of crops and for termination of lease upon default of lessee, and agreement between owner of land and company which had refinanced lease subordinated, except as to rentals, the claims of owner to those of company, and gave company right in event of lessee's breach of lease, to take possession and dispose of crops for period not exceeding term of lease, termination of lease by owner for lessee's default did not end security interest of company in crops, but company had right to remain in possession under terms of lease for balance of term, and crop remained subject to indebtedness owed to company.

2. Sales ⚿84

Where lease of asparagus land for ten year period provided for rental of twenty-five percent of crop and for termination of lease upon default of lessee, and contracts between owner of land and company which had refinanced lessee, executed at time of agreement subordinating claims of owners to those of company, provided that owners sold their share of crop to company, contracts for sale to company did not terminate when company entered into possession of premises in accordance with subordination agreement.

3. Landlord and Tenant ⚿330(1)

Agreements between owner of asparagus farm land subject to ten year lease with renewal option and company which had refinanced lessee, for subordination of owner's claims, except as to rentals of 25% of crop, to those of company, and for right of company to asparagus crop grown for term of lease upon default by lessee and entry by company, were not unfair to owner since refinancing agreements assured owners that they would have lessee who would carry out lease and bring asparagus plants to producing stage, and provided them with certain market for their rental percentage.

Rutherford, Jacobs, Cavalero & Dietrich, D. R. Jacobs and William H. Woodward, all of Stockton, for appellants.

Price, Macdonald & Knox, Oakland, Mazzera, Snyder & DeMartini, Stockton, and Wallace W. Knox, Oakland, for respondents.

CARTER, Justice.

In 1943, Empire Tract Company, as owner and lessor, leased to R. C. MacLean, lessee, a tract of farm land for the purpose of growing asparagus for a ten year term, commencing January, 1943, with an option for two years more; the rental was 25% of the asparagus grown. In 1943, MacLean planted asparagus. In 1944, MacLean, with the consent of the lessor, assigned his lease to defendant, Arthur C. Bass, who assumed MacLean's obligations under the lease. In September, 1944, Bass, with the lessor's consent, gave a crop mortgage on the asparagus crop to Richmond-Chase Company, the latter having financed the planting of the asparagus. In 1945, plaintiffs acquired title to the land subject to the lease. In 1947, Bass needed refinancing, which was obtained from defendant, Stokely Foods, Inc., and the rights and duties involved were set forth in agreements between the defendants and plaintiffs.

Upon a breach of the lease in 1949 by Bass, plaintiffs gave notice to defendants, and the default not having been cured, plaintiffs commenced the instant action against defendants to quiet title to the land and crops and sought to have it declared that defendants no longer had any interest in the land or asparagus crop. Defendant Bass defaulted, but Stokely asserted in detail its rights under the agreements. The court decreed, as we construe it, that Stokely shall be the owner of the asparagus crops to be grown through the 1955 season, when grown, in accordance with the asparagus contracts (hereafter mentioned) which were declared to be in full force; that plaintiffs are the owners of the land; that Stokely has a lien (to secure $47,893.19 due from Bass) on 75% of the crops to be grown through 1955; that until the rights of Stokely under the subordination agreement (hereafter mentioned) and the asparagus contracts have terminated, any new lease or conveyance of the land shall be subject to such agreements, and a lien is imposed upon the land to that extent; that the liens are to exist until the indebtedness is paid or 1955, whichever arrives first.

Plaintiffs appeal, urging two main contentions: That the 1947 agreement properly interpreted, as a matter of law, does not alter the general rule that a termination by the lessor of the lease for default, ended the security interest of Stokely in the crops, and that if the agreement does alter the rule, it is unconscionable and unfair and should not have been enforced in equity.

The 1943 lease provided that the lessor shall receive as "rental" for the property 25% of all asparagus crops produced thereon during the term of the lease and renewals, to be delivered on the premises, and lessor to bear 25% of the cost of packing the annual crop; lessee is to establish the crop (which has a normal life of ten to twelve years); time is of the essence, and lessor may, upon ten days notice, terminate the lease for a breach of any of its terms by lessee. The crop mortgage to Richmond-Chase in 1944, embraced 75% of the "crops of asparagus growing and to be grown," from October, 1944, to June, 1955, and was to secure $40,000 and further sums advanced and was consented to by the lessor; as a part of the transaction, MacLean assigned the lease to Bass and was released from all liability under the lease and his indebtedness to Richmond-Chase. An advance was made to Bass under the mortgage and he borrowed money from a bank, secured by his farm equipment during 1944–46. Finding himself in financial difficulties in 1947, Bass, without any participation by plaintiffs, approached Stokely to have it refinance him; his indebtedness then amounted to about $72,000. Stokely was receptive, and its counsel, Mr. Knox, advised plaintiff, Eberhardt, by letter that Stokely would acquire the Richmond-Chase crop mortgage and would advance Bass funds to pay the debt on the equipment; that in return it wanted to buy from Bass all the canning asparagus grown during the term of the lease; and that proper documents for its security and a new crop mortgage be made and a memorandum of the lease recorded. Enclosed were two proposed contracts, one for the purchase of canning white asparagus and the other green asparagus, called asparagus contracts, also a "Subordination Agreement." Eberhardt's counsel suggested changes in the latter agreement: (1) To the effect that if Bass defaulted and Stokely entered the leased property, Stokely would assume Bass' obligations, and (2) the lessors' rental of 25% of the crops be excepted from the agreement. The subordination agreement and canning asparagus purchase contracts were signed by plaintiffs. Thereafter Richmond-Chase assigned its mortgage to Stokely.

The subordination agreement recites that plaintiffs are the owners of the land and of the lessors' interest in rentals to become due under the lease which is in full force; and that Stokely, under the terms of the agreement, is willing to loan money to Bass to finance him in the asparagus project under the lease. It then provided that in consideration of the loan by Stokely to Bass, plaintiffs "[3] agree that all claims of the [plaintiffs] against said * * Bass, except for rental as provided in said lease, and any and all of the [plaintiff's] interest in or to, or claims against, any of the asparagus crops, except for rental as provided in said lease, shall be subject and subordinate to the claims of Stokely Foods, Inc., against said [Bass] lessee and against said crops under any crop contract and any crop mortgage the lessee [Bass] * * may execute and deliver to Stokely Foods, Inc., covering said asparagus and shall be subject and subordinate to the claims of Stokely Foods, Inc., as assignee of Richmond-Chase Company, * * * under that certain crop mortgage executed by * * Bass, dated September 30, 1944, * * *.

"[4] Should the lessee [Bass] breach or abandon said lease or do or cause anything to be done whereby he might or would lose possession of said land, the [plaintiffs] hereby agree to permit Stokely * * * to exercise all rights which it has under any crop contract and/or any crop mortgage as if lessee had not breached said lease or had remained in possession, as the case may be, and agree that Stokely * * * will be permitted to take possession of said crops and dispose of them as provided in said crop contract and/or crop mortgage for a period not exceeding the term of said lease, provided while Stokely * * * is in possession of the demised premises it shall perform all of lessee's [Bass'] agreements as set forth in said lease.

"[5] If said real property should be relet, sublet, sold or encumbered before the rights of Stokely * * * under said contract or crop mortgage terminate, the [plaintiffs] further agree that any new lease to the same lessee or to any other person and any deed or other conveyance or mortgage or deed of trust of said real property shall contain a provision expressly recognizing the agreements herein provided for and subordinating the right of the lessee or transferee to the rights of Stokely * * * under any crop contract, any crop mortgage, and hereunder.

"[6] In said lease it is provided that lessors shall be entitled to receive 25% of all of the crops of asparagus produced on said land during the term of said lease as rental and that lessor may elect to dispose of its said percentage through lessee. The [plaintiffs] hereby agree that they have this day sold their share of said crops of canning asparagus to Stokely * * * and that they will not elect to permit lessee to dispose of said canning asparagus.

"[7] The [plaintiffs] hereby consent to the assignment by lessee of said lease to Stokely * * * for the purpose of securing any indebtedness of said * * * Bass (including said Richmond-Chase crop mortgage) and the [plaintiffs] further consent to the sale and/or mortgage by said * * * Bass of his interest therein to Stokely * * * of the canning asparagus growing and to be grown upon the demised premises.

"[8] In the event lessee [Bass] defaults in any obligation contained in said lease, before exercising any rights contained in said lease, the undersigned agree to give Stokely * * * written notice thereof * * * and to give it ten days within which to cure said default before exercising any right of reentry, cancellation or termination of said lease, it being understood that so long as said lease is assigned to Stokely * * * the bankruptcy or insolvency of said * * * Bass shall not be a ground for termination of said lease."

In 1949, two years after the subordination agreement, Bass having failed to operate the property as required by the lease, plaintiffs gave notice to him and Stokely of its termination. The default not being cured, plaintiffs entered into possession of the property and commenced the instant action.

[1] Commencing with the premise that the interest of a crop mortgagee under a mortgage on crops to be grown, given by the lessee as mortgagor on the latter's share of the crops, expires when the lease is terminated for the default of the lessee, plaintiffs urge that the subordination agreement does not negative the application of that rule; that therefore Stokely's interest was lost when the lease was terminated for Bass' default and their title should have been quieted against Stokely.

The subordination agreement, as above seen, specifically states that all claims of plaintiffs against Bass, which could include a right to terminate the lease and *all plaintiffs' interest in or claim against any of the asparagus crops,* which may reasonably embrace the right to crops to be grown that plaintiffs would acquire by terminating the lease, are subject and subordinate, that is, inferior to Stokely's rights against Bass under any crop contract or mortgage, that is, the right to have the crops to be grown as security for the debt owed by Bass to Stokely. In harmony with that construction, and implementing it, Stokely is given the right to exercise all of its rights under any crop mortgage, if Bass should breach the lease, the same as if the lease had not been breached, and may take possession of all crops and dispose of them for the term of the lease, provided it abides by the lease. While the expression that, the rights under the contracts might be exercised for the term of the lease, may be susceptible of the meaning that if the lease was terminated the rights would cease, it may also be susceptible of the meaning that such rights might be exercised for the period covered by the lease, ten years plus two one year renewals. To that end plaintiffs must give Stokely notice of any breach of the lease by Bass. This might indicate that Stokely's rights are restricted to Bass' but not necessarily so by reason of the other terms of the contracts. Moreover, if conditions should change, such as a reletting, subletting, or selling or an encumbering before Stokely's rights under the crop mortgage end, any such new arrangements should recognize the rights of Stokely. A reletting means a new lease which embraces a termination of the Bass lease, hence the inference is that the termination of the Bass lease is not to end Stokely's rights.

Plaintiffs urge, however, that the changes made at their request, in the subordination agreement, before its execution, shows a contrary intent. The first change was that made in paragraph four. As proposed, it read, after the last use of the word mortgage, "during all of the years covered thereby," and the change in lieu of that provides as it does "for a period etc." They claim that the former clause would cover the crops for the years to 1955 mentioned in the crop mortgage, but the change fixed the period for the term of the lease, which might be less if terminated by plaintiffs. If their theory is correct that ordinarily a crop mortgage dies with the lease, the originally proposed words might not have the meaning they claim. As above seen, the expression used, "term of said lease," may well mean the years expressed on its face as its life. There was also added to the paragraph the provision that if Stokely did take possession it must perform the terms of the lease while in possession. This may reasonably indicate Stokely's duties if it chose to take possession as an alternative means of protecting its superior rights given by the forepart of the agreement and not as a restriction on those rights if it did not choose to take possession.

The second change, in paragraph seven, consisted of the addition of the words "by Arthur C. Bass, of his interest therein to Stokely" after the last use of the word mortgage. There may be some indication that only Bass' interest in the crops might be sold or mortgaged and thus when the lease was terminated there would be no interest to mortgage or sell, but it does not necessarily negative the forepart of the lease. It may be that plaintiffs intended by this amendment to prevent a holding out of themselves as guarantors of Bass to the full extent of the crops, including their 25% as lessors, but it does not conclusively show that the crop to be grown was not to be subject to the indebtedness for as long as the ten year term and renewal period of the lease.

[2] Plaintiffs urge that the contracts (called asparagus contracts) under which the asparagus crops were to be sold to Stokely, terminated with the termination of the lease. As heretofore shown, the subordination agreement recited that while the lease provided that plaintiffs may elect to dispose of its 25% share of the crops through Bass, plaintiffs agreed that they have "this day sold their share" to Stokely. The asparagus contracts were executed with the subordination agreement and signed by Bass, plaintiffs and Stokely. They state that Bass and plaintiffs have "sold" and Stokely "has bought for the season 1947 to 1955," inclusive, the asparagus "which is growing or which" Bass and plaintiffs agree to grow upon the property. Detailed provisions are made including a promise in paragraph seven that "during the life of" the contract, plaintiffs and Bass will cultivate and care for the "asparagus beds" in a prudent manner. The judgment declared the asparagus contracts to be in full force and effect and Stokely to become the owner of the crops to be grown. Plaintiffs urge that the court erred in deciding that Bass and plaintiffs sold the crop to Stokely because Bass, as lessee, had title to it under the lease and plaintiffs were entitled to only 25% thereof as rental, see Silveira v. Ohm, 33 Cal.2d 272, 201 P.2d 387, and therefore it could not have been intended that Stokely was bound by paragraph seven of the asparagus contracts. The language in paragraph seven, however, is specific and clear as above seen. Indeed, it may well be inferred, if plaintiffs' argument is accepted, that it was intended that plaintiffs must abide by that paragraph at a time when Bass would no longer have title to the crop, that is, after the lease was terminated, thus indicating that the termination of the lease was not to destroy Stokely's rights.

Plaintiffs urge various other asserted ambiguities in the asparagus contracts when read with the other instruments, such as that plaintiffs could not have been the seller of the crop and pass title there to when they did not have it, and the statement that there were no encumbrances on the crops when there were. These factors do not compel us to ignore the clear and positive provisions of the contracts which are reasonably susceptible of the interpretation placed thereon by the trial court.

The contracts died with the lease, argue plaintiffs, because the Knox letter written during the preliminary negotiations referred to the purchase of the crops to be grown during the term of the lease. As we have seen, however, that is not the necessary construction of the subordination agreement and the asparagus contracts are expressly made to run to 1955.

Plaintiffs claim the court erred in concluding that Stokely may retain 75% of the amounts to be paid by it for asparagus under the asparagus contracts until it has been reimbursed for Bass' indebtedness to it in the sum of $47,893.19. This is the legal effect of the conclusion of law in the judgment that Stokely has a lien on the crops to secure that indebtedness, and it follows that it should receive the proceeds from the crops until it is paid.

[3] Plaintiffs assert that the refinancing arrangement consisting of the crop mortgage, subordination agreement and asparagus contracts as interpreted by the trial court is unfair and unconscionable; and that a lien cannot be equitably imposed to enforce them beyond the term of the lease because plaintiffs get nothing out of it and the benefits all lie with Stokely. To that end they urge that Stokely gets: (1) The right to the asparagus crops to be grown under the asparagus contracts; (2) Bass' promissory notes; (3) A crop mortgage on 75% of the crops; (4) A discount on the Bass indebtedness of $14,000; (5) A chattel mortgage on Bass' farming equipment; (6) An assignment of Bass' lease; and (7) Security rights under the subordination agreement. With regard to (1) the contracts assured to plaintiffs the current market price for the crops. As to Bass' notes, Stokely paid the original mortgagee, Richmond-Chase, and any benefit that would accrue by a reduction in the debt would be to make the debt less. The assignment of the lease was something that came from Bass, not plaintiffs. The essence of plaintiffs' argument seems to be that, as interpreted by the court, the refinancing arrangement imposed upon the asparagus crop and property, liens for an obligation incurred by MacLean and Bass, not plaintiffs, and for a period beyond the termination of the lease for Bass' default; that for having their property encumbered by that obligation they received nothing. They did receive value, however, when we look at the whole transaction. The original indebtedness was incurred to establish the perennial asparagus plants and bring them to a producing stage. That was a benefit to plaintiffs' land, rendering it productive of valuable crops of which they were to receive 25%. In 1947, by the refinancing arrangement, the debt became less and the asparagus contracts were made to assure plaintiffs and Bass of a certain market. Certainly plaintiffs were benefited by having a properly financed lessee who would carry out the lease. When the refinancing arrangement was made it may be assumed that the parties believed the value of the crops would pay for their care and cultivation and still leave a profit. The termination of the lease would not necessarily alter that situation, for it would only change the personnel of the one who cared for and harvested the crops. If defendants performed that function they would realize any profit Bass would have made. The fact remains that the crops were assumed to be a benefit to all concerned and they were made possible by the money advanced.

To plaintiffs' contention that the lien should not have been imposed, it is clear from the foregoing discussion that the property was to be security for the indebtedness under the refinancing instruments. The court did nothing more than declare their effect.

It is claimed that there is no allegation or finding that the refinancing arrangement was fair and plaintiffs received value. The transactions were fully set forth in Stokely's pleadings and the findings of the court and we do not see how plaintiffs were prejudiced by failure to set forth more.

Judgment affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

JOHNSTON v. JOHNSTON.

Civ. 18745.

District Court of Appeal, Second District, Division 1, California.
May 8, 1952.

Rehearing Denied May 28, 1952.

Hearing Granted July 7, 1952.
Appeal Dismissed Oct. 2, 1952.

A wife brought an action against her husband and was granted a divorce and she subsequently filed an affidavit whereunder an order to show cause was issued and directed to former husband to show cause why a modification of alimony should not be granted. The Superior Court of Los Angeles, Mildred L. Lillie, J., entered an order in favor of the former wife and the former husband appealed. The District Court of Appeal, Doran, J., held that decree could be modified so as to require payment of a larger amount for support.

Order affirmed.

1. Husband and Wife ⚷39

A husband and wife may contract with each other with respect to support and property rights. Civ.Code, §§ 139, 158, 159.

2. Divorce ⚷245(1)

An award of alimony in divorce decree may be modified under appropriate circumstances. Civ.Code, § 139.

3. Divorce ⚷245(1)

Incorporation of agreement in divorce decree for payment of support by husband to wife, so long as it is not a property settlement agreement, does not prevent modification of decree relative to amount to support payments under appropriate circumstances. Civ. Code, § 139.

4. Divorce ⚷245(2)

Where agreement providing that husband was to pay specified sum monthly for support of wife was incorporated in divorce decree obtained by wife, decree could subsequently be modified so as to require payment of a larger amount of support where business condition of former husband became more favorable. Civ.Code, § 139.

Edgar J. Melchione, Earl Oakley, Los Angeles, for appellant.

Walley & Davis and Milton Davis, all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order made after final judgment in a divorce action.

The facts briefly are as follows:

The action was filed July 12, 1934. A copy of an agreement between the parties was attached to the complaint and, "in paragraph VI of said complaint its execution was pled". Appellant was personally served but did not appear. A default was entered. The interlocutory judgment was entered November 19, 1934; the final judgment, January 15, 1936.

The agreement provided that defendant (the husband) was to pay plaintiff $5.00 per month for support with the further provision that, "in the event that the business conditions of the second party shall become more favorable, the said second party shall pay a proportionately larger share as alimony to the first party." At the time the proceedings herein considered were commenced the payments were $20.00 per month. The contract further provided that, "It is agreed that this agreement may be incorporated as part of any decree of divorce hereafter to be rendered in favor of the first party and against the second party, subject to the approval of the Judge there presiding."

"On March 13, 1951, an affidavit was filed by respondent whereunder an Order to Show Cause was issued and directed to appellant to Show Cause why a 'modification' of 'alimony' (supposedly granted and contained in the Interlocutory Judgment of Divorce) should not be granted to respondent, * * * Such order to show cause came on for hearing, whereupon an objection was made by appellant to the Court making any award of alimony upon the ground that no alimony had been made or granted in favor of respondent in either the Interlocutory of Final Judgments of Divorce, and that the power of the Court to grant alimony had, therefore, ceased when the Final Judgment of Divorce was entered without any alimony award having been made in the action". The court decided in favor of plaintiff and the alimony was increased. Defendant appeals from the order.

It is contended on appeal that the primary question involved is, "whether or not the trial court had power and jurisdiction to make the questioned orders".

It is argued by appellant that since there was no order in the decree for the payment of alimony and the decree had become final that the court was without judisdiction to modify the decree and include such an order thereafter. However, as noted above, the agreement provided, "this agreement may be incorporated as part of any decree of divorce", etc. And the decree provided, "It is further ordered that the property settlement filed herein is accepted and made a part of this Decree".

Quoting from appellant's brief, "Appellant feels that the most exhaustive and best considered of the recent cases in this field is the case of Shogren v. Superior Court, 1949, 93 Cal.App.2d 356, 209 P.2d 108, wherein practically all of the former decisions on this subject were carefully considered and reviewed." The Shogren case was a contempt proceeding and Young v. Superior Court, 105 Cal.App.2d 65, 233 P.2d 39, as well as some of the other cases relied on by appellant are contempt cases. There is no resemblance between a contempt proceeding and the proceeding herein considered hence such opinions are of no help. Here the order merely increased the amount of the alimony payments to be made.

The conclusion of the court in the Shogren case, supra, is beside the issue; contempt proceedings being quasi-criminal. In the within action the court is merely required to determine the meaning of the words used in the decree and what was intended thereby.

Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15, was an action on a property settlement agreement in a divorce action. It was held that an order theretofore made modifying the divorce decree was res judicata. Although the issues are different quotations and citations are applicable to the issue herein. The decision recites, 26 Cal.2d at page 609, 160 P.2d at page 17, "Turning first to the relation between the separation agreement and the divorce decree, it appears to be well settled, that if the agreement is presented to the court in the divorce proceeding for adjudication, and the agreement, or a part thereof, is incorporated in the decree and made a part thereof, the part so incorporated is merged in the decree. (Citing cases.)"

In the Hough case, 26 Cal.2d at page 611, 160 P.2d at page 18, the court points out, quoting from the Michigan Law Review, that, "The obligation to pay alimony or support money to a divorced wife is one peculiarly justified by considerations of social desirability and generally prescribed as a consequence to dissolution of the marital relation. Being a continuing obligation, and being subject to scrutiny of the courts as to fairness and adequacy at its inception, it should so remain and the contract of the parties should not be allowed to oust the court of power otherwise exercisable." The Hough opinion, 26 Cal.2d at page 612, 160 P.2d at page 18, recites that, "Support allowances on the other hand should be subject to the discretion of the court as justice may require. It may well be reasoned that the provision of section 139 of the Civil Code authorizing the modification of support allowances becomes an implied part of the agreement when it is incorporated into the decree. It is said in Smith v. Smith, 94 Cal.App. 35, 47, 270 P. 463, 468:

" 'The holding of the cases there cited is to the effect that the *order* allowing alimony *is subject to revision* at any time. *The parties, in making the agreement, will be presumed to have entered into the same with the understanding that the trial court possessed the power to change or modify the award or provision made for support,* as the circumstances might require or as the justice of the case might necessitate, the distinction being drawn that in some states, there being no statute similar to our code, the power to change or modify must be reserved in the decree.' (Emphasis included.)

[1–3] "The law of California is in harmony with the foregoing principles and policy. A husband and wife may contract with each other with respect to support and property rights. See Civ.Code, §§ 158, 159; Puckett v. Puckett, supra [21 Cal.2d 833, 136 P.2d 1]. An award of alimony in a divorce decree may be modified under appropriate circumstances (Civ.Code, § 139; Leupe v. Leupe, supra [21 Cal.2d 145, 130 P.2d 697]; Puckett v. Puckett, supra), and the incorporation of an agreement in the decree for the payment of support as long as it is not a property settlement agreement does not prevent a modification of the decree under appropriate circumstances."

As above noted, to support a contempt proceeding, which is quasi-criminal, the decree or order must be specific for obvious reasons. In civil proceedings however the law exacts no such standard. In such proceedings the law, in the administration of justice, is more liberal and, in the circumstances as here presented an appellate tribunal is merely required to determine the meaning of the decree or order and what was intended. Thus its legal effect is established.

[4] The language of the decree in the within action is neither equivocal nor uncertain and is clearly intended to "incorporate" therein and, as a part thereof, the property settlement agreement. This being true the court had jurisdiction to modify the order. Such a conclusion is consistent with the administration of justice.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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110 Cal.App.2d 738

COHEN v. COHEN.

Civ. 18324.

District Court of Appeal, Second District,
Division 1, California.

May 6, 1952.

Appeal from a portion of an interlocutory divorce judgment which had been modified by a judge, who had heard motions for new trial, but who had not heard the case, so as to reduce plaintiff's attorney's fees from $750 to $400. The Court of Appeal, Drapeau, J., held that since the judge who had modified the judgment had before him the minute order made on hearing of order to show cause pendente lite awarding $350 as attorney's fees, which the record showed had been paid, as well as all other proceedings in the case, such judge had jurisdiction under his statutory discretionary power to modify the judgment, though he had not heard the testimony.

Affirmed.

See also, 103 Cal.App.2d 275, 229 P.2d 464.

1. Divorce ⚷229

Where one judge had entered interlocutory divorce judgment awarding wife's counsel fees of $750, and, such judge's assignment having expired, another judge heard motions for new trial, and such second judge had before him minute order made on hearing of order to show cause pendente lite awarding $350 as attorney's fees which record showed had been paid, as well as all other proceedings in the case, such second judge had jurisdiction under his statutory discretionary power to modify judgment so as to reduce such fees to $400, though he had not heard the testimony. Code Civ.Proc. § 662.

2. New Trial ⚷114

Although judge who heard motions for new trial was not the judge who tried the case, his powers and duties with respect to weighing evidence and determining motions were the same as would have been the powers and duties of the judge who tried the case in the event that the latter had heard and determined the motions.

Leonard Horwin, Beverly Hills, and Jones & Wiener, Los Angeles, for appellant.

Paul Gordon and Melvin E. Fink, Los Angeles, for respondent.

DRAPEAU, Justice.

An interlocutory judgment of divorce in favor of plaintiff wife was entered on May 23, 1950. Thereafter both parties moved for a new trial. By its minute order of September 1, 1950, the trial court denied plaintiff's motion. In denying defendant's motion, the court, pursuant to section 662, Code of Civil Procedure, modified the judgment by reducing the $750 award of attorney's fees to plaintiff's counsel to the sum of $400.

Plaintiff appealed from the whole of the interlocutory judgment except that part which granted her a divorce. She also appealed from the order of modification.

By stipulation filed in this court, the appeal has been abandoned except for that portion which is taken from the order of modification reducing the award of fees to plaintiff's attorneys.

The divorce action was heard by Honorable Ben R. Ragain, Judge of the Superior Court of Colusa County, sitting in Los Angeles County by designation of the Chairman of the Judicial Council. His assignment having expired, the motions for new trial were heard by the Honorable W. Turney Fox, then a Judge of the Superior Court of Los Angeles County.

Defendant's notice of motion for new trial recites: "Said motion will be made and based upon this Notice and upon all the records, pleadings and files in this action." Attached to said notice of motion was a letter from Judge Ragain that it had been his intention to allow $750 as fees to counsel for each of the parties; and that it had not been called to his attention that such fees had partially been paid. In that connection, the record discloses that plaintiff's counsel had previously collected $350 attorney's fees, pursuant to a minute order made on hearing of order to show cause pendente lite which provided that payment of further fees, if any, should be fixed at time of trial on the merits.

It is here urged that the judge, who heard the motions for new trial, lacked jurisdiction to modify the original judgment. This for the reasons that the modification is entirely unsupported by the evidence and the court had no discretion to modify it in the absence of having heard the testimony.

[1, 2] Judge Fox had before him the minute order awarding $350 as attorney's fees, as well as all other proceedings in the case. In the exercise of the discretion vested in him, he decided that $750 was a reasonable fee for the entire services rendered. As a matter of fact, he did not change Judge Ragain's decision, but merely corrected an obvious error in the record. This was well within the power conferred by section 662, Code of Civil Procedure, and in accord with the holding in Woods v. Walker, 57 Cal.App.2d 968, 972, 136 P.2d 72, 74:

> "Plaintiff further contends that as the judge who heard the motion for a new trial was not the judge who tried the case, his powers and duties with respect to weighing the evidence and determining the motion were not the same as would have been the powers and duties of the judge who tried the case in the event that the latter had heard and determined the motion. But the authorities in this jurisdiction are all to the contrary. Jones v. Sanders, 103 Cal. 678, 37 P. 649; Wilson v. California C. R. Co., 94 Cal. 166, 29 P. 861, 17 L.R.A. 685; Miller v. Logan, 32 Cal.App. 28, 161 P. 1022."

The order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.

110 Cal.App.2d 782

SPADE v. COSSETT et al.

No. 14981.

District Court of Appeal, First District,
Division 1, California.
May 7, 1952.

Action by Harry Vernon Spade, doing business as Spade Realty, against Helen S. Cossett and others to recover real estate broker's commission. The Superior Court, San Mateo County, Murray Draper, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Wood, J., held that written deposit receipt agreement to sell realty and pay broker's commission was delivered upon express condition which was not fulfilled.

Judgment affirmed.

1. Brokers ⚷8(3)

In action to recover real estate broker's commission for obtaining purchaser of realty owned by defendant and her husband in joint tenancy, evidence sustained findings that written deposit receipt agreement to sell realty and pay broker's commission, signed by defendant was delivered to broker's agent upon express agreement that it was not to be delivered to purchaser or at all, unless husband agreed to sell the realty upon the terms stated in deposit receipt, and that husband did not at any time agree to sell.

2. Evidence ⚷444(4)

Evidence that written deposit receipt agreement to sell realty owned by husband and wife in joint tenancy and pay broker's commission, signed by wife, was delivered to broker's agent upon express agreement that it was not to be delivered to purchaser at all unless husband agreed to sale upon the terms stated in deposit receipt and that husband did not at any time agree to sell was competent and relevant and was not inadmissible as tending to vary the terms of written agreement.

3. Evidence ⚷444(2)

Parol evidence is admissible to show that the parties never intended a writing to constitute a contract or that the taking effect of contract depended upon a condition precedent.

4. Evidence ⚷397(1)

A written contract must be in force as a binding obligation to make it subject to parol evidence rule.

5. Contracts ⚷42

A written contract cannot become a binding obligation until it has been delivered and, if delivery is conditional, it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled.

6. Brokers ⚷40

Where written deposit receipt agreement to sell realty owned by husband and wife in joint tenancy and pay broker's commission was signed by wife but delivered to broker's agent upon express agreement that it was not to be delivered to purchaser or at all unless husband agreed to sale upon the terms stated in deposit receipt and husband did not at any time agree to sale, wife was not liable for real estate broker's commission for obtaining a purchaser of the realty.

◆

Moerdyke & Anderson, by Stanley R. Evans, Palo Alto, for appellant.

Crist, Stafford & Peters, Elton F. Martin, Palo Alto, for respondents.

FRED B. WOOD, Justice.

Plaintiff appeals from a judgment for the defendant in an action to recover a real estate broker's commission for obtaining a purchaser of certain real property owned by defendant and her husband in joint tenancy.

The trial court found (1) that respondent signed a written deposit receipt agreement to sell the property and to pay appellant a commission of five per cent of the sale price, but delivered the document to appellant, the agent of respondent, upon the express agreement that the deposit receipt agreement (a) was not to be delivered to the purchaser or at all unless respondent's husband agreed to the sale of the property and (b) was to terminate if her husband would not agree to sell the property for the price and upon the terms stated in the deposit receipt; and (2) that her husband did not at any time agree to sell.

[1] The evidence amply supports the finding. A Mrs. George, in the employ of appellant, called on the respondent at the latter's home on Saturday, July 9, 1949, and presented copies of a deposit receipt which already bore the signature of appellant and Ralph W. Scott, the prospective purchaser, and recited that Scott had made a $3000 deposit. Mrs. George had already given Scott a copy of the receipt. Respondent's daughter, Patricia, was present at this interview and testified that Mrs. George told respondent the Scotts wanted to buy the house, were also interested in another house, and respondent had better hurry up and sign; that respondent asked, "Well, if I do sign it, will it hold good if my husband refused to sign it?"; and Mrs. George said "No," that she would not deliver the receipt until respondent's husband agreed to sign it, and that there would be no deal if he did not sign it. Later that day, he disapproved the deal, and respondent, according to her testimony, phoned Mrs. George, "My husband doesn't want to sign it, but I think he will." Respondent further testified: the following Monday I told Mrs. George that Mr. Cossett would not sign and she said I had phoned and it was off and she would see what Mr. Scott said; I called her on Tuesday and then on Wednesday she said she had seen Mr. Scott and delivered the deposit receipt to him and that he said so far as he was concerned it was a deal. Asked if she did not recall that "if the sale didn't go through you were to pay the real estate broker one half of the deposit?" respondent replied, "No, I didn't understand that at all."

[2–5] This evidence was competent and relevant. It did not vary the terms of the writing. It was used to show that the writing never took effect as the embodiment of an obligation, upon the familiar principle that evidence is admissible to show that the parties never intended a writing to constitute a contract, P. A. Smith Co. v. Muller, 201 Cal. 219, 222, 256 P. 411, or that the taking effect of the contract depended upon a condition precedent. Severance v. Knight-Counihan Co., 29 Cal.2d 561, 177 P.2d 4, 172 A.L.R. 1107, and Paratore v. Scharetg, 53 Cal.App.2d 710, 713, 128 P.2d 560. "'"A written contract must be in force as a binding obligation to make it subject to this [parol evidence] rule. *Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled.*"'" Gleeson v. Dunn, 113 Cal.App. 347, 351, 298 P. 119, 121, quoting from Burke v. Dulaney, 153 U.S. 228, 14 S.Ct. 816, 38 L.Ed. 698.

[6] Appellant argues that even if not authorized to deliver the deposit receipt agreement to the prospective purchaser, nevertheless, he earned his commission. He invokes the asserted analogy of the case in which an owner makes a firm commitment to sell, the agent finds a purchaser, and then the owner refuses to convey or his title proves defective. There is no analogy. Such an argument ignores or misconceives the very condition upon which the deposit receipt here involved was to become a contract, a condition which did not occur. In support of this argument, appellant construes some of the testimony and some of the remarks of opposing counsel as meaning that the sole defense was non-delivery to the purchaser, not non-delivery to the broker. That is not correct. Appellant sued upon a written instrument, purportedly a contract to sell to Scott and to pay a commission to appellant. Respondent denied she ever made any such an agreement. Upon the trial, her counsel said, "* * * we have denied the execution. Execution consists of two acts, one is signature, and the other is delivery. We question the delivery. That is our sole defense." Certainly, that included non-execution and non-delivery as to the appellant, the only party to the purported agreement who in this action is asserting rights under it. The record shows the case was tried upon that theory.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

111 Cal.App.2d 84

CASON v. GLASS BOTTLE BLOWERS ASS'N OF UNITED STATES AND CANADA et al.

Civ. 18957.

District Court of Appeal, Second District, Division 1, California.

May 14, 1952.

Alfred B. Cason brought action against the Glass Bottle Blowers Association of the United States and Canada, etc., and others. The Superior Court of Los Angeles County, Allen W. Ashburn, J., entered an order after judgment amending a satisfaction of judgment nunc pro tunc, and defendants appealed, and plaintiff moved to dismiss the appeal. The District Court of Appeal, White, P. J., held that a direct appeal from such order was authorized.

Motion to dismiss appeal denied.

Appeal and Error ⚿82(2)

Direct appeal by defendants would lie from an order made after judgment amending a satisfaction of judgment nunc pro tunc so that satisfaction of judgment satisfied only that portion of the judgment awarding money to plaintiff. Code Civ. Proc. §§ 473, 963, subd. 2.

V. P. Lucas, Los Angeles, for appellants.

George D. Higgins, Los Angeles, for respondent.

WHITE, Presiding Justice.

Motion to dismiss an appeal taken by defendants from an order made after judgment amending a satisfaction of judgment *nunc pro tunc* pursuant to the provisions of section 473 of the Code of Civil Procedure.

For the purpose of the instant proceeding it will suffice to set forth that a judgment was rendered awarding plaintiff damages as against the national union and granting a peremptory writ of mandate directing plaintiff's reinstatement to membership in the union.

From this judgment defendants appealed, and the Supreme Court modified the same only as to the writ of mandate, directing that the writ be amended to provide that defendants accord plaintiff "a full and fair hearing" before the national union tribunals, or "reinstatement to membership" in the union. As so modified, the judgment was affirmed. Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 231 P.2d 6, 21 A.L.R.2d 1387.

The remittitur from the Supreme Court was lodged with the County Clerk of Los Angeles County on June 18, 1951.

Thereafter, on July 27, 1951, a satisfaction of judgment, signed by plaintiff and his attorney, was filed with the Clerk of the Superior Court. Said satisfaction of judgment read in part as follows: "The judgment herein having been paid, full satisfaction is hereby acknowledged of said judgment * * * and the clerk is hereby authorized and directed to enter full satisfaction of record in said action".

Thereafter, plaintiff caused to be issued out of the Superior Court of Los Angeles County a writ of mandate directing defendant national union and certain of its officers to appear before the court to show cause why they should not reinstate plaintiff or afford him a fair trial before the union tribunals.

However, plaintiff was confronted with the aforesaid satisfaction of judgment when defendants made a motion to quash service of said writ. The hearing was continued, obviously to afford plaintiff an opportunity to file such motions as he might be advised with regard to the aforesaid satisfaction of judgment.

On October 4, 1951, plaintiff filed his notice of motion to amend the satisfaction of judgment *nunc pro tunc* under section 473 of the Code of Civil Procedure. Following hearing upon said motion, the court denied defendants' motion to quash the writ of mandate and granted plaintiff's motion, made under section 473 of the Code of Civil Procedure.

Pursuant thereto, the Clerk of the Superior Court was directed to make appropriate notations upon the satisfaction of judgment and the judgment.

The satisfaction of judgment was accordingly amended in part to read: "The *money* herein having been paid, full satisfaction is hereby acknowledged of said *money* * * *, and the clerk is hereby authorized and directed to enter full satisfaction of record in said action as to the *money judgment only*". (We have italicized the *nunc pro tunc* amendment made by the court to the original satisfaction of judgment.) From such order defendants appeal.

From the above recital it is manifest that the foregoing order of the court was a special order made after judgment and which affected the final judgment and bears some relation to it by way of enforcing its execution. A direct appeal from such order is therefore authorized by subdivision 2 of section 963 of the Code of Civil Procedure; Phelan v. Superior Court, 35 Cal.2d 363, 366, 217 P.2d 951; Huffaker v. Decker, 77 Cal.App.2d 383, 386, 175 P.2d 254; Lande v. Southern Calif. Freight Lines, 78 Cal. App.2d 417, 419, 177 P.2d 936.

The motion to dismiss the appeal is denied.

DORAN and DRAPEAU, JJ., concur.

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110 Cal.App.2d 759

LEWIS FOOD CO. v. STATE DEPARTMENT OF PUBLIC HEALTH.

Civ. 18759.

District Court of Appeal, Second District, Division 1, California.

May 6, 1952.

Rehearing Denied May 28, 1952.

Hearing Denied June 26, 1952.

Action for declaratory and injunctive relief. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered judgment for the defendant and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that Health and Safety Code, § 28007, providing that labels on canned horse meat for dog food may not use the term "packed in gravy" is a reasonable regulation to insure that such meat will not be mistakenly eaten by human beings.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

Trial court's findings supported by substantial evidence will not be disturbed on appeal.

2. Constitutional Law 🔑81

Under the police power, the state has the unquestioned right to place restrictions upon personal liberty and limitations upon the use of private property.

3. Food 🔑3

All law, state, federal and municipal, which has to do with the inspection of meat is designed to protect men, women and children from infection.

4. Health 🔑20

Paramount duty of the state is to conserve and protect the health of the citizen, which is a fair and reasonable exercise of the sovereign power.

5. Food 🔑1

Whether statute relating to regulation of sale of horse meat is a reasonable exercise of police power depends upon whether the statute is within or without the legitimate purview and scope of the police power, and whether it has a substantial relation to legitimate objects to be accomplished. Health and Safety Code, § 28007.

6. Constitutional Law 🔑70(3)

Question as to the wisdom, justice, policy or expediency of a statute are for the Legislature alone, not for the courts.

7. Constitutional Law 🔑45

Unless it clearly appears that the objective of the law under attack is erroneous and without reasonable foundation, the law is to be upheld and not struck down, and it is only when it is clear that the law exceeds the limit of the legislative power and infringes upon rights guaranteed by the Constitution that it will be declared invalid.

8. Food 🔑1

The statute regulating sale of horse meat and providing that labels on canned horse meat for dog food may not use the term "packed with gravy" is a reasonable exercise of police power to insure that such meat will not be mistakenly eaten by human beings. Health and Safety Code, § 28007.

William H. Wilson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

In 1949 the California Legislature added new sections to the Health and Safety Code regulating the sale of horse meat. Section 28007 so enacted, in part provides that labels on canned horse meat for dog food may not use the following terms: "Packed in gravy," "packed with gravy," "horse meat loaf," "horse meat stew".

Plaintiff brought this action in declaratory relief and for injunction, restraining the Department of Public Health of the State of California from enforcing the law. The trial court found for the state and judgment for defendant followed. From this judgment plaintiff appeals.

From the record it appears that the legislation was enacted because of the following developments in the marketing of horse meat:

Horse meat for human consumption comes under the supervision of the United States Department of Agriculture, Meat Division. Inspection by that governmental agency is both post- and ante-mortem. It is designed to ascertain whether or not the animal had any disease which would render the flesh unfit for human consumption. The inspection is under the supervision of doctors of veterinary medicine and is similar to that required for beef for human consumption.

Horse meat not for human consumption comes under our State Department of Public Health. All that is required is that there be some semblance of sanitation. No post- or ante-mortem inspection is made, and no qualified doctors of veterinary medicine are employed. If there is no odor of decomposition, and no obvious evidence of filthy conditions in the slaughtering of the animals, or in the handling, packing or transportation of the horse meat, it is passed; but for consumption by animals only.

An inspector for the Public Health Service of this state testified that there were three canned horse meat brands in the Los Angeles market, federally inspected, and for human consumption, labeled "Horse meat with gravy." He said that due to the similarity of the wording on the labels of plaintiff's canned horse meat, people of limited means were purchasing it, thinking it fit for human use.

On appeal plaintiff contends that it was error for the trial court to make the following findings: (a) that the use of the words "with gravy" tended to mislead the public into the belief that the dog food could be used for human consumption; (b) that plaintiff's business would not be substantially affected by eliminating such wording from the labels; and (c) that the plaintiff was not deprived of his property contrary to due process of law. Plaintiff further contends that the statute does not bear any real or substantial relation to the object sought to be obtained, and is arbitrary, unreasonable and capricious, and, therefore, unconstitutional.

[1] None of plaintiff's contentions are sound. The trial court's findings were supported by substantial evidence. So, under the familiar rule, an end is put to all of plaintiff's contentions except as to the constitutionality of the statute.

[2] In the recent case of Beverly Oil Co. v. City of Los Angeles, Cal.App., 242 P.2d 682, in an opinion written by Mr. Justice pro tem. Hanson, this court had occasion to discuss at some length the scope and extent of legislation enacted under the police power. Under that great power is to be found the unquestioned right in the state to place restrictions upon personal liberty and limitations upon the use of private property. One conspicuous example of the legitimate exercise of the police power is evidenced by the universal regulation of food products for human use.

[3] All law, state, federal and municipal, which has to do with the inspection of meat is designed to protect men, women and children from infection. For example, the toxins of botulism bring untold misery and death to human beings. Sources of human infection are found in meat from diseased animals, and in filthy conditions in

the slaughter, packing and preparation of meat.

With the constantly arising cost of beef, the temptation to housewives with meagre budgets to use cheaper substitutes is sometimes irresistible. They, and their husbands, and their children, and their families need protection from the possibility of infection from contaminated horse meat.

[4, 5] To conserve and protect the health of its citizens is a paramount duty of the state, and a fair and reasonable exercise of the sovereign power. As pointed out in Beverly Oil Co. v. City of Los Angeles, supra, it is true that in its legitimate exercise the police power at times works damage to property and even injustice to individuals. Indeed, in its exercise property may in some instances be utterly destroyed. Always the question in every case is whether the statute is within or without the legitimate purview and scope of the power. Is it reasonable? Does it have "a substantial relation to a legitimate object to be accomplished"? Dribin v. Superior Court, 37 Cal.2d 345, 231 P.2d 809, 811.

[6] Questions as to the wisdom, justice, policy or expediency of a statute are for the legislature alone, not for the courts. California State Auto. Ass'n Inter. Ins. Bureau v. Maloney, 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788; Dribin v. Superior Court, supra.

[7] Unless it clearly appears that the objective of the law under attack is erroneous and without reasonable foundation, the law is to be upheld, not struck down. Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794.

And it is only when it is clear that the law exceeds the limit of legislative power and infringes upon rights guaranteed by the Constitution that it will be declared invalid. Bernstein v. Bush, 29 Cal.2d 773, 778, 177 P.2d 913.

[8] In the case at bar to state the evils sought to be guarded against by the state is to answer the question whether the law is or is not reasonable. It was the manifest and imperative duty of the law-making power of this state to regulate the sale of canned horse meat, to insure that dog food labeled "with gravy" be not mistakenly eaten by human beings. Although it may not be a judicial function for this Court to say so, we think it not inappropriate to add that in our opinion it would be a good idea to have all canned horse meat for animals plainly labeled: "Unfit for Human Use"—so plainly labeled that the harassed housewife, thinking to cut down the high cost of living, be put on notice that dog food is not for human beings.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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111 Cal.App.2d 38

HOWARD v. ALTA CHEVROLET CO. et al.

Civ. 4371.

District Court of Appeal, Fourth District, California.

May 9, 1952.

Action by Harry B. Howard against Alta Chevrolet Company and others for injuries sustained in automobile collision. The Superior Court, Tulare County, Clark Clement, J., entered judgment on a verdict in favor of plaintiff, as conditionally reduced by court, and defendants appealed. The District Court of Appeal, Barnard, P. J., held that whether plaintiff and driver of automobile in which he was riding were engaged in a joint enterprise and whether plaintiff was contributorily negligent were questions of fact for jury.

Judgment reversed.

1. Appeal and Error ⚷927(7)

On appeal from judgment for plaintiff in action for injuries sustained by automobile passenger in collision with defendants' automobile, the evidence, with the inferences therefrom, must be viewed in the light most favorable to defendants in determining whether trial court erred in taking from jury issues as to joint venture and contributory negligence.

2. Negligence ⚷93(10)

Automobile passenger must either exercise control or have the right to exercise control over operation of automobile in order to come within "joint enterprise" rule under which driver's negligence is imputed to passenger.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Enterprise".

3. Negligence ⚷136(30)

Whether automobile passenger had the right to exercise control over operation of automobile so that driver's negligence may be imputed to passenger under joint enterprise rule depends upon the circumstances in each particular case and usually depends upon several questions of fact to be determined by jury.

4. Negligence ⚷136(30)

Whether maintenance employees of county on way to a common job for employer pursuant to common orders of a superior officer in county-owned automobile assigned to driver for the particular trip were engaged in a joint enterprise so that driver's contributory negligence would be imputable to and bar recovery for injuries sustained by fellow employee in collision with defendants' automobile was a question of fact for jury.

5. Automobiles ⚷245(88)

In action for injuries sustained by occupant of automobile which collided with defendants' automobile at dangerous highway intersection normally protected by stop signs, whether occupant of automobile who was familiar with intersection was contributorily negligent in failing to warn driver of dangerous condition was a question of fact for jury, in view of evidence that occupant knew or should have known that stop sign at intersection was not then in place, that intersecting highway for a distance of several miles was also a through highway and that driver of automobile approaching on intersecting highway would probably be unable to see intersection in time to stop due to banks of adjoining irrigation ditch and vegetation thereon.

6. Automobiles ⚷224(1, 3, 4)

Automobile passenger must exercise ordinary care for his own safety, even though negligence of driver is not imputable to him, and he may not close his eyes to obvious danger or blindly rely on driver in approaching a place of danger.

7. Automobiles ⚷245(88)

Whether automobile passenger has exercised ordinary care under the circumstances for his own safety is usually a question of fact for jury.

8. Damages ⚷216(9)

In action by county employee for injuries sustained when automobile in which he was riding collided with defendants' automobile, instruction that state compensation insurance fund had filed a claim of lien in specified amount, being its estimated liability under Labor Code, should not have been given, at least in such form.

◆

McFadzean, Crowe & Mitchell, Visalia, for appellants.

O. L. Duemler, Tulare, Francis L. Smee, Visalia, for respondent.

BARNARD, Presiding Justice.

The plaintiff was injured in an automobile collision which occurred at 8:45 A. M. on September 7, 1950, at the intersection of Monson-Sultana Highway and Sierra Way in Tulare County. The Monson-Sultana Highway runs north and south and is a narrow concrete road normally protected by stop signs at all intersecting roads, including Sierra Way. Sierra Way is an oiled road running east and west, and is also protected by stop signs at all intersecting roads from Dinuba, three or four miles to the west, to the intersection in question. At the time in question the stop sign usually maintained at the southwest corner of this intersection, requiring east-bound traffic on Sierra Way to stop, was down and could not be seen.

An unusually dangerous condition existed at the time because this stop sign was not then in place, and because of the surrounding conditions. An irrigation ditch ran north and south to the west of the Monson-Sultana Highway, the east bank of the ditch being 18 feet from the paved road. Coming east on Sierra Way there was "a gradual rise onto the ditch crossing, and a sudden drop onto this highway here." On each side of Sierra Way the banks of this ditch were from two and a half to three feet higher than the surface of the Monson-Sultana Highway, and wild oats growing on these banks extended upward for another two and a half to three feet. The result was that the ditch banks and the wild oats concealed the highway from the view of anyone approaching from the west until he got within a few feet of the intersection. On the southeast corner of this intersection there was an orange grove bordered by a row of olive trees. Photographs in evidence disclose that, in the absence of this stop sign, the situation constituted a dangerous trap which would naturally affect traffic on both roads.

The plaintiff was employed by Tulare County as a maintenance man. A superior officer had instructed him and another maintenance man named Root to proceed from Visalia to Dinuba to install some lighting fixtures in the county library there. Root was given a county car and picked the plaintiff up at the court house. Neither of them had been assigned a car for regular use, and neither had ever driven this car before. Root was driving, with the plaintiff on the other front seat. The plaintiff testified that he would have driven the car if he had been told to, or if occasion required. They approached this intersection on their way to Dinuba at a speed of 40 to 45 miles an hour. The plaintiff testified that when they were some 270 feet south of the intersection he looked to his left to see if there was any traffic approaching from the west on Sierra Way; that he saw none; that he then looked to the east trying to see if any traffic was approaching from that direction; that he continued to look to the east until the front end of their car was in the intersection; that because of the trees he was unable to see if any traffic was coming from the east until they were actually in the intersection; that when the front end of their car was almost to the center of the intersection they were going between 25 and 30 miles an hour, and he then heard the squealing of tires on the other car; and that he then saw the other car between 45 and 50 feet away. The plaintiff had been familiar with this intersection for 20 years. He had traveled through this intersection every Sunday for a number of months, and on the preceding Sunday, September 3, he had driven through it proceeding from west to east.

At the same time defendant Moore was approaching this intersection from the west on Sierra Way. He was employed by the other defendants as an automobile salesman, and was driving a demonstrator Chevrolet. He was on his way to see a customer and had been traveling at 45 to 50 miles an hour. He had not been over this road for more than a year, and after leaving Dinuba the road was protected by stop signs at all intersecting roads. The stop sign at the Monson-Sultana Highway was down, and he did not know that he was approaching an intersecting road until he was within 35 or 40 feet of it, as it was hidden from his view by the ditch banks and the vegetation thereon. He reduced his speed somewhat as he crossed the culvert over the ditch, and when he then saw the intersecting road he applied his brakes at first but concluded he would not be able to stop and went on across. The county car in which plaintiff was riding struck the defendants' car on its right side, the point of impact being about four feet east of the center of the intersection.

In this action the plaintiff alleged that he was riding as a guest in this county car and that he suffered injuries proximately caused by the negligence of the defendants. The defendants denied these allegations and, as separate defenses, alleged that the plaintiff and Root were engaged upon a joint venture, their negligence being responsible for the accident; that the plaintiff was guilty of contributory negligence; and that the accident was unavoidable insofar as the defendants are concerned.

While the evidence was conflicting in many important respects the court held, as a matter of law, that the plaintiff and Root were not engaged in a joint venture and that the plaintiff was not guilty of contributory negligence. All instructions asked for by the defendants on the doctrine of imputed liability arising from a joint venture or a joint enterprise were refused, and the court further instructed the jury that even though the driver of the county car was negligent this would not preclude a recovery by the plaintiff if the jury further found that the defendant Moore was also guilty of negligence proximately contributing to this collision. The court also refused to give instructions on contributory negligence requested by the defendants, and further gave the following instruction at the request of the plaintiff:

> "I instruct you that there has been no evidence in this case of any contributory negligence on the part of plaintiff Harry B. Howard. It is, therefore, your duty to consider only the question as to whether or not defendant Hurst Dolan Moore was guilty of any negligence which proximately contributed to the happening of this accident, in arriving at a verdict on the matter of liability for damages for such injuries, if any, received by plaintiff Harry B. Howard."

The court also instructed the jury that the State Compensation Insurance Fund had filed a claim of lien in the amount of $4,000, being its estimated liability under the provisions of the Labor Code. The jury returned a verdict in favor of the plaintiff for $14,000. When a motion for a new trial was argued the court conditionally reduced the amount of the verdict to $11,168, which was accepted by the plaintiff. This was apparently done because the court believed that his instruction about the $4,000 lien had probably misled the jury into believing that plaintiff's medical expenses amounted to $4,000. No further evidence was taken but plaintiff's counsel informed the court that the medical bills did not exceed $1,168. Judgment was entered accordingly and the defendants have appealed.

[1–3] The main questions on this appeal are whether the court erred in taking from the jury the issues as to joint venture and as to contributory negligence. In deciding these questions the evidence, with the inferences therefrom, must be viewed in the light most favorable to the appellants. The law is well settled that in order to come within the joint enterprise rule a passenger in an automobile must either exercise control or have the right to exercise control over its operation. Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914. Whether or not such a right of control exists depends upon the circumstances in each particular case, and usually depends upon several questions of fact which are for the jury to determine in the light of the applicable principles of law. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385.

There is no evidence here that the respondent was a guest in the county car, as he contends, and the cases he relies on do not support his contention that it must be held as a matter of law that he and the driver of the car in which he was riding were not joint venturers and not engaged in a joint enterprise. It may be said here as was said in Collins v. Graves, 17 Cal.App.2d 288, 61 P.2d 1198, 1202:

> "The appellant has cited a number of cases where the parties were not held to be engaged in a joint enterprise, but those cases are all readily distinguishable from the conditions here presented for our consideration. The following elements were lacking in the cited cases: A common employer; a common purpose; an assignment to accomplish that purpose by some superior officer representing the common employer; a trip undertaken in the conveyance belonging to the common employer; the expenses borne by the common employer, and both having a right to insist that the vehicle belonging to the common employer be driven directly to the destination indicated by a superior officer of the county employer, and not a trip undertaken independently by either officer; and neither officer possessing any right to deviate from the purposes of his assignment."

[4] All of the distinguishing elements there listed were here present. Disregarding any conflicting evidence, both the respondent and the driver of the county car were maintenance men in the employ of the

county. They were directed by their superiors to go to Dinuba to perform a service for their common employer. Neither had the right to deviate from the purpose to which they were assigned and the respondent, beyond question, had the right to insist that the county car be driven directly to the assigned destination. The fact that he was not actually driving the vehicle is not controlling. Shook v. Beals, 96 Cal.App.2d 963, 217 P.2d 56, 18 A.L.R.2d 919. The respondent was not in the position of the ordinary guest, the driver of the car was not his superior officer, the car was not regularly assigned to the driver, they were on their way to a common job pursuant to common orders, and it might fairly be inferred, regardless of who was actually driving, that neither was in a superior position insofar as any right of control is concerned. Moreover, there is evidence that the respondent felt enough responsibility to take an interest in a matter directly affecting the operation of the car. He testified that he first looked to the west to see if any traffic was approaching and then continued to look to the east, looking for a chance to see through the trees, in order to see whether or not any cars were approaching from the east. He knew the nature of this intersection, and he displayed an active interest in the operation of the car, whether or not he did all that he should. There was some evidence that the driver of the county car was negligent, and if these parties were engaged in a joint enterprise his negligence was imputable to the respondent. Under the facts shown by the record we think the question as to whether or not these parties were engaged in a joint enterprise was one of fact, which should have been left to the jury.

[5–7] A similar situation exists with respect to the issue of contributory negligence. Even where the negligence of the driver of a vehicle is not to be imputed to a passenger it has been frequently held that the passenger is bound to exercise ordinary care for his own safety; that he may not shut his eyes to an obvious danger, he may not blindly rely on the driver in approaching a place of danger, and whether or not he has exercised ordinary care under the circumstances is usually a question of fact for the jury and not one of law. Parmenter v. McDougall, 172 Cal. 306, 156 P. 460; Marchetti v. Southern Pac. Co., 204 Cal. 679, 269 P. 529. There is strong evidence that the stop sign at the southwest corner of this intersection was down and lying in the ditch about 8:00 o'clock on the morning of Sunday, September 3, and that it remained down continuously up to the time of this accident. The respondent testified that he traveled across this intersection on Sierra Way on Sunday, September 3, going from west to east, and it might reasonably be inferred that he knew or ought to have known that the stop sign was not then in place. With this knowledge, and with his knowledge of the unusually dangerous condition at this intersection, as above described, he might well be considered as being under a duty to warn the driver of the car. Matsumoto v. Renner, 90 Cal.App.2d 406, 202 P.2d 1051. There can be no question that he had an ample opportunity to give such a warning. It might well be found, factually, that the respondent was not justified in assuming that this was then a through highway, protected by a stop sign at the point in question. This should also be considered in the light of the fact, well known to the respondent, that Sierra Way for a distance of several miles was also a through highway protected by stop signs, and in the light of the fact that in the absence of a stop sign the driver of a car going east on Sierra Way would probably be unable to see this intersection in time to stop. The following language in Parker v. Southern Pacific Co., 204, Cal. 609, 269 P. 622, 624, is appropriate here: "On the record before us it cannot be said that the jury might not find that the plaintiff was in some degree at fault in not apprising the driver of the impending danger." It can not be held here, as a matter of law, that the respondent was entirely free from negligence. Shields v. King, 207 Cal. 275, 277 P. 1043; Martindale v. Atchison T. & S. F. Ry. Co., 89 Cal.App.2d 400, 201 P.2d 48. A factual question appears in this regard which should have been left to the jury, and the court erred in passing upon it as one of law.

[8] The appellants further contend that the court erred in giving the instruction concerning the claim of lien for $4,000 filed by the State Compensation Insurance Fund, that this probably misled the jury into assuming that respondent's medical expenses amounted to that sum, that there is no evidence of the actual amount of such medical expenses, and that counsel's statement on motion for a new trial that these expenses amounted to $1,168 is supported by no evidence. While this instruction should not have been given, at least in that form, and while the evidence upon this element of special damage is somewhat deficient those matters can be corrected upon a retrial of the action, and require no further consideration here.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

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111 Cal.App.2d 1

PEOPLE v. GOULD.

Cr. 4714.

District Court of Appeal, Second District, Division 2, California.

May 9, 1952.

Hearing Denied June 5, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Otto J. Emme, J., of receiving stolen goods, and his motion for new trial was denied, and he appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

Prior opinion, Cal.App., 241 P.2d 577.

1. Criminal Law 🔑1159(2)

On appeal, on ground of insufficiency of evidence, from conviction of receiving stolen property, court would not attempt to determine weight of evidence, but would decide only whether upon face of evidence it could be held that sufficient facts could not have been found to warrant inference of guilt, and before judgment could be set aside, it must clearly appear that upon no hypothesis was there sufficient substantial evidence to support conclusion reached in court below. Pen.Code, § 496.

2. Criminal Law 🔑1144(13), 1159(2)

On appeal on ground that evidence was insufficient to warrant conviction for receiving stolen property, court would assume existence of every fact in favor of verdict which jury could reasonably have deduced from the evidence, and would then determine whether such facts were sufficient to support verdict, and if circumstances reasonably justified verdict, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant would not warrant interference with determination of jury. Pen.Code, § 496.

3. Receiving Stolen Goods 🔑8(3)

Evidence sustained conviction for receiving stolen property knowing same to have been stolen. Pen.Code, § 496.

4. Receiving Stolen Goods 🔑8(4)

Where some of goods which had been stolen were found on following day in defendant's possession, but defendant contended that he had received them from another without knowledge that goods were stolen property, fact that watch which also constituted part of goods taken at same time was hidden a few feet from defendant's living quarters was sufficient to warrant jury inference that defendant had knowledge of stolen character of goods. Pen. Code, § 496.

5. Criminal Law 🔑555

Testimony of mistress of defendant who was charged with receiving stolen goods, in view of her relationship with defendant, need not have been accepted as true, but her relationship as mistress placed her in position of one having interest in outcome of case, and was factor affecting credibility, to be weighed and evaluated by trier of fact.

6. Criminal Law 🔑260(11)

In prosecution for statutory offense of receiving stolen property, whether defendant had had knowledge of stolen goods hidden a short distance from building in which he was staying, and question of truthfulness of defendant and his mistress' explanation of source of other stolen goods in his possession, was for trial court. Pen.Code, § 496.

7. Receiving Stolen Goods ⚿8(3)

In determining question of sufficiency of evidence to support determination of guilty of receiving stolen goods, all circumstances must be considered together to ascertain whether inference of guilt may be found.

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Lawrence William Steinberg, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant appeals from the judgment convicting him of receiving stolen property in violation of section 496bb of the Penal Code,[1] and from the order denying his motion for a new trial. The case was tried by the court sitting without a jury. Defendant challenges the judgment on the ground of the insufficiency of the evidence.

The articles involved are a lady's handbag which had been stolen from Virginia Haralson, and a mink coat, a lady's handbag and a watch, which had been stolen from the North Hollywood home of Mr. and Mrs. Frost between 5:30 and 10:30 on Thanksgiving evening, November 23, 1950. On the day following the Frost robbery one Joe Paladino, a cafe and bar owner, purchased the stolen coat from defendant, whom he had known about two and a half years. When defendant came to the Paladino residence he inquired of Paladino whether he wanted to buy a fur coat that belonged to a friend of his. Because of Paladino's interest in the coat defendant brought it into the Paladino home. Mrs. Paladino liked the coat so her husband purchased it, paying defendant $1,500 cash. The sale occurred between 8:00 and 9:00 o'clock in the evening. Mrs. Paladino saw someone whom she believed to be Mel Furlong in a car parked in front of the house. Furlong passed away late at night the next day. An experienced furrier to whom Mrs. Paladino took the coat for alteration fixed the retail value of the coat at $4,500 exclusive of taxes. If it were sold to a furrier who dealt in second-hand coats, he estimated it would bring $2,000.

Mrs. Furlong testified she was in the hospital on Thanksgiving and that her husband brought the coat to her room that night "a little after visiting hours" and offered it to her as a present. She declined the gift. Mr. Furlong did not sit down but stood by her bedside with the coat on his arm turned inside out. He did not hold the coat up or tell her where he got it. She did notice, however, "there was something on the inside that didn't look right." When Mrs. Frost recovered the garment the panel in the lining containing her name had been removed.

Defendant was arrested on November 30, about 11:00 A.M., at a motel on Ventura Boulevard, in Los Angeles. That evening officers investigated certain apartments at a motel near Arcadia. It was established that defendant and Betty Lou Pressler,[2] who were not married to each other, had registered at this motel on November 17th, just after midnight, as Mr. and Mrs. J. Gould. They were assigned bungalow No. 6 where they resided for approximately two weeks. In this bungalow officers found luggage containing both men's and women's wearing apparel. In one of the smaller suitcases which police released to Pressler they found feminine clothing and the Frost and Haralson purses.

The area around the Arcadia motel was searched, and under some leaves beneath a bush the officers discovered a plastic bag containing numerous items of jewelry, such as watches, brooches, pins and rings. In this bag was found the watch stolen from the Frost home. The bush was located behind a ledge near a wall about 35 to 40 feet from defendant's bungalow. A search of defendant's luggage brought to light a plastic bag of the same size and color as that found under the bush, each having the same legend stamped on the bottom. Defendant denied any knowledge of the jewelry in this plastic container. Concerning the presence of the plastic bag found in his possession, he and Pressler gave the explanation that a friend by the name of Calvert who, lived in bungalow No. 7 at the Arcadia motel, had given them two in which to keep golf balls. In this connection the husband of the owner of the motel testified that the man who occupied bungalow No. 7 (Calvert) had offered to sell him a set of earrings and a brooch which he took out of a bag similar to those produced in court. The witness saw no other jewelry. Defendant had known Calvert, who had two aliases, for a number of years, and he had been in business with Furlong. He admitted Calvert and Furlong were acquainted.

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[1] The section was amended in 1951 and renumbered section 496, Penal Code.

[2] The charges against her were dismissed prior to trial upon motion pursuant to section 995, Penal Code.

Defendant's testimony did not touch upon the presence of the stolen purses. According to Pressler these purses were two of "approximately eight" she had purchased from Calvert for about $100 on the day after Thanksgiving. She "picked them out of about 18 purses which he [Calvert] took out of a suitcase * * *."

Pressler testified they lived in two different places during the period in question. Also, they had an apartment on Huston Street in Sherman Oaks, a suburban area of Los Angeles. It was the latter place to which Furlong brought the coat "sometime after the noon hour" on the day following Thanksgiving, according to defendant. He further testified that the transaction with Paladino took place "in the afternoon" sometime between 2:00 and 4:00 o'clock.

On the witness stand defendant admitted having been convicted of two felonies: one burglary and a violation of the National Stolen Property Act, 18 U.S.C.A. §§ 2311, 2314, 2315, and having served time in the State and Federal prisons, respectively, therefor.

[1, 2] The elements of the offense created by the code are as follows:

1. That the property found in the possession of the defendant was acquired by acts constituting theft or extortion;

2. That the defendant received, concealed or withheld the property from the owners; and

3. That defendant knew the property was stolen. People v. Rossi, 15 Cal.App.2d 180, 181, 59 P.2d 206.

The basic rules here applicable are that an appellate court " 'will not not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt' " and that before a judgment of conviction " 'can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' *If the circumstances reasonably justify the verdict * * * the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury.*" (Emphasis added.) People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779; People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Jones, 36 Cal.2d 373, 224 P.2d 353.

[3] Applying these rules, the judgment of conviction must be sustained. The Frost home was burglarized between 5:30 and 10:30 P.M. on Thanksgiving Day, yet Furlong visited his wife at the hospital that night with the coat. She noticed there was something on the inside that did not look right. Apparently such disfigurement of the lining was readily noticeable upon casual observation. When Mrs.

Frost regained her coat the panel in the lining containing her name had been removed. These facts would amply justify an inference that Furlong had not come by this coat honestly. That Furlong appeared at defendant's apartment in Sherman Oaks some time after the noon hour the next day was admitted. Furthermore, defendant sold the coat to the Paladinos that night. On that very same day, "The day after Thanksgiving," defendant's paramour came into possession of a lady's handbag through Calvert which had been taken from the Frost home Thanksgiving evening. Less than a week later the Frost watch (with many other pieces of jewelry) was found hidden some 35 to 40 feet from defendant's Arcadia bungalow in a plastic container the inscription on which is identical with one found in defendant's possession. In this connection it must be remembered that Calvert and defendant had been friends for a number of years and were living next door to each other at the Arcadia motel; that Calvert had been trying to peddle some jewelry; also, that defendant and Furlong had been in business together, and that Furlong and Calvert were acquainted. To this should be added the fact that in addition to his Sherman Oaks apartment defendant maintained living quarters in two motels, and that the trial court might well disbelieve defendant's explanations and denials because of his two prior felony convictions. Civ.Code, sec. 2051; People v. Riccardi, 50 Cal.App. 427, 432, 195 P. 448. These facts and circumstances would amply support an inference on the part of the trial court that defendant, Pressler, Furlong and Calvert constituted a ring engaged in the sale and disposition of stolen property, and that defendant was fully aware the fur coat had been stolen, that his paramour had two stolen handbags, and that he had hidden the bag of jewelry containing the Frost watch.

[4-6] The identity in size, color, material and markings of the plastic bag found in defendant's possession with that hidden only a few feet from his living quarters, which contained among other jewelry the Frost watch, supports an inference connecting defendant with this stolen item. The fact that the watch was thus hidden would indicate guilty knowledge of its stolen character. For the reason previously noted, the trial court was not required to accept defendant's story that Calvert was the source of supply of these plastic bags. Code Civ.Proc., sec. 2051; People v. Riccardi, supra. Likewise, the court was not required to accept as true the testimony of Pressler on this point. Her relationship with defendant put her in the position of one having an interest in the outcome of the case. This was a factor affecting her credibility to be weighed and evaluated by the trier of the fact. People v. Payton, 36 Cal.App.2d 41, 55, 96 P.2d 991; People v. Peter, 125 Cal.App. 657, 14 P.2d 166; People v. Peccole, 92 Cal.App. 470, 268 P.473. It was for the trial court to determine whether defendant's denial of any knowledge of the hidden jewelry, and his and Pressler's explanation of the source of the plastic sacks, was satisfactory. People v. Shafer, 101 Cal.App.2d 54, 59, 224 P.2d 778. Apparently the court was not convinced of either.

If the court believed the Pressler story about the purchase of the purses from Calvert the inference that defendant knew of such purchase and the character of the property is amply supported. Such inference would find support in the relationship of defendant and Pressler; the relationship between Calvert and defendant; the number of purses purchased and amount paid; the number from which the selections were made; and ordinary human propensities. Code Civ.Proc., secs. 1958, 1960; People v. Hubler, 102 Cal.App.2d 689, 228 P.2d 37. If she made such purchases it would have been the natural and normal thing for Pressler to tell defendant. She does not claim that she did not tell him, or that he did not know about the purse deal. Also, it is significant that defendant did not give any testimony concerning the purses. From the number of purses Calvert had, the inference is virtually inescapable that he was selling stolen property. Of course the court may not have believed the Pressler story about buying the handbags for reasons previously noted. People v. Payton, supra. The court may have concluded the parties were simply dividing some of their loot, or that defendant had given these purses to his paramour with full knowledge of their history.

As to the fur coat, the trial court would have been justified in disbelieving defendant's story that he was merely helping a friend dispose of a coat which he had bought for his wife and which she did not want, so that he could get his money out of it. Code Civ.Proc., sec. 2051; People v. Riccardi, supra. On the other hand, the court would have been amply justified in concluding that defendant knew the history of the coat and had an interest in selling it. Supporting such an implied finding is the fact, according to Mrs. Furlong, that "there was something that didn't look right on the inside" of the coat. In view of Mrs. Frost's testimony that when her coat was returned the panel in the lining containing her name was gone, it was reasonable to infer that Furlong had removed the name and had done it in such manner that it was readily noticeable. Defendant could hardly have failed to discover this condition which Mrs. Furlong saw at a glance. It aroused her suspicions; it should have had a like effect on defendant. Then the price was disproportionately low. That too was a suspicious circumstance. Also, there was a conflict between defendant and Paladino as to when the sale took place. The former testified the sale was made in the afternoon; the lattter that it was between 8:00 and 9:00 o'clock at night. This conflict was significant, and the trial court was justified in resolving it against the defendant. Code Civ. Proc., sec. 2051; People v. Riccardi, supra. If this was a nonprofit transaction for a friend who merely wanted to get his money out of a fur coat he had bought for his wife which she did not desire, natural human propensitites would ordinarily have induced the owner to take an active part in attempting to make the sale. Code Civ.Proc., secs. 1958, 1960; People v. Hubler, supra. Furlong, however, remained outside in the car. The trial court could reasonably have concluded this conduct was out of the ordinary in the absence of some explanation and consequently could have drawn an unfavorable inference as to the veracity of defendant's story. The close relationship between the parties was also a factor for the court's consideration on this point.

Finally, the trial court may well have concluded that it was not just a series of coincidences that a fur coat which had been stolen the night before should turn up at defendant's apartment some time after the noon hour the following day and be sold by defendant that evening under the circumstances here delineated; that a lady's handbag stolen in the same burglary came into the possession of his paramour also on the day following this burglary; and that a watch stolen from the same place should be found a week later hidden 35 to 40 feet from one of defendant's motel living quarters in a bag identical in size, color, quality and markings with one found in defendant's possession. The court was entitled to give weight to this *combination of circumstances.*

[7] In a case such as this, all the circumstances must be considered together in determining whether the inference of guilt may be found. People v. Goodall, 104 Cal. App.2d 242, 247–249, 231 P.2d 119. When so considered there is ample evidence to support the judgment.

The basic difficulty with defendant's argument is that he would have this court reweigh the evidence, and draw inferences contrary to those drawn by the trial court. Under firmly established principles we are not at liberty to do this. People v. Newland, supra; People v. Hubler, supra.

The judgment and order denying motion for a new trial are affirmed.

MOORE, P. J., concurs.

McCOMB, J., dissents.

111 Cal.App.2d 79

MASON v. ROLANDO LUMBER CO.

Civ. 14920.

District Court of Appeal, First District, Division 2, California.

May 12, 1952.

E. M. Mason sued Rolando Lumber Company for conversion of six truckloads of lumber. The Superior Court of the State of California in and for the City and County of San Francisco, William F. Traverso, J., rendered judgment in favor of defendant, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that the evidence would sustain a finding that plaintiff's assignor had considered a third party, rather than defendant, to be the buyer of the goods allegedly converted.

Affirmed.

1. Evidence ⚷595

Reasonable inference drawn from circumstantial evidence will support finding against direct evidence to the contrary.

2. Sales ⚷87(3)

In conversion action brought by seller's assignee, evidence would sustain finding that seller had considered third party, rather than defendant, to be the buyer of the goods allegedly converted.

3. Carriers ⚷53

Evidence ⚷424

A bill of lading is a contract between the shipper and the carrier, and therefore parol evidence rule would not prevent consignee, who was not party to such contract, from showing true situation with respect to title to goods shipped.

4. Contracts ⚷9(1), 10(1)

Executory contract may be unenforceable because of lack of mutuality or uncertainty, but such defense is not available where the contract has been executed.

5. Sales ⚷201(4)

Seller's delivery to third person by direction of buyer is effective to transfer title to buyer.

6. Frauds, Statute of ⚷89(1)

Receipt and acceptance of goods satisfies the Statute of Frauds. Civ.Code, §§ 1624a, 1724.

Aaron M. Sargent, San Francisco, for appellant.

Harry Corvin, Albert Picard, San Francisco, Raymond N. Baker, San Francisco, of counsel, for respondent.

DOOLING, Justice.

Plaintiff and appellant as the assignee of Homn Lumber Co., a partnership, sued defendant for the conversion of six truckloads of lumber. Judgment went for defendant after a trial to the court without a jury. Only five truckloads of lumber are involved on this appeal since the evidence disclosed that the sixth had been delivered to another party.

The assignors, hereinafter called Homn, were engaged in cutting and selling lumber. According to the testimony of Nowlin, one of the partners in Homn, one Anderson, whom the evidence shows to have been a wholesale dealer in lumber, was introduced to Nowlin by Espinosa, an independent truck operator. According to Nowlin, in which he was corroborated by Espinosa, Anderson represented that he was an agent of defendant and offered to buy an unspecified quantity of fir lumber from Homn for defendant at $45 per thousand feet F. O. B. mill, the lumber to be sent direct to defendant, to which Nowlin agreed. Nowlin further testified that it was agreed that he was to send a copy of the tally sheets to Anderson showing the quantity of lumber shipped to defendant because Anderson told him that he would see that Homn would get their money faster that way.

The five truckloads of lumber were shipped by Homn direct to defendant by Espinosa's trucks with tally sheets and freight bills showing Homn as shipper and defendant as consignee. The shipping receipts were altered by the addition of Anderson's name thereto without the knowledge of Homn or the defendant, presumably by Espinosa's trucker. No bills were sent to defendant by Homn although the usual custom of the trade was to bill the purchaser within ten days and a 2% discount was allowed in the trade for payment within that time.

Anderson was not in fact an agent for defendant and represented to defendant that he was purchasing the lumber from Homn and reselling it to defendant and defendant paid Anderson in full for the five truckloads of lumber. Anderson sent his personal check to Homn for the first two truckloads of lumber at $45 per thousand less 2%, which Nowlin endorsed and deposited in the bank. This check was returned because there were not sufficient funds in Anderson's account to meet it. Nowlin then during several weeks unsuccessfully tried to get in touch with Anderson and finally succeeded and thereupon for the first time Nowlin appeared at the office of defendant where he saw Miss Lagomarsino, defendant's secretary-treasurer. Miss Lagomarsino testified that Nowlin told her that he had an appointment to meet Anderson there and when Anderson failed to appear Nowlin said: "that Mr. Spence Anderson had not paid for the lumber that was delivered to us." Miss Lagomarsino told Nowlin that they had paid Anderson for the lumber and asked Nowlin "why he didn't question us as soon as the bill became due and it was not paid, if it was transacted through him. And all our transactions were through Spence Anderson. We didn't know of any Homn Lumber Company until this matter came up." To this Nowlin replied: "he would see if he could get hold of Mr. Anderson at a later date", and left. A few days later Homn sent a bill for the lumber to defendant on the letter head of their attorney. Anderson was dead at the time of trial. It further appeared that the first time the lumber was charged to defendant on Homn's books was some time after Anderson's check had been returned unpaid.

[1, 2] It is appellant's primary claim that since Nowlin's and Espinosa's testimony as to the conversation with Anderson is uncontradicted the court's finding that the lumber was sold to Anderson and by him resold to defendant is contrary to the evidence. Appellant overlooks the fact that a reasonable inference drawn from circumstantial evidence will support a finding against direct evidence to the contrary. Gray v. Southern Pacific Co., 23 Cal.2d 632, 640–641, 145 P.2d 561; Hicks v. Reis, 21 Cal.2d 654, 659–661, 134 P.2d 788.

The entire course of conduct above outlined furnishes reasonable grounds for the inference that Nowlin, acting for Homn, considered Anderson the buyer and not defendant and that only after all attempts to collect from Anderson proved futile did Nowlin for the first time seek to impose a liability on defendant.

[3] Appellant argues that the shipping receipts are bills of lading which cannot be contradicted by parol. A bill of lading is a contract between the shipper and the carrier, Pioneer Fruit Co. v. Southern Pac. Co., 47 Cal.App. 44, 46, 190 P. 50, and the parol evidence rule does not prevent defendant, not a party to that contract, from showing the true situation with respect to title to the goods. 10 Cal.Jur. 198–199.

[4, 5] Appellant further argues that the contract lacked mutuality and was too uncertain to be enforced. Though an executory contract may be unenforceable because of lack of mutuality or uncertainty that defense is no longer available where the contract has been executed, as here by the delivery of the lumber pursuant to its terms, Vitagraph, Inc., v. Liberty Theatres, Inc., 197 Cal. 694, 701, 242 P. 709; Hunter v. Sparling, 87 Cal.App.2d 711, 725, 197 P.2d 807; Klein v. Farmer, 85 Cal.App.2d 545, 555, 194 P.2d 106; Auto Spring Repairer Co. v. Mutual Auto Accessories Co., 72 Misc. 402, 130 N.Y.S. 140; Joseph Schlitz Brewing Co. v. Missouri Poultry & Game Co., 287 Mo. 400, 229 S.W. 813; 46 Am.Jur. 261–262, and the seller's delivery to a third person by direction of the buyer is effective to transfer title to the buyer, Francis v. Merkley, 59 Cal.App. 196, 210 P. 437; Pray v. Trower Lumber Co., 101 Cal.App. 482, 281 P. 1036; John A. Dunn Co. v. C. F. Weber & Co., 122 Cal.App. 45, 9 P.2d 511; 46 Am.Jur. 604.

[6] There is nothing to the argument that the contract was within the statute of frauds since the receipt and acceptance of the goods satisfies the statute. Secs. 1624a, 1724, Civ.Code.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

PEOPLE v. KIRKES.*

Cr. 4655.

District Court of Appeal, Second District, Division 3, Califorina.

April 29, 1952.

Rehearing Denied May 12, 1952.

Hearing Granted May 29, 1952.

Defendant was convicted in the Superior Court of Santa Barbara County, Ernest D. Wagner, J., of murder in the second degree, and he appealed from the judgment and from an order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that under the evidence, improper argument of deputy district attorney was prejudicial and resulted in miscarriage of justice.

Judgment and order reversed.

Wood, J., dissented.

1. Criminal Law 🔑720(6), 723(1)

In murder prosecution, closing argument of prosecutor which appealed to sympathy of jury for victim, characterized defendant as "wolf at bay", and drew imaginary and fanciful inferences as to circumstances of crime not justified by evidence, was improper.

2. Criminal Law 🔑719(1, 3)

Arguments of prosecutor which are not justified by record, assertions outside record which were harmful to defendant, and declarations intended and calculated to impress upon jury belief of prosecutor of guilt of deceased, are improper.

3. Criminal Law 🔑1171(1)

Where it appears from record that jurors could have reasonably entertained doubt as to defendant's guilt, and that misconduct of prosecuting attorney might well have influenced result, conviction will be reversed.

4. Criminal Law 🔑713

Each criminal case wherein errors are predicated upon prosecutor's argument to jury, must be considered on its own facts under general principles by which propriety of argument is to be judged and questions of prejudice determined.

5. Criminal Law 🔑713

Closing argument of deputy district attorney in criminal case must be considered as coming from one who by virtue of office and as representative of state wields great power and influence.

6. Criminal Law 🔑719(3)

Statement of prosecutor to jury in criminal case that he believes defendant to be guilty is weighted with authority of his office, and is declaration of conclusion as reached in official capacity and cannot fail to make an impression upon minds of jurors, and is breach of duty of fairness owed to defendant and the court.

7. Criminal Law 🔑719(3)

Where in murder case deputy district attorney in closing argument laid foundation by mentioning 19 years of service in office of district attorney and asserted that he not only believed but knew before he became associated in prosecution that defendant had committed crime, same could not fail to make impression upon minds of jurors.

8. Criminal Law 🔑719(2)

Where, in murder prosecution, defense counsel in closing argument characterized murder as a maniacal sort of thing without reason, and a deputy district attorney in reply in closing argument said that he would tell jury what motive in case is and then proceeded to advance theory of improper sexual advances, and killing upon fear of exposure, which theory was not based on evidence, jury could have believed that assertions by deputy district attorney were based upon information or knowledge of facts that he had which had not been developed in evidence, in view of deputy district attorney's previous assertion that he believed and knew defendant to be guilty prior to association with case.

9. Criminal Law 🔑723(1)

Where, in murder case, witness for the people was recalled for further cross-examination by defense after learning that witness had been confined as mental case, and on cross-examination witness admitted that she had been confined as mental case during pregnancy, deputy district attorney's remarks in closing argument putting to shame defense counsel for unwarranted attack upon integrity of young woman and characterizing cross-examination as attempt to belittle her testimony by casting aspersions upon her character, mind and integrity, was appeal to passion and prejudice of jury.

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* Subsequent opinion 249 P.2d 1.

10. Criminal Law ⚷700

Where, in murder case, name of witness for people was withheld by district attorney from defense counsel who did not learn that witness had been confined in mental institution until after cross-examination had been made, fair play would require that confinement should not have been concealed from defendant, and that defendant be given opportunity to investigate hospital records, and to obtain any evidence that was available as to nature of mental condition and stability of witness.

11. Criminal Law ⚷719(1)

In 1950 prosecution for 1942 murder wherein defense counsel properly argued to jury that witness for people remained silent for eight years because she had not recognized defendant as driver of automobile with which murder was connected and that she had not stated any reason for distinguishing automobile which she saw from any other, and did not accuse witness of giving false testimony or suggest wrong motive, deputy district attorney's closing argument explaining silence of witness as caused by fear of death from hands of defendant if she had come forward before defendant was taken into custody, was strongly prejudicial in absence of any evidence that witness had been threatened or that she had been in fear.

12. Criminal Law ⚷719(2, 3)

In criminal case it is privilege of defense counsel to go farther afield in argument than prosecutor may go because theories and statements of opinion of spokesmen for defendant have little weight as compared with similar statements of district attorney.

13. Criminal Law ⚷726

Purely argumentative statements of defense counsel in murder case in closing argument that crime was without motive, that former district attorneys over eight year period had not instituted prosecution, and that witness for people remained silent for eight years and did not report her evidence until after indictment, did not invite so as to preclude complaint of manifestly improper and unfair reply, not based on evidence, by deputy district attorney that he had been in office 19 years and believed defendant guilty before association with prosecution, that motive was sexual with fear of exposure, and that witness remained silent because of fear of bodily harm from defendant.

14. Criminal Law ⚷728(2, 5)

Where deputy district attorney in murder prosecution asserted in closing argument that he believed defendant guilty before he became associated with prosecution, asserted theory, unsupported by evidence, that motive was sexual and fear of exposure, and that people's witness had remained silent for eight years because of fear of harm from defendant, even if there had been instruction that jury should disregard statements, the improper argument was such that harm could not have been undone thereby, and hence failure to object to statements with request for admonishment of prosecutor and cautioning of jury to disregard them was not waiver of right to rely upon statements as misconduct.

15. Criminal Law ⚷728(2)

In determining whether failure of defense counsel to object to improper statements in closing argument by prosecutor amounted to waiver of right to rely on statements as misconduct, it must not be overlooked that when defense counsel interrupts argument of prosecutor with objections, it is confession that defendant has been hurt, and that it is a question of judgment whether it is better course to object and thus magnify concern of counsel, and possibly incur displeasure of court or jury, or by remaining silent, to attempt to minimize harmful effect of argument to which objection could properly be made.

16. Criminal Law ⚷728(2)

Where prosecutor in murder case throughout entire closing argument made persistent and repeated improper statements upon different matters, it was duty of court to take the initiative in regard to discontinuance of such type of argument.

17. Criminal Law ⚷782(10)

While instruction that fact may be proved by testimony of single witness which is opposed by that of greater number of witnesses if jury believes testimony of single witness is entitled to greater weight is proper rule in civil case where preponderance of evidence is required to establish essential facts, it is not proper in criminal case unless there is clearly read into it by reference to other instructions, rules pertaining to sufficiency of circumstantial evidence and reasonable doubt. Code Civ.Proc. § 2061.

18. Criminal Law ⚷782(10)

Even if in criminal case instruction that fact may be proved by testimony of single witness which is opposed by that of greater number of witnesses if jury believes testimony of single witness is entitled to greater weight would be otherwise proper, it would be erroneous as confusing where case presented no single determinative fact but depended upon many incriminating circumstances.

19. Criminal Law ⚷782(10)

In murder prosecution, instruction that testimony of one witness entitled to full credit is sufficient for proof of any fact and would justify verdict in accordance with testimony even though number of witnesses on other side might testify to opposite state of facts, if, from whole case, jury believes that greater weight of evidence is on side of one witness as against greater number of witnesses, was not justifiable as relating only to matter of credibility of witnesses.

20. Criminal Law ⚷552(3)

Where evidence in criminal case is entirely circumstantial, each circumstance which is deemed by jury to be essential to establishment of guilt must be established beyond reasonable doubt, and it is not sufficient that each of them be established by preponderance of evidence.

21. Criminal Law ⚷810

Where, in murder prosecution, instruction was given that fact may be proved by testimony of single witness which is opposed by that of greater number of witnesses if jury believes testimony of single witness is entitled to greater weight, and court also repeatedly told jury that guilt must be established beyond reasonable doubt, there was irreconcilable conflict created by two formulas for determining guilt, and rule that instructions are to be considered as a whole did not remove such vice.

22. Criminal Law ⚷1144(14)

District Court of Appeal in criminal case must presume that erroneous instruction was given same consideration by jury as correct instruction.

23. Criminal Law ⚷1172(2)

If jury in murder case gave same consideration to instruction that fact may be proved by testimony of single witness which is opposed by that of greater number of witnesses if jury believes testimony of single witness is entitled to greater weight, as it gave to instruction that guilt must be established beyond reasonable doubt, jury must have been confused if not actually misled, in view of fact that case was based on circumstantial evidence, and hence giving of instruction was reversible error.

24. Criminal Law ⚷471

Testimony in murder case of witness for people who qualified as expert that mark on limbs of deceased could have been made with part of rubber mat taken from certain automobile, that tear such as one found in dress of deceased could have been made by luggage compartment of defendant's automobile, and that grease spot on deceased's dress could have been caused by grease which he found on latch of luggage compartment of defendant's automobile, was not expert testimony because witness was in no better position or better qualified to draw conclusion from facts in evidence than were jurors, but evidence was not inadmissible though admitted under untenable theory.

25. Criminal Law ⚷387, 404(4)

Where the people in murder case showed that marks on limbs of deceased could have been made by 1939 Ford automobile mat, prosecutor could prove that no other automobile mat came with same pattern and could produce other mats as were available to show that marks upon limbs of deceased could not have been made by such other mats.

26. Criminal Law ⚷1170½(5)

Even if, in murder case, greater latitude should have been allowed in cross-examination by defense counsel of sheriff for purpose of showing sheriff's activity and possible bias upon his part, exclusion of questions as to names of witnesses and persons with whom sheriff had recently discussed the case did not restrict cross-examination to extent that was harmful to defendant, where it was shown that sheriff had been extremely active, diligent and interested to extent of not only discussing case with all witnesses who testified for people but also with number of those who testified for defendant.

27. Witnesses ⚷344(2)

Where, in murder case, testimony of witness for people was in direct conflict with that of defendant, and witness for people had been interviewed by sheriff concerning testimony, utmost liberality should have been permitted on cross-examination of witness, and question as to whether witness, who was in liquor business, had been under investigation by authorities, including sheriff, should have been allowed as tending in some degree to weaken testimony.

28. Criminal Law ⚷1172(1)

In murder prosecution, instruction that importance of jury's duties require that they consider right of people of state to have law properly executed, that they should also keep in mind importance to accused of result of their deliberations and be just to him as well as to people of the state, was harmless though a redundant platitude.

29. Criminal Law ⚷806(1)

In prosecution for murder wherein court instructed that there is no limitation of time within which prosecution for murder must be commenced, court should have omitted added instruction that if defendant's guilt was established beyond reasonable doubt jury should so find irrespective of fact that such evidence discloses that there had been lapse of approximately eight years between death of deceased and prosecution.

30. Criminal Law ⚷1045

Where two alternate jurors were selected after regular jury had been impaneled and after two alternates had been examined on voir dire, defense counsel claimed right to exercise two challenges against chair of one alternate only and court stated that if they were exercised challenges should be used, one against one alternate and other against second alternate, and defendant did not challenge either alternate and court did not make ruling, defendant was not prejudiced and there was nothing to review.

31. Criminal Law ⚷1134(1)

Where rights of defendant had been invaded by misconduct of district attorney and error in giving instruction, it was necessary that District Court of Appeal should critically examine the entire evidence in order to satisfy it as to strength of case of people.

32. Homicide ⚷234(7)

In murder prosecution, there was ample circumstantial evidence to establish guilt of defendant though it was not overwhelming and fell short of being conclusive.

33. Homicide ⚷234(7)

In murder prosecution, evidence was such that if jurors or any of them in judging credibility of witnesses and weight of their testimony had entertained doubt as to defendant's guilt, it could not be said that it was an unreasonable doubt.

34. Criminal Law ⚷1171(1)

Where circumstantial evidence in murder case was such that jury could reasonably have found defendant guilty or not guilty, if misconduct of deputy district attorney in closing argument added materially to weight of evidence of people, or to proof of important incriminating circumstances as to which evidence was in conflict, rights of defendant were thereby invaded and prejudice resulted.

35. Homicide ⚷234(7)

Where in murder case unconflicting evidence as to manner in which crime was committed was sufficient to establish all elements of murder of first degree, yet verdict found defendant guilty of murder in second degree, such finding of guilt of lesser offense was consistent with existence of doubt in minds of some of jurors that defendant was guilty of crime.

36. Criminal Law ⚷1134(1)

It is not proper for reviewing court in determining whether miscarriage of justice warranting reversal resulted from error or misconduct at trial to be guided solely by its own opinion as to weight of evidence bearing upon question of guilt, but it is necessary to decide in light of experience and by application of reasoning whether evidence presented to jury critical questions of fact as to which reasonable minds might differ. Const. art. 6, § 4½.

37. Criminal Law ⚷1159(4)

Extreme caution is required to avoid usurping functions of jury when decision of vital question of fact by jury depended upon credibility of witnesses whose testimony, if believed, would largely, if not wholly, resolve question of guilt or innocence.

38. Criminal Law ⚷1186(4)

When reviewing court, after mature consideration, is in grave doubt whether verdict was influenced by wrongful statements of deputy district attorney, injustice is more likely to be avoided by resolving doubt in favor of accused and awarding new trial. Const. art. 6, § 4½.

39. Criminal Law ⚷1186(4)

Where, in murder prosecution, circumstantial evidence presented questions of fact which jury found to be close and difficult to decide, and improper statements on closing argument of deputy district attorney may have added weight to case of people without which verdict of guilty would not have been returned, there was miscarriage of justice requiring reversal of judgment of conviction. Const. art. 6, § 4½.

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W. P. Butcher and Canfield & Westwick, all of Santa Barbara, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., David S. Licker, Dist. Atty. of Santa Barbara County, Santa Barbara, for respondent.

SHINN, Presiding Justice.

On September 21, 1950, the grand jury of Santa Barbara County returned an indictment accusing Leonard M. Kirkes of the murder of Margaret Senteney on or about August 28, 1942. In a jury trial defendant was found guilty of murder of the second degree. He moved for a new trial, which was denied, and he appeals from that order and from the judgment.

Defendant assigns as error the giving of certain instructions, the admission of certain evidence, the restriction of cross-examination, the exclusion of offered testimony, and improper and prejudicial remarks of the deputy district attorney made in the course of his closing argument. The evidence of the People was wholly circumstantial; no claim is made that it was insufficient to justify the verdict.

Margaret Senteney, a single woman, 20 years of age, lived with her parents in Carpinteria. On Friday, August 28, 1942, she had dinner at home and left the house about 7:30 p. m. to go to the home of Mrs. Shepard, about a quarter of a mile distant, where she had been employed during the past week as a night companion of Mrs. Shepard. At about 10:00 o'clock a. m. on the following Sunday, her body was found lying beside a little used dirt road which led off from Toro Canyon Road, some seven miles west and north of Carpinteria. Highway 101 extends from Carpinteria toward Montecito in almost a westerly direction. About five miles west of Carpinteria, Toro Canyon Road leads from the highway to the north. The body of the deceased was found lying face down in the dirt. She had not been sexually molested. Death had been caused by strangulation and dislocation of vertebrae of the neck. A rope or wire had been placed around her neck and pulled backward. The frontal forehead bone had been crushed by a blow which, according to expert opinion, had been administered after the fatal injuries had been inflicted. There was a tear in her skirt and at the point of the tear a smear of grease. One shoe, a coat and a purse were missing and were not found. A quantity of dirt was taken from the mouth of deceased and when compared with that upon which the body lay was found to be different, indicating that the murder had been committed at another place, which, according to the evidence, could not be identified. One fingernail was bent entirely back; beneath the nails there was dirt and perhaps some loose skin. Above the left instep and upon the right calf were certain evenly spaced indentations and smudges which had been caused by pressure after death. These were photographed and compared with the pattern of a rubber mat taken from a 1939 Ford car, which they matched. Near the body were found two footprints estimated to have been made by about a number nine shoe. Upon the dirt road, in one of the few soft spots, were tire marks showing a zigzag or "squeegee" pattern, as well as marks from two other types of tires.

Defendant was a graduate of Vanderbilt University, about 36 years of age, and for some eight years had been an officer of the State Highway Patrol. He lived in Carpinteria with his wife, her mother Mrs. Beckstead, and a young son. He was under investigation by the sheriff and the district attorney commencing shortly after the murder. At the trial the evidence against him consisted of the testimony of Mrs. Dorothy Egan who swore that she saw deceased enter the car of defendant shortly before 8:00 p. m., before dark, on the evening of August 28. Defendant owned a 1939 Ford business, or one-seat, Coupe which he was driving that night, and admittedly was in the same vicinity as the deceased shortly before 8:00 o'clock. A vegetable grower, Fogliani, testified that he saw defendant driving on Toro Canyon Road away from the place where the body was found between 6:30 and 7:30 Saturday morning, August 29th. There was evidence of numerous acts and statements of the defendant shortly after the crime was committed, and of circumstances of an incriminating nature to which we shall refer in some detail.

It may be mentioned here that Dorothy Egan, then about 17 years of age and unmarried, lived with her parents in Carpinteria. She testified that while she was taking an infant brother for a walk and while it was still light she saw a car starting and stopping in the vicinity of the high school grounds. She saw Margaret Senteney enter the school grounds, turn around toward the car, which was then stopped, enter the car and drive away; she recognized the car as that of defendant, in which she had once ridden; the car passed her with its lights on but she did not recognize the driver or anyone in the car. She did not testify that she knew or noticed the license number on the car, nor that she noticed any features of the car that would distinguish it from any other of the same make, model and color. She first recounted the occurrence to the district attorney in October, 1950, the month following the indictment of defendant.

At 7:30 p. m. on Friday evening defendant's car was parked for some time at a Shell Service Station on the highway, where he talked with witnesses Treloar and Wullbrandt, who was in his own car and accompanied by his son. Wullbrandt and his son testified to the conversation, and that defendant left before they did, driving down Linden Street toward the beach. Traveling in this direction it would be two blocks to Eighth Street and then three blocks to the left on Eighth Street to the nearest corner of the high school grounds, which covered an entire block. Defendant also testified to his conversation with Wullbrandt, but insisted that he left the parking lot after the Wullbrandts and went in a direction other than that testified to by them.

On Saturday, Sheriff Ross, who at the time was Undersheriff, called upon defendant to assist in the search for Margaret Senteney. Defendant complied and assisted in the investigation. Nothing was developed until Sunday morning when the body was discovered by one Caughill, a caretaker of an estate upon or nearby which the body was discovered. Caughill had gone up the dirt road toward a dump, looking for scrap metal. Upon receipt of word from Caughill, Ross and the defendant, in separate cars, went to the scene. Ross testified that defendant said he knew the vicinity and that he led the way. Arriving at the intersection of the dirt road with Toro Canyon Road the two encountered Caughill and a neighbor, Pozzbon. The four men proceeded up the steep dirt road to the point where the body lay in a more nearly level area. Ross returned to his car to send a radio message. He testified that he observed two footprints near the body and told defendant to see that they were preserved, and that on the way down to his car he observed tire tracks and marked them with some brush; that when he returned defendant was standing beside the body and had walked over the footprints and obliterated them; that he reprimanded defendant, who replied that he was sorry but that this was his first murder investigation and he was nervous; later a photographer from the sheriff's office, Bradford, and a deputy, Walker, arrived and pictures were taken. Ross and Bradford both testified that defendant again approached the body and was shoved away by Ross. Bradford and Walker testified that attention was directed to the tire marks and that they were told to walk on the other side of the road on the way up. They both testified that defendant started toward the tire marks and was called back by Ross.

An autopsy was conducted Sunday evening. Following an examination of the imprints upon the limbs of the deceased, and upon the assumption that the body had been transported in an automobile, a search was commenced for a car having a mat with a pattern comparable to the marks on the body. No other 1939 Ford Business Coupe was found in the area. Eventually, a mat was taken from a 1939 Ford Coupe which had such a pattern. A section of the mat was cut out for comparison with the photographs and was placed in evidence. Although there was no direct evidence that the rubber mat in defendant's car was of the same pattern as that of the mat produced, the original owner of the car and an intermediate owner from whom defendant purchased it, were shown the mat in possession of the officers and testified that the car had a "similar mat" while they owned it. Defendant testified to the same general effect. None of these witnesses testified as to the pattern. There was evidence that Ford cars used the same type of mat in 1938, 1939, 1940 and 1941, a fact which we shall mention in another connection. There was no evidence that the mats in Business Coupes were of different pattern from those in other models. All defendant's tires had the "squeegee" pattern, which fact was ascertained by the authorities. The witness Wullbrandt testified that in the evening of August 29th he met defendant in a drug store opposite the Shell Service Station, and that other persons were present; defendant asked him what time it was when they were talking across the street the night before; Wullbrandt answered that it was shortly before 8:00 o'clock p. m. Defendant said: "That's my alibi. By God the rest of them know what is good for them, they will be getting theirs." Wullbrandt testified that defendant also remarked that he had driven by the school house about the time of Margaret Senteney's disappearance and that he had seen nothing wrong.

On Monday, August 31st, defendant took his car into a garage in Carpinteria and ordered that it be lubricated, the spark plugs checked and the spare tire taken from the luggage compartment and put on the car. This was done by a young man named Moore. An order for the work was made out in triplicate by Groves, proprietor of the garage; two copies were placed in a box file in the office and the third, on cardboard, was placed under the windshield wiper on the car. It was customary to give the customer one of the copies, to keep another in the file, and throw away the third cardboard copy after the work had been done. Groves testified that on the day the work was ordered he filed two copies, and after the work was done saw defendant in the garage office going through the box file. Undersheriff Ross came to the garage to inquire about the work order, and it was discovered that the filed copies were missing from the file box. The third copy was not found at that time. Groves informed Ross that he had seen defendant looking through the files; he later told defendant of his conversation with Ross and defendant denied having tampered with the files when questioned by Groves.

On August 31st defendant had the inside of his car, including the luggage compartment, blown out with an air hose, was dissatisfied with the job, had it done more thoroughly and assisted therein. On September 1st defendant had his car washed and the back compartment blown out with an air hose at a service station in Santa Barbara. On September 2nd defendant arranged with one Boverton to have the latter paint his car. It was arranged that the work would be done September 8th. On that day defendant asked Boverton to paint the luggage compartment. Boverton replied that that was not customary but defendant insisted he wanted it done and the car, including the luggage compartment, was painted, the work being finished September 9th. Before the painting was commenced Boverton called defendant's attention to the fact that the lock on the luggage compartment was broken. The painter testified that there was no mat in the rear compartment and that the floor was in good condition.

Either around 4:00 p. m. or 8:00 p. m., August 28th, defendant had purchased a pint of whiskey and two bottles of Coca Cola from one Leibler, proprietor of a liquor store on the highway. Leibler testified that defendant came into his store September 2nd to discuss the purchase; that he was nervous and distraught; stated that everyone with tires similar to those that had left marks on the road, as his were, would be suspected, and that he needed an alibi; he asked Leibler what time he had made his purchase on the 28th; Leibler replied 4:00 o'clock, and defendant asked if he was sure it was not 7:30, to which Leibler replied that he was sure that it was not. Leibler reported this conversation to the Sheriff and Undersheriff on September 3rd.

Ray Pinker, a chemist and technician of the Los Angeles Police Department, was called into the case. On September 5th Pinker and others examined defendant's car but found it locked. That night they found it parked on the street, had it opened by a locksmith under the direction of the district attorney, breaking the lock of the luggage compartment in the process. It was discovered that there was no mat in the compartment and that a large part of the cardboard facing on the right hand side had been removed. Grease was found on the catch of the lock. The latch protruded and could catch onto articles that were pushed across it. On September 5th, defendant remarked to Pinker that he was contemplating having his car painted but was uncertain whether he should do so under the circumstances.

On September 8th defendant learned that the sheriff wished to talk with him. That night he left a note in the sheriff's office saying he would be available, and a meeting was arranged for the following day, when defendant met with the district attorney, Heckendorf, the undersheriff Ross, Pinker, and the deputy district attorney Licker. Defendant was questioned by the district attorney. He answered all questions until he was asked about a mat in his car, whereupon he stated in substance that the inquiry seemed to be centered upon him, that he was uncertain as to what he should do in answering further questions, asked Licker what he ought to do, was told that he ought not hesitate to state the facts, and finally declared that he would not answer further questions until he had received the advice of an attorney, and left the meeting. On the same day he went to see Moore and questioned him about the date when his car had been worked on. The two searched for the order slips but did not find them. Defendant then obtained from Moore, who was 17 years of age and a part time employee, a written statement to the effect that the work had been done August 24th and that there was no mat in the car at that time. Moore testified that defendant suggested the date and that he, Moore, assuming it to be correct, signed the statement. Defendant then went to Boverton's place of business, lifted the lid of the luggage compartment of his car and saw that the inside had been painted.

On September 10th defendant obtained a statement from one Hart that in the early part of July he, defendant, had deposited a rubber mat on a rubber stock pile at Hart's place of business. He also obtained a statement from one Sample that about August 1st, 1942, he had had his car lubricated at Sample's station, and that there was no mat in the car at that time.

On September 11th defendant attended another meeting with the district attorney and others who had been present at the meeting of the 9th. Defendant was accompanied by his attorney, Laselle Thornburgh. He was questioned at length by the district attorney and the interview was reported. Defendant's statement was, as far as it went, the same as his testimony at the trial, which we shall refer to later. It was generally known by this time that the pattern of the rubber mat which had been taken from the 1939 Ford could have made the marks which appeared on the body of the deceased, and defendant was questioned with relation thereto. Sheriff Ross testified that a few days after the statement was given defendant asked him if Pinker had found any hairs in the rear of his car, and asked: "Confidentially, did anyone say that they saw Margaret Senteney get into my car?"

The cardboard copy of the work order written up by Groves was eventually found and it bore the date of August 31st, instead of August 24th, as stated by Moore in his written statement. This record showed that the car had only traveled 661 miles since the last preceding lubrication.

Defendant testified that he knew Margaret Senteney and that she had served as a baby sitter in his home on one occasion. He testified that on August 28th he had dinner at home, drove to town, parked at the Shell Service Station, conversed with a Mr. Treloar and Mr. Wullbrandt, and that Wullbrandt left the station when a woman for whom he was waiting alighted from a bus and while he, Kirkes, was still at the station. He testified that he drove down the highway to Leibler's liquor store where he purchased a pint of whiskey and two bottles of Coca Cola around 8:00 o'clock; that he drove to the home of George Peyster, an old man who lived on Rincon Hill outside of town, a long time acquaintance whom he occasionally visited, and who was often assisted by his neighbors; Peyster had one drink, defendant had one or two; defendant returned to Carpinteria, drove around looking for some young people who had been reported to be driving recklessly, but not encountering them, he returned to his home around 9:30. Peyster later accompanied defendant to the office of Mr. Thornburgh where he gave defendant an affidavit; Peyster died in November, 1942.

In many details the testimony of defendant differed from that of Ross. Defendant testified that Ross was acquainted with the vicinity in which the body was found and led the way to the scene, defendant following. In this defendant was corroborated by Mrs. Anderson who testified that as they neared the vicinity the sheriff's car was in the lead. (A picture taken of the two cars parked at the entrance of the dirt road showed the sheriff's car parked in front of defendant's car.) Defendant denied having made the statements on the evening of August 29th which were attributed to him by Wullbrandt, although he did not deny having talked with the latter; he denied having suggested to Leibler that he purchased the liquor around 8:00 o'clock, and testified that when he asked Leibler the time the latter stated that it was about 8:00 o'clock; he denied that he had abstracted the work order in the garage of Groves; denied that he had suggested August 24th as the date when Moore did the work on his car, and testified that the two looked at a calendar and were agreed as to the date; he denied that he saw footprints or that anything was said about footprints beside the body or that Ross had told him to stay away or had pushed him back; he denied having started toward the tire tracks on the road; he testified that there was rust in the rear compartment of his car and scratches on the fenders and a dent in the fender, and that he had been considering and discussing having the car repainted for a number of months; also that the mat in the car had been torn across in the summer of 1942 when he was carrying tubfulls of sand from the beach to his son's sand pile; that he had discarded a part of the mat on the beach and in July had thrown the remainder onto a rubber pile at Mr. Hart's place of business; he had broken the cardboard on one side of the luggage compartment while on a fishing trip and had thrown parts of it away; he explained the cleaning of the car, saying it was for the removal of dirt and sand preparatory to having it painted, and he explained that the scratches on the car had been there for some time and were showing rust; he had frequently driven through Mrs. Beckstead's lemon grove which he was managing for her; he did not deny having asked Ross whether Pinker had found hairs in the back of the car, and he explained this question by referring to questions asked by the district attorney at the time he made his statement: "Did you ever see any human hairs in the back of your car, female hairs? You don't know how any would get in there? Or how any blood would get in there?" which questions he had answered in the negative. He testified that he had interviewed the people from whom he had obtained statements pursuant to the request of Mr. Thornburgh that he obtain statements of any facts which he considered to be of importance.

Defendant's wife and her mother, Mrs. Beckstead, testified that defendant returned home about 9:30 the night of August 28th and did not leave the house until about 5:15 the following morning. Both testified that the mat was taken from the car and given to the rubber drive during the month of July, Mrs. Beckstead explaining how it had been torn in removing tubfulls of sand. They also testified that the cardboard had been taken out and had been used by children playing in the sandpile; both testified that defendant had been discussing for some time the repainting of his car. Defendant's father and mother, who lived in Laguna Beach, testified that defendant visited them for several days in the early part of August and told them he was planning to have his car repainted. Alfred Thurman testified that he had discussed with defendant the matter of the painting of the car; that the paint was badly oxidized and the car looked to be in need of paint. Robert Gorham testified that he examined defendant's car before it was painted, did some of the sanding, and that the paint was oxidized and the grill rusty. Mr. Long, a highway patrol officer, testified that betweeen one and three weeks prior to August 28th he and defendant were at Boverton's place of business and that it was then arranged for Boverton to paint defendant's car. Mr. Nelson, a highway police officer, testified that prior to June, 1942, defendant had mentioned to him that he intended to have the car painted.

Mr. Hart testified that in July, 1942, there was a rubber stock pile at his service station on which a large quantity of rubber was deposited; that about July 4th defendant drove onto the lot and deposited on the pile a rubber mat. Mr. McCloskey, employed at the station, testified that defendant drove onto the lot on that occasion, did not stop at the pump or receive any service, but that he did not see whether he went to the stock pile. Mr. Sample testified that on August 1st, at his service station, defendant had his car lubricated and the oil changed; that he, Sample, had entered the rear compartment several times to remove a squeak and to check the spare tire and there was then no mat in the car. He produced the work order dated August 1st. Mr. Kendrick testified that he had serviced defendant's car; that in the previous year he had entered the back to remove a squeak and that the cardboard on the side was ragged and torn, part of it having been removed. Mr. Maddox, called in rebuttal by the People, testified that after a barbecue in the summer of 1942 when defendant had carried two pigs in the back of his car, defendant complained that he had been unable to get the smell out of the car, said he had thrown the mat on his porch and intended to give it to the rubber drive; he advised defendant to use lye to remove the odor.

Mr. Laselle Thornburgh testified that he was consulted by defendant; that shortly after defendant had given his statement Sheriff Ross told him there was skin under the fingernails of Margaret Senteney; that he told Ross that there was no mark on defendant except a small mark on one finger and he asked Ross to examine defendant physically (this was not done); that Ross had made the same statement with respect to skin under the fingernails several times, the last time shortly before the trial. He also testified that at about the same time Pinker said to him that whoever killed Margaret Senteney would in all probability have blood on his or her clothing because the skin under her nails indicated her assailant had been scratched, and also the nature of her wounds was such that the probability was that blood from those wounds would have gotten onto the clothing of the assailant. Pinker said that even though any of defendant's clothes had been dry cleaned he could tell by the aid of chemicals whether there had been blood on the clothes before they were dry cleaned. Mr. Thornburgh suggested that defendant's clothes be examined. They were not examined. He also testified that he had told Undersheriff Ross that he had been informed that a sailor was known to have driven to Carpinteria August 28th and had stated that he was going out that evening with a "Churchy girl." (Margaret Senteney sang in a Church choir.) Mr. Thornburgh called Ross a number of times and was told that nothing had been done to check the information. After two and one-half weeks Ross told him that it had been checked and nothing had been discovered.

Ross testified that after he learned that defendant had interviewed Mr. Hart and Mr. Sample he also interviewed them, and that they both told him they did not know the dates of the incidents concerning which they had given statements. Both Hart and Sample testified that they had not made such statements to Ross.

Ross and Pinker both testified that they had not made any of the statements to Mr. Thornburgh as related in his testimony.

It will be seen from the foregoing recital that the evidence which tended most strongly to connect defendant with the crime was that of Dorothy Egan. This witness, as we have said, testified to no identifying numbers or marks on defendant's car, although she did show a familiarity with the grills and the position of the lights on 1938 and 1939 Fords. Her father had operated a garage. She did not testify to any reason for failing to advise the authorities for a period of eight years of the events to which she testified. Although the district attorney in his opening statement announced that he would produce a witness who saw Margaret Senteney get into defendant's car, the identity of the witness, although requested of the sheriff, was not disclosed to defendant's attorneys until she took the stand. Some time after her cross-examination was concluded, Mrs. Egan was recalled for further cross-examination. She testified that she had lived in or near Santa Barbara, and later Santa Maria, except for a period of some five months which she spent in Connecticut following her marriage in the Spring of 1946. It was developed, through efforts of defendant's attorneys, without information received from the prosecution, that for four months in 1946 Mrs. Egan was an inmate of a State Hospital in Connecticut as a mental patient, due, she testified, to a nervous breakdown attendant upon a condition of pregnancy.

With respect to the testimony of Mr. Fogliani, it should be mentioned that he testified that he was driving about 40 miles an hour on the morning of August 29th at the time he saw and recognized defendant driving on Toro Canyon Road. Before the grand jury he had testified that the car defendant was driving was blue. Upon the trial he testified that it was not blue or red or a bright color, and also that he could not identify the make of car.

The foregoing narration of the salient features of the evidence is introductory to the ground of appeal which we shall discuss first, namely, the claimed improper and prejudicial remarks of the deputy district attorney during his closing argument.

Defense counsel referred to the absence of proof of motive, stating: "I submit that there was no reason, that this was a crime without reason, without any motive, without any sense. A maniacal sort of thing, the work of some crazy man, without reason, not Leonard Kirkes. Some idiot. Makes more sense to me than—I don't know how else you can explain it. Think about a motive, you finally boil it down, I guess there wasn't any. Crazy act." Later: "If they have a case against this man, now, they had it eight years ago. You have had three District Attorneys in that period of time, good ones. Mr. Percy Heckendorf was the District Attorney then, later went up to be the Director of Vocational Standards of our State of California. Was there a reasonable doubt in the mind of Mr. Heckendorf, ladies and gentlemen? Was there a reasonable doubt about the guilt or innocence of this Defendant? It was his duty to prosecute all offenses in the County. Mr. Lawrence Parma succeeded Mr. Heckendorf, and he was an able District Attorney, so able in fact that he is still retained in the District Attorney's Office as a sort of special deputy. Was there a reasonable doubt in the mind of Mr. Parma, about the guilt or innocence of this Defendant, and was there a reasonable doubt in the mind of Mr. Licker of the guilt of this Defendant up until September of this year—about the guilt or innocence of this Defendant." Counsel commented upon the fact that Mrs. Egan had not made any report to the authorities until the month following defendant's indictment. She was not criticized for this, nor were her motives impugned, although it was pointed out that she did not know the license number of defendant's car nor anything about it which would enable her to distinguish it from other cars of the same model and color. Nothing was said by defense counsel which even remotely questioned the good faith of the district attorney or his deputy in the prosecution of defendant. Upon the contrary, it was conceded, in effect, that Mr. Licker had no doubt in his mind as to defendant's guilt at the time the prosecution was instituted. The argument of defense counsel as a whole was confined to a fair discussion of the evidence and the inferences that might be drawn therefrom.

In considering the point of misconduct it will be necessary to quote several passages from the closing argument of Mr. Weldon, the deputy district attorney.[1]

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[1] "I appear here today before you in a dual capacity. I appear here as a member of the District Attorney's office of this County of Santa Barbara, with which office I have been connected for 19 consecutive years, in charge of the Santa Maria office."

"As a member of the District Attorney's Office of this County I have taken an oath to prosecute cases to the best of my ability. If, during the conduct of this trial I have been—I have appeared to you to have been overly aggressive or tenacious, *then I say to you that I was following out that oath, that in all sincerity I believe, and I still believe and knew prior to the time that I became associated in this particular prosecution in the month of October, that this particular Defendant was guilty of this particular offense. I would not have been associated with the prosecution of this particular case unless I had so believed.* One of the mottos of my life to which I always adhere is this: 'This above all, to thine ownself be true and then thou canst not be false to any man.' I appear here, secondly, as advocate for one who is not here present, and absent, her voice having been stilled on the fateful night of August the 28th, 1942. *Remember that Margaret Senteney is not here present. Remember her in your deliberations as you have a right to do.* * * *"

"Remember that there was an eyewitness to this transaction, who could and did have the opportunity under oath on this witness stand to tell you of the facts and circumstances surrounding that woman's death. Remember that opportunity was given to him to tell you what her last words were and what conduct on her part merited this brutal and savage, pre-meditated, wilful, and deliberate murder on her part by him. Remember that he could have told you but he saw fit not to do so. He saw fit, by fabrication, by pointing out inconsistencies, and by falsehood, to lead you astray and to tell you that someone else,—perhaps two men—did it. But he didn't do it. He reminds me of a wolf at bay, also a man-killer, who will use every means at his

> disposal to escape capture and extermination."
>
> "I see. In order to bring these facts which were known by the Defendant and his counsel, did he get up at the outset of this particular case and say 'We are willing to stipulate to the following facts—that he owned—that Leonard Kirkes owned a 1939 Ford automobile; that at one time he had a mat similar to the mat in a 1939 Ford Coupe'. Did he stipulate to that—to those facts? No! The prosecution must put upon the proof of every fact necessary to sustain the burden of proof in this particular case. They are endeavoring and hoping in their own mind that we could not produce those facts so that they could secure a dismissal so this case would never reach a Jury. You noticed at the outset the attitude of Mr. Canfield. You noticed at the outset the difficulty we had with our witnesses, over objection after objection, with reference to Leal and to those other witnesses in the early days of this trial. Those facts were subsequently admitted to be true and why did the Defendant wish to keep them from you at that particular time? The trial of of a case of this nature—
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> "Mr. Canfield: Just a moment. We don't like to interrupt but the actions of counsel cannot be thrown upon this Defendant and that is not a proper argument. The Court: They have no bearing. Mr. Weldon: I have a right to argue this case—Mr. Canfield: When a prosecutor of many many years experience comes into Court and makes such statements—The Court: Well, the attitude of counsel is of no importance in the materiality in Court. Mr. Weldon: The trial of a case of this nature is analogous and similar to the playing of, say, a ball game, or football game. There are two opposing sides. They have umpires and the spectators pass ultimately upon the merits of the game. So it is with a law suit. * * *"
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> "The cause or reason upon which the intent of a Defendant is founded is never indispensible for a conviction. We have been asked the question, what was the motive in this particular case? Once a murder or a crime is brought home to the Defendant, the murder—the motive, becomes unimportant and immaterial, and the Court will so instruct you, but I will tell you and you have a right, as the Court will instruct you, to make inferences or deductions from the evidence. *I will tell you what the motive in this case is.* Mr. Westwick told you that this girl was in a hurry to get to work. She was proceeding toward that work. She was hailed by a car and she placed her hand in this position (indicating) to see who was in that car. She found out who was in that car. It was this Defendant, Leonard Kirkes, a Police Officer who knew her, a Police Officer who was, as counsel for defense said, the only Police Officer in the town of Carpinteria, a man who belonged to the same church that this girl did, a man in whose home this girl had acted as a baby-sitter. Would she hesitate to get into this car with such a man? She got in that car with him, there is no doubt about that, and then what happened? *Immediately after she got into that car, and you have a right to infer that, from the evidence in this case, as I am now inferring it to you, from the evidence in this case, improper advances were made to her. True, it had not reached the state of sexual molestation. She told him, 'If I ever get back I will tell my father. I will tell your wife. You are a Police Officer.' And what could Kirkes do under the circumstances? It meant disaster for him if that girl ever got back to her home alive. It meant disaster. It meant her death at that time. I mean that! I mean that! And how did she come to her death? She had with her a coat, a purse, and she was dressed. When she got out of that car—and she jumped out—the car was probably stopped in order for him to accomplish what—accomplish the purpose that was in his mind. She jumped out of that car and he followed her and grabbed her and she lay prone upon the ground and left her coat and purse in that car at that time. He throttled her and strangled her in the manner described to you by Mr. Licker. To be sure that she was dead at that particular time, either in her dying moments or when she had that death rattle in her throat, he wanted to be sure she never got back to Carpinteria, and what did he do? He brutally fractured her skull. That can be inferred from the evidence in this case.*"
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> [And in speaking of the testimony of Dorothy Egan]: "Their attempt to belit-

[1] Those portions of the argument which we have quoted were improper for one or more of several reasons. They appealed to the sympathy of the jury for the unfortunate victim of the crime; they characterized the defendant as "a wolf at bay"; they drew imaginary and fanciful inferences as to the circumstances of the crime

not justified by any evidence in the record; it was asserted as a fact that Dorothy Egan would have met death at the hands of defendant if she had made statements against him before he had been incarcerated; and finally, in a manner most improper and harmful, they threw against the defendant the weight, not only of the prosecutor's belief in the guilt of the defendant, but also the blunt assertion that "I * * * *knew* prior to the time that I became associated in this particular prosecution in the month of October, that this particular defendant was guilty of this particular offense." The excerpts we have quoted are sufficient to show the impassioned nature of the argument. It was not only positive and forceful in its assertions, but it was calculated to appeal to and arouse the sympathies and passions of the jury. The particular statements which we deem to have been especially harmful to the defendant should be considered with relation to the atmosphere that was created by the argument as a whole. The appeals to passion and prejudice could not have failed to render the minds of the jurors more receptive to the more harmful assertions which are underscored in the excerpts, and need not be repeated.

[2] We will consider first the statement of the deputy district attorney in the passages first quoted. He reminded the jury that he had been in the district attorney's office for 19 years in order to give added weight to the remarks he was about to

tle her testimony by casting aspersions upon her character, upon her mind, and upon her integrity, are analogous to a similar situation that occurred more than 1950 years ago about this season of the year, when a woman, also with child, was belittled and humbled by a populace that had no place for her to rest, in their minds or in their hearts or in their homes. I say, shame upon counsel, I say shame upon counsel for this unwarranted attack upon the integrity of this young woman. If the evidence discloses that she was not mentally competent at the time she saw Kirkes on August 28th, 1942, that would be one thing to bring out but to bring up an event that took place more than three years after and while she was in a delicate condition and to hold her up to ridicule in this Court, I say, shame! The court will instruct you that you have a right to make inferences and deductions from the evidence. You have a right to infer the following from the testimony of Dorothy Egan: First, that she was seventeen years of age when the incident she testified to happened. Second, that the Defendant had not been apprehended in this case until September 1950. *You have the right to infer that this girl waited for her own safety until this Defendant was apprehended, until he was indicted by a Grand Jury of this County, until proceedings were had against him, to bring him to justice, before coming forward, because if she had come forward, with the knowledge that that man had of every portion of the evidence in this case, her life wouldn't be worth that.*"

"Had Leonard Kirkes performed his obligations which he owed to society and lived uprightly and in accordance with the law, this case and its attending circumstances would never have occurred. But Kirkes saw fit to disregard the obligations he owed to society and demonstrate to the world that he possessed a heart fatally bent on mischief. The kinder and nobler feelings of our nature found no lodgment in his heart. He has wickedly imbued his hand in the blood of a fellow man and the blood of that fellow man now cries out from the earth against him. He has taken the life of a fellow creature and sent a creature bearing God's image unbidden into his presence. Remember, he has taken all that can never be restored except by God alone. He took away from Margaret Senteney her most valuable possession. All that a man has, will he give for his life. He gave Margaret Senteney no chance for capitulation. Not a moment of time in which to say, 'God be merciful to me.' But robbed her in a moment of her life. Sent her unannointed, into an undiscovered land, closed her eyes forever to the pleasant and endearing scenes of this earth, the mountains, the valley, the hills, the ocean, the flowers, the sunset, the moon and the stars, the sight of her father and her loved mother. There is a law that was penned more than three thousand years ago, that has come down the long track of time and is hoary with age: 'Thou shalt not kill.' The penalty for that violation was penned about the same time: 'He that shedeth man's blood by man shall his blood be shed." Leonard Kirkes, you have violated that law and a dreadful penalty has attached to your violation."

make. His statement as to his belief and his knowledge that the defendant was guilty, followed shortly after his introductory remarks. That the statements to which we have called particular attention were highly improper is not open to question. Arguments of prosecutors which were not justified by the record, assertions outside the record which were harmful to the defendant, and declarations intended and calculated to impress upon juries the belief of the prosecutor of the guilt of the accused, have been held improper times without number.

In a large group of cases the misconduct consisted of statements of facts not in evidence made by the district attorney in his argument to the jury. People v. Mitchell, 62 Cal. 411; People v. Bowers, 79 Cal. 415, 21 P. 752; People v. Ah Len, 92 Cal. 282, 28 P. 286; People v. Valliere, 127 Cal. 65, 59 P. 295; People v. Sing Lee, 145 Cal. 190, 78 P. 636; People v. Cook, 148 Cal. 334, 348, 83 P. 43; People v. Henderson, 4 Cal.2d 188, 192, 48 P.2d 17; People v. Brown, 81 Cal.App. 226, 239–244, 253 P. 735; People v. Westcott, 86 Cal.App. 298, 319, 260 P. 901; People v. Stafford, 108 Cal.App. 26, 290 P. 920; People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867. In another group of cases the misconduct consisted of statements in final argument which indicated the district attorney was convinced of the guilt of defendant, but also indicated this conclusion was not based solely upon the evidence introduced. People v. Podwys, 6 Cal.App.2d 71, 44 P.2d 377; People v. Edgar, 34 Cal.App. 459, 467, 167 P. 891; People v. Hidalgo, 78 Cal.App.2d 926, 938, 179 P.2d 102; People v. Brown, 81 Cal.App. 226, 241, 253 P. 735; People v. Hale, 82 Cal.App.2d 827, 832, 187 P.2d 121. Other California cases involved appeals to passion and prejudice, repeated asking of questions relative to objectionable and prejudicial matter, and persistent improper comment within the hearing of the jury. People v. Lee Chuck, 78 Cal. 317, 327, 20 P. 719; People v. Mullings, 83 Cal. 138, 23 P. 229; People v. Devine, 95 Cal. 227, 231–234, 30 P. 378; People v. Wells, 100 Cal. 459, 34 P. 1078; People v. Derbert, 138 Cal. 467, 71 P. 564; People v. Derwae, 155 Cal. 592, 102 P. 266; People v. Fleming, 166 Cal. 357, 377–381, 136 P. 291; People v. Tufts, 167 Cal. 266, 271, 139 P. 78; People v. Anthony, 185 Cal. 152, 196 P. 47; People v. Braun, 14 Cal.2d 1, 92 P.2d 402; People v. Grider, 13 Cal.App. 703, 709, 110 P. 586; People v. Pang Sui Lin, 15 Cal.App. 260, 114 P. 582; People v. Terramorse, 30 Cal.App. 267, 271, 157 P. 1134; People v. Irby, 67 Cal.App. 520, 528, 227 P. 920; People v. George, 72 Cal.App. 124, 128, 236 P. 934; People v. Ephraim, 77 Cal.App. 29, 40, 245 P. 769; People v. Simon, 80 Cal.App. 675, 252 P. 758; People v. Angelopoulos, 30 Cal.App.2d 538, 549, 86 P.2d 873; People v. Freitas, 34 Cal.App.2d 684, 94 P.2d 397; People v. Duvernay, 43 Cal.App.2d 823, 111 P.2d 659; People v. Wynn, 44 Cal.App.2d 723, 731, 112 P.2d 979; People v. Lynch, 60 Cal.App.2d 133, 141, 140 P.2d 418; People v. Williams, 104 Cal.App.2d 323, 231 P.2d 554.

[3] Many of the cases listed above are readily distinguishable from the present case upon their facts, but they are consistent in holding prosecutors to their duty to refrain from conduct which would deprive the accused of a fair trial. They state a principle of justice from which there should be no departure. Where it appeared from the record that the jurors could have reasonably entertained a doubt as to the defendant's guilt and the misconduct of the prosecuting attorney might well have influenced the result, our courts have reversed convictions so obtained. In all the reported cases there will be found no exception to this practice.

[4] With respect to argument to the jury the improper statements that have been condemned by the courts have varied so widely in context, and the circumstances in which they were uttered have been so dissimilar, as to require that each case be considered on its own facts, under the general principles by which the propriety of argument is to be judged and questions of prejudice determined. Those principles have been stated innumerable times and with great emphasis, but too often go unheeded.

In Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 566, 87 L.Ed. 734, the court said: "The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

[5, 6] The closing argument of the deputy district attorney must be considered as coming from one who by virtue of his office and as a representative of the State wields great power and influence. A statement of the prosecutor to the jury that he believes the defendant to be guilty is weighted with the authority of his office. It is a declaration of a conclusion he has reached in his official capacity and cannot fail to make an impression upon the minds of jurors. It is a breach of the duty of fairness he owes to the defendant and the court, whether it is done in an excess of zeal, without appreciation of its impropriety, or with the intention of taking an unfair advantage. The result is the same in either case. It means that the district attorney has constituted himself a judge of the facts and has passed on to the jury his own conclusion, fortified by his experience and knowledge in such matters and by the public confidence and the prestige which he enjoys. Upon many occasions the courts have expressed strong disapproval of such unfair practices and have held it ground for reversal. We repeat the oft quoted statement in People v. Edgar, 34 Cal.App. 459, 468, 167 P. 891, 894: "When the district attorney declared that he would not prosecute any man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion, formed from deductions made from the evidence adduced at the trial, that the defendant was guilty of the crime charged. People v. Rogers, 163 Cal. 476, 126 P. 143. But his declaration to the jury that he would not prosecute any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear, and which perhaps could not have been shown, in evidence." See also People v. Podwys, 6 Cal.App.2d 71, 44 P.2d 377.

[7] Here the deputy district attorney asserted not only that he *believed,* but that he *knew, before he became associated in the prosecution,* that defendant had committed the crime. And, as we have mentioned, this came immediately after he had laid a foundation by mentioning his 19 years of service in the office of the district attorney, and by giving what the court in People v. Edgar characterized as a "testimonial of the district attorney to his own integrity". He knew all about the case and knew defendant had committed the crime. How can we have any assurance that the jurors, or some of them, did not come to the belief that if Mr. Weldon said it was so, it must be so?

[8] We have mentioned that defense counsel in argument characterized the murder as "a maniacal sort of thing, the work of some crazy man, without reason, not Leonard Kirkes, some idiot" etc. The deputy district attorney in reply said: *"I will tell you what the motive in this case is."* He then proceeded to draw upon his imagination and reconstruct the crime in a manner that would furnish a motive which he argued would render it more reasonable to believe that defendant was the perpetrator. If there had been some evidence of attempted sexual molestation, a motive for the murder could have been inferred from that fact. But there was no such evidence, nor, it would seem, any evidence of motive from the manner in which the murder was com-

mitted, except a fiendish desire to take a human life. Nevertheless, the deputy district attorney accused defendant of having made improper advances to the deceased, proceeded then to invent threats upon her part to expose him, thence to defendant's fear of exposure and a realization that Margaret Senteney must never be allowed to return to Carpinteria alive. "It meant disaster. It meant her death at that time. I mean that. I mean that," he said. Many intangible theories as to motive and the circumstances of the crime might occur to anyone who had heard the evidence, but they would have been speculative and unsupported by the evidence or reasonable inferences from the circumstances in evidence. Although the deputy district attorney asserted that the supposed facts could be inferred from the evidence, this shallow statement could not disguise the fact that his description of the crime was no more than a statement of his belief. It no doubt was considered by the jury in connection with the previous assertion that the deputy district attorney believed and knew the defendant to be guilty. The jury could reasonably have believed that the assertions, which went far beyond any evidence in the case, were based upon information or knowledge of facts that the speaker possessed which had not been developed in the evidence. In this respect they were more than assertions of a mere theory evolved from the evidence. In their very nature they implied there was some additional basis for the statement, "I will tell you what the motive in this case is."

[9, 10] We turn now to the prosecutor's discussion of the testimony of Dorothy Egan. First, we remark that the criticism of defense counsel, who were put to shame for "this unwarranted attack upon the integrity of this young woman," was wholly unjustified. The witness had been treated with respect and consideration. After her cross-examination had been completed it was learned by defense counsel that she had been confined in Connecticut as a mental case for a period of about four months. She was recalled for further cross-examination and when questioned on the subject admitted that she had been so confined during pregnancy. This was characterized as "their attempt to belittle her testimony by casting aspersions upon her character, upon her mind, and upon her integrity." The statement that followed, as well as the entire criticism of counsel, was an appeal to the passion and prejudice of the jury, and we may add that, in our opinion, if there was to be criticism of counsel with respect to this witness it could more reasonably have been directed toward the office of the district attorney, than to defense counsel. The name of this witness was withheld from defendant's attorneys, although they requested it when they learned the district attorney claimed to have a witness who would testify that Margaret Senteney was seen to enter defendant's car. Inasmuch as it no doubt was known to the district attorney that the witness had been confined in a mental institution, fair play would seem to have required that this fact should not have been concealed from the defendant, and that he be given some opportunity to investigate the hospital records, and to obtain any evidence that was available as to the nature of the mental condition and stability of the witness.

[11] But far more serious was the explanation that was given by the deputy district attorney for the silence of the witness for a period of eight years. She had not attempted to explain it. She had not been accused by defense counsel of giving wilfully false testimony, nor had it been suggested that she had any wrong motive or purpose to serve in testifying against the defendant. It had been argued, and quite properly, that she did not recognize defendant as the driver of the car and that she had not stated any reason for distinguishing the car which she saw from any other car of the same make, model and color. Nevertheless, the deputy district attorney asserted with much assurance that if the witness had come forward before the defendant was taken into custody she would have met death at his hands, declaring, "her life would not be worth that." He said: "You have the right to infer that this girl waited for her own safety until this defendant was apprehended." This was not a proper inference from the evidence, nor any more than a conjecture which could not properly be considered for any purpose. There was no evidence that any witness had been threatened, nor that Dorothy Egan had been in fear. Here, again, the deputy district attorney asserted a fact that was not in evidence, nor to be inferred from the evidence. It was of the pattern of his earlier statements which implied that he had knowledge or information of facts in addition to those that had been presented to the jury as evidence; it was inexcusable and strongly prejudicial.

We shall not give special notice to the impassioned appeal in the closing passages of the argument further than to say that they help to reveal the poisonous atmosphere which was created by the argument as a whole.

It having been established that the deputy district attorney was guilty of serious misconduct, the only remaining question is whether the misconduct constituted such a serious invasion of the rights of the defendant as to amount to a miscarriage of justice.

With respect to this matter the People urge two grounds, upon either of which it is contended defendant is precluded from complaining of misconduct. It is said that the statements of the district attorney were invited by the argument of counsel for defendant. We cannot agree. Not one word had been spoken which was critical of the motives or lack of good faith of the district attorney or his deputy. The fact that former district attorneys over an eight-year period had not instituted a prosecution, while commented upon by defense counsel, had nothing to do with the evidence to be discussed in the arguments. It was a patent fact, conceded by defense counsel, that the present district attorney considered the evidence to be sufficient to warrant a prosecution.

[12, 13] It is the privilege of defense counsel to go farther afield in argument than the prosecutor may go. Their theories and their statements of opinion as spokesmen for the defendant have little weight as compared with similar statements of the district attorney. The reasons for this have been previously discussed. It is an untenable theory that purely argumentative statements of defense counsel "open the door" to unrestrained and manifestly improper and unfair reply by the district attorney. How, in the name of justice, can the blame here be shifted from the shoulders of the guilty to those of the innocent! The improper assertions of deputy district attorney Weldon cannot be justified or excused as having been invited by the argument of defense counsel, or as fair or legitimate reply thereto. If we were to hold otherwise we would be sanctioning chicanery and the invasion of the right of accused persons to an intolerable degree.

[14, 15] The second ground urged by the People is that defendant did not object to many of the statements of the deputy district attorney with requests for admonishment of the prosecutor, and cautioning of the jury to disregard them. In order to give the argument validity it is claimed that if the jurors had been told to disregard the statements they would have done so and their minds would have been as free from influence as if the improper statements had not been made. We are convinced that the harm could not have been undone by telling the jurors to forget what they had just heard and to free their minds of any impressions the statements had created. In People v. Ford, 89 Cal.App.2d 467, 470, 200 P.2d 867, 869, we said: "As a general rule, if the harmful effect of improper statements could probably have been removed by an admonition to the jury, failure to request such admonition is regarded as a waiver of the right to rely upon the statements as misconduct. People v. Simon, 80 Cal.App. 675, 678, 679, 252 P. 758, and many cases cited. Upon the other hand, where the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal in cases where the jury has been admonished, People v. Braun, 14 Cal.2d 1, 8, 92 P.2d 402; People v. Derwae, 155 Cal. 592, 597, 102 P. 266; People v. Hidalgo, 78 Cal.App.2d 926, 948, 949, 179 P.2d 102; People v. Duvernay, 43 Cal.App. 2d 823, 828, 111 P.2d 659; People v. Edgar, 34 Cal.App. 459, 471, 167 P. 891, as well as in cases where no objection was made or admonition requested on behalf of the ac-

cused. People v. Wynn, 44 Cal.App.2d 723, 732, 112 P.2d 979; People v. Podwys, 6 Cal.App.2d 71, 76, 44 P.2d 377; People v. Stafford, 108 Cal.App. 26, 29, 290 P. 920; People v. Simon, 80 Cal.App. 675, 679, 252 P. 758; People v. George, 72 Cal.App. 124, 131, 236 P. 934. In either situation, where the case is closely balanced and guilt has not been so clearly established as to render it improbable that the harmful effect of the misconduct may have turned the scales against the accused, such misconduct has consistently been deemed ground for reversal. People v. Hale, 82 Cal.App.2d 827, 834, 187 P.2d 121; see also, People v. Lynch, 60 Cal.App.2d 133, 145, 140 P.2d 418; People v. Fleming, 166 Cal. 357, 381, 136 P. 291, Ann.Cas.1915B, 881; People v. Angelopoulos, 30 Cal.App.2d 538, 549, 86 P.2d 873." Clearly it is the exception, rather than the rule, which applies here. The assertions of the deputy district attorney cut deep. True, the court, if requested, should have informed the jury that the statements should not have been made and were to be disregarded, but the fact would remain that they had been made, and the court in its admonitions could not, of course, have told the jury that the sttaements were untrue. Furthermore, the misconduct did not consist of only one statement, but a series of assertions which ran throughout the entire argument, not all of which, we may say, have been fully quoted. It is not to be overlooked that when defense counsel interrupt the argument of a prosecutor with objections it is a confession that the defendant has been hurt. It becomes a question of judgment whether it is the better course to continually object, and thus magnify the concern of counsel, and possibly incur the displeasure of the court or jury, or by remaining silent to attempt to minimize the harmful effect of argument to which objection could properly be made. The problem becomes more difficult and the harm more serious when the objectionable argument is made in the closing address of the prosecutor, as it was here.

[16] One of the most damaging statements—the claimed knowledge of defendant's guilt—was made at the very beginning of the argument. Many others intervened before the assertion that defendant would have taken the life of Dorothy Egan to prevent her testifying against him. Objections would have had to run throughout the entire argument and could easily have placed defense counsel in an embarrassing position before the jury. It is the duty of the court to take the initiative in such matters. We are considering persistent and repeated improper statements of the prosecutor upon different matters. It would be unfair to compel the defendant to continually register objections, and unfair to penalize him if he failed to object. Our holding, however, is that admonitions would have been ineffectual to remove the harmful effect of the improper assertions and argument of the prosecutor.

The court gave an instruction at the request of the People,[2] and refused defendant's requested instruction.[3] Section 2061, Code of Civil Procedure, provides that the jury shall be instructed: "* * * on all proper occasions * * * 2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds;" and "that in criminal cases guilt must be established beyond reasonable doubt". A number of proper instructions were given on the doctrine of reasonable doubt and the rules relating to circumstantial evidence. The questions are presented whether it was error to give the instruction first noted below and to refuse defendant's requested instruction, and if so, whether the error was cured by the instructions on reasonable doubt and circumstantial evidence.

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[2] "The testimony of one witness entitled to full credit is sufficient for the proof of any fact *and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite state of facts, if, from the whole case,* the jury believes that *the greater weight of the evidence,* considering its reliability and the credibility of the witness, is on the side of the one witness as against the greater number of witnesses."

[3] "You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence."

[17, 18] The instruction given is a departure from the language of the code section. The latter declares that the jury are not bound to decide in conformity with the declarations of any number of witnesses *which do not produce conviction in their minds* against a lesser nnmber or against a presumption or other evidence *satisfying their minds.* The instruction states that a fact may be proved by the testimony of a single witness which is opposed by that of a greater number of witnesses if the jury believes the testimony of the single witness to be entitled to the greater weight. This is a proper rule in a civil case where only a preponderance of the evidence is required to establish an essential fact. It is not a proper statement in a criminal case unless there is clearly read into it by reference to other instructions the rules pertaining to the sufficiency of circumstantial evidence and reasonable doubt. The People say that the jury must have considered the questioned instruction with the instructions on circumstantial evidence and reasonable doubt and reconciled them so as to bring about consistency and avoid confusion. We express no opinion as to whether the argument would have had validity if the instruction that was given had omitted the words (referring to the testimony of a single witness) "*and would justify a verdict in accordance with such testimony, even though a number of witnesses on the other side might testify to an opposite set of facts.*" Now what would it mean to jurors to be told that they could base their verdict upon the testimony of a single witness if they believed that the greater weight of the evidence was on the side of such witness? In a civil case if there was a certain determinative fact in evidence upon which a verdict could be based there would be reason for such an instruction, or at least no harm in it. But if there was no such single fact to be proved, the instruction would be confusing and improper. Long v. Standard Oil Company, 92 Cal.App.2d 455, 462, 207 P.2d 837. In the present case there was no such single determinative fact, nor can there be in a case made up of many incriminating circumstances. Here there were a great number of disputed facts upon which the People relied. There was the testimony of Dorothy Egan that she saw Margaret Senteney enter defendant's car, the testimony of Fogliani that he saw defendant driving away from the vicinity where the body was found early in the morning following the murder, the testimony of Sheriff Ross that defendant walked upon and obliterated footprints near the body, and the testimony of Leibler that defendant endeavored to have him make false statements as to the hour when the whiskey was purchased. The jury may have believed that the testimony of Dorothy Egan, corroborated by that of any one or more of the other witnesses just named, would be sufficient to justify a verdict of guilty, and that without such corroboration her testimony would be insufficient. Under the instruction, belief that the testimony of Dorothy Egan was entitled to greater weight than that of the defendant, and belief that the testimony of any one or more of the witnesses, Fogliani, Ross and Leibler, thought to be essential, was entitled to greater weight than the testimony of defendant, would have justified a verdict of guilty.

[19–21] The People say that the instruction in question had application only to the matter of the credibility of witnesses, and would have been so understood by the jury. This not only attributes to the lay mind too great an ability to draw fine legal distinctions, but it suggests a distinction which eludes us. How could it have related only to credibility when the jury was told that a *verdict* could be based upon the testimony of a *single witness if from the whole case* it was believed to have *greater weight than the testimony opposed to it.* By this statement the instruction was clearly made to relate to the weight of the evidence—to the "whole case"—and was brought into direct conflict with the instructions on reasonable doubt and the sufficiency of circumstantial evidence. Where the evidence is entirely circumstantial, each circumstance which is deemed by the jury to be essential to the establishment of guilt must be established beyond a reasonable doubt. It is not sufficient that each of them be established by a preponderance of the evidence. It is of course impossible to know what circumstances to which the witnesses testified were deemed essential to justify a verdict of guilty. The rule that instructions are to be considered as a whole does not remove the vice of the instruction that was given. It was entitled to the same consideration as the instructions on reasonable doubt and circumstantial evidence. It created an irreconcilable conflict. It is true the jury was told repeatedly that guilt must be established beyond a reasonable doubt, but at the same time it was given another formula for determining what evidence could form the basis of a verdict, namely, the testimony of a single witness which, upon the whole case, was believed to be entitled to greater weight than the evidence opposed to it.

The People have cited People v. Ames, 61 Cal.App.2d 522, 143 P.2d 92, in which the court said of a similar instruction that although it was erroneous there was only a slight possibility that it misled the jury. The question whether the jury may have been misled by conflicting instructions is not an abstract one. It must be related to the evidence. Ames was not a case of circumstantial evidence. The clear opportunities for harmful application to the evidence which we have pointed out were not present in that case.

[22] If, as we must presume, the erroneous instruction was given the same consideration as each of the correct ones, the jury would inevitably have been confused, if not actually misled.

It was said in People v. Cornett, 33 Cal. 2d 33, 41, 42, 198 P.2d 877, 883, in reversing the judgment: "Where it is impossible to determine which of inconsistent instructions were followed by the jury, conflicting instructions have been held to constitute reversible error. * * * In view of the evidence it is impossible to determine, therefore, whether or not the jury reached its verdict on the basis of the correct instructions." It is manifestly impossible to know whether the jury, in finding Kirkes guilty, applied the false rule that was given them, or ignored it.

[23] A comprehensive review of the cases convinces us that it would be contrary to firmly established precedent to hold that the judgment should be affirmed, notwithstanding the grievous error in the instructions. People v. Campbell, 30 Cal. 312; People v. Valencia, 43 Cal. 552; People v. Anderson, 44 Cal. 65; People v. Wong Ah Ngow, 54 Cal. 151; People v. Messersmith, 57 Cal. 575; People v. Bush, 65 Cal. 129, 3 P. 590; People v. Williams, 73 Cal. 531, 15 P. 97; People v. Thomson, 92 Cal. 506, 28 P. 589; People v. Marshall, 112 Cal. 422, 44 P. 718; People v. Westlake, 124 Cal. 452, 57 P. 465; People v. Ford, 138 Cal. 140, 70 P. 1075; People v. Maughs, 149 Cal. 253, 86 P. 187; People v. Roe, 189 Cal. 548, 209 P. 560; People v. Dail, 22 Cal.2d 642, 140 P. 2d 828; People v. Cornett, 33 Cal.2d 33, 41, 198 P.2d 877; People v. Hardy, 33 Cal.2d 52, 198 P.2d 865; People v. Neetens, 42 Cal. App. 596, 184 P. 27; People v. Reese, 65 Cal.App.2d 329, 345, 150 P.2d 571. See also, Westberg v. Willde, 14 Cal.2d 360, 371, 94 P.2d 590; Akers v. Cowan, 26 Cal. App.2d 694, 699, 80 P.2d 143, citing many cases.

[24, 25] Defendant complains of error in the receipt of testimony of the expert witness Pinker. We shall discuss the matter briefly. This witness, after qualifying as an expert, compared an enlarged photograph of the marks on the limbs of the deceased with a part of a rubber mat taken from a 1939 Ford automobile, and testified that the marks could have been made by such a rubber mat. He testified that a tear such as the one found in the dress of the

deceased could have been made by the latch on the luggage compartment of defendant's car, and that a grease spot on her dress could have been caused by grease which he found on the latch; also that only a few of a great many cars he had examined had grease upon the locks of their luggage compartments. All this was called expert testimony, but none of it was expert testimony. The witness was in no better position, nor better qualified to draw conclusions from the facts in evidence, than were the jurors. This witness produced rubber mats taken from a number of different makes of automobiles, all of which differed in pattern from that of a 1939 Ford mat. Over defendant's objections these several mats were received in evidence. The theory under which they were offered and received was that they merely illustrated the expert opinions of the witness. We are at a loss to discover what opinion they illustrated. If it was an opinion based on a comparison of the photographs with the piece of the Ford mat it was not an expert opinion, nor did the other mats tend in any manner or degree to illustrate anything to which the witness had testified. Although the testimony was admitted under an untenable theory, it was not inadmissible. The People having shown that the marks on the limbs of deceased could have been made by a 1939 Ford mat, were privileged to prove that no other automobile came with a mat of the same pattern, or to go as far in that direction as it was possible to go, by the production of as many other mats as were available. Defendant complains that the evidence with relation to the other mats was introduced for the purpose of strengthening the claim of the People that he had a rubber mat in his car at the time of the murder. We do not follow this argument. The evidence only tended to show that the marks upon the limbs of the deceased could not have been made by the types of mats that were taken from other cars. An additional reason for denying the claim of prejudice is that it was shown on cross-examination of the witness Pinker that mats which came in 1938, 1940, 1941 and perhaps 1942 Fords were the same as those that came with the 1939 models.

[26] Another claim of error is that the court unduly restricted the cross-examination of Sheriff Ross. He was requested to name the witnesses and persons with whom he had recently discussed the case. Objections of the People were sustained. Even if greater latitude should have been allowed in the cross-examination for the purpose of showing the activity of the sheriff, who was an important witness, and possible bias upon his part, as to which no expression of opinion is necessary, the cross-examination was not restricted to any extent that was harmful to the defendant. It was shown that the sheriff had been extremely active, diligent and interested, to the extent of not only discussing the case with all the witnesses who testified for the People, but also with a number of those who testified for the defendant.

[27] The witness Leibler was asked on cross-examination whether in his liquor business he had been under investigation by the authorities, including the sheriff. Objections to this line of questioning were sustained and the rulings are assigned as error. Inasmuch as the testimony of this witness was in direct conflict with that of the defendant, and he had been interviewed by the sheriff concerning his testimony, the utmost liberality should have been permitted in his cross-examination. It might possibly have developed facts which tended in some degree to weaken his testimony. However, it was a matter of no great importance.

[28] Defendant assigns error in the giving of an instruction which he designates "an instruction placing duty on jury as law enforcing agents." The admonition to which the criticism is directed is thus expressed: "The importance of your duties requires that you consider the right of the People of the State of California to have the law properly executed * * * you should also ever keep in mind the importance to the accused of the result of your deliberations and be just to him, as well as to the People of the State of California." This thought was elaborated upon somewhat. It was merely an innocuous, and we think redundant, platitude that might have been dispensed with, but was harmless.

[29] The court gave an instruction that there is no limitation of time within which a prosecution for murder must be commenced, and should have omitted another instruction which added that if defendant's guilt was established beyond reasonable doubt the jury should so find "irrespective of the fact that such evidence discloses that there has been a lapse of approximately eight years between the death of Margaret Senteney and the prosecution of the defendant." It is possible that the jury may have been led to minimize the lapse of time in considering the accuracy of the memory of witnesses.

[30] Two alternate jurors were selected after the regular jury had been impaneled. One of them served in the place of a juror who was excused for illness. After the two alternates had been examined on voir dire, defense counsel claimed the right to exercise two challenges "against the chair of one alternate only." The court stated that if they were exercised the challenges should be used, one against one alternate, the other against the second alternate. Defendant did not challenge either alternate, and the court did not make a ruling, although it intimated what the ruling would be if challenges were exercised. There was nothing in this procedure which prejudiced defendant in any manner or which justifies his attack upon it. Under the circumstances there is nothing to review.

Having considered all the points urged by defendant which are deserving of special notice there remains the question whether the misconduct of the district attorney and the error in giving the instruction first discussed deprived defendant of a fair trial and constituted a miscarriage of justice. We are obliged to answer these questions in the affirmative.

[31] Where the rights of the defendant have been invaded to the extent shown by what we have previously said, it is necessary that we should critically examine the entire evidence in order to satisfy ourselves as to the strength of the case of the People. We have not attempted to state all the evidence which tended in some degree to establish the guilt of the defendant. In minor respects the case of the People could have been supplemented and somewhat strengthened, and also additional facts might have been stated which tended to indicate that defendant was not the perpetrator of the crime. But further detail would only have lengthened our opinion without adding anything substantial to our outline of the evidence.

[32, 33] There was ample evidence to establish the guilt of the defendant. Although there was no direct testimony that he had a rubber mat in his car at the time of the murder, it is clear that if the jury was convinced that Margaret Senteney entered defendant's car, as related by Dorothy Egan, and if it was believed that defendant did have a rubber mat in his car at that time, it would have been difficult indeed to reconcile these facts with defendant's innocence. But there was other evidence to be weighed against that of the People. In calling attention to it we intend no expression of opinion as to its weight. Our references will be to some features of the evidence which it was the duty of the jury to weigh and consider. Eight years had elapsed since the murder. Dorothy Egan did not recognize defendant as the driver of the car that passed by her with its lights burning, and she did not testify to any identifying feature of the car which would distinguish it from any other gray 1939 Ford business coupe. The witness Fogliani testified he was driving 40 miles an hour when he saw defendant early Saturday morning. His testimony was conflicting and uncertain as to the color of the car. The identification was not made under circumstances which eliminated the element of mistake. We have already stated the evidence with respect to the disposition of the rubber mat as claimed by defendant and his witnesses; also the testimony touching defendant's statements to others with respect to his intention to have his car repainted, including the testimony that he made an arrangement for the repainting some weeks prior to the date of the murder. Other details of the evidence have been stated. In one view, defendant's conduct in contacting the witnesses Moore and Leibler could have been regarded as indicating a consciousness of guilt. In another view, those efforts could

have been regarded as the actions of one who knew he was under suspicion and in need of evidence to establish his innocence. Defendant realized he was under suspicion. Undoubtedly it was fear that induced him to go to Moore seeking evidence that the mat was missing from his car prior to the date of the murder, although there was available to him the evidence of numerous witnesses to the effect that the mat had been removed from the car some time in July. It was fear that led him to go to Leibler in order to obtain evidence tending to prove that he had driven down the highway Friday night and not toward the beach as the Wullbrandts had testified. There was room for doubt whether the fear which defendant manifested was actuated by a consciousness of guilt or by his knowledge of circumstances which had placed him under suspicion. Although there was ample circumstantial evidence of guilt, it was not overwhelming and it fell considerably short of being conclusive. Much depended upon the credibility of witnesses. After a careful consideration of the evidence we are of the opinion that if the jurors, or any of them, after judging of the credibility of the witnesses and the weight of their testimony, had entertained a doubt as to defendant's guilt, it could not be said that it was an unreasonable doubt. If they had not been satisfied with Dorothy Egan's testimony, if they had been in doubt as to the reliability of her identification of defendant's car, or if they had entertained a doubt that the rubber mat was in defendant's car on the date of the murder, they would have been warranted in concluding that guilt had not been established beyond a reasonable doubt.

[34] The crucial question was whether on the night of August 28th there was a rubber mat in defendant's car. It may have been considered by the jury to be a close question and difficult to decide. If any misconduct of the deputy district attorney added materially to the weight of the evidence of the People as to this disputed fact, or to the proof of other important incriminating circumstances as to which the evidence was in conflict, the rights of the defendant were thereby invaded, and prejudice resulted. We have already held the giving of the erroneous instruction to have been prejudicial.

[35] One other matter is to be noticed. The unconflicting evidence as to the manner in which the crime was committed was sufficient to establish all the elements of murder of the first degree. And yet the verdict found defendant guilty of murder of the second degree. The reason for this can be known only to the jurors. But the finding of guilt of the lesser offense is consistent with the existence of a doubt in the minds of some of the jurors that defendant was guilty of the brutal and monstrous acts which characterized the crime.

We are forbidden by section 4½ of Article VI of the Constitution to reverse a judgment "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The court, in People v. Wilson, 23 Cal.App. 513, at page 524, 138 P. 971, at page 975, speaking through Presiding Justice Conrey, defined the term as follows: "The phrase 'miscarriage of justice' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' (Opinion written by Mr. Justice Sloss in People v. O'Bryan [165 Cal. 55] 130 P. 1042.)"

[36–38] It is not proper for a reviewing court in determining whether a miscarriage of justice resulted from error or misconduct at the trial to be guided solely by its own opinion as to the weight of the evidence bearing upon the question of guilt. It is necessary to decide in the light of experience and by the application of seasoned reasoning whether the evidence presented to the jury critical questions of fact as to which reasonable minds might differ. Extreme caution is required to avoid usurping the functions of the jury when the decision of vital questions of fact by the jury depended upon the credibility of witnesses whose testimony, if believed, would largely, if not wholly, resolve the question of guilt or innocence. We refer especially to the testimony of defendant and his witnesses that there was no rubber mat in defendant's car on August 28th. Who can say that this crucial testimony, some of it from disinterested witnesses, did not create a problem that was difficult for the jury to solve? True, the verdict is proof that these witnesses were disbelieved, but the question is whether this conclusion was arrived at readily and freely, without the influence and pressure which the wrongful statements of the deputy district attorney inevitably exerted. When the court, after mature consideration, is in grave doubt whether the verdict was so influenced, injustice is more likely to be avoided by resolving the doubt in favor of the accused and awarding him a new trial.

[39] We conclude that the improper statements of the deputy district attorney may have added weight to the case of the People without which a verdict of guilty would not have been returned. There can be no question that they were extremely harmful. We are persuaded that there were questions of fact which the jury found to be close and difficult to decide. This is sufficient to require a reversal of the judgment. We also hold that in view of the evidence to which it may have been applied by the jury, the erroneous instruction was so prejudicial that to give it deprived defendant of a fair trial and resulted in a miscarriage of justice.

The judgment and order denying motion for new trial are reversed.

VALLÉE, J., concurs.

PARKER WOOD, Justice (dissenting).

I dissent. The evidence of guilt was very strong. Defendant, an experienced police officer, deliberately destroyed and attempted to destroy evidence, and he manufactured and attempted to manufacture evidence.

In violation of the specific order of the sheriff, defendant trampled over and obliterated footprints near the body, and he attempted to obliterate the tire tracks which were of the same design as the tread on his tires.

The imprint on the body of the victim was of the same design as the design on the rubber mat in the rear compartment of a 1939 Ford coupe. The evidence was ample to support a finding that, soon after the body was found, the defendant removed the mat from the rear of his 1939 Ford coupe. On August 31st, the day after the body was found, he had the spare tire of his automobile changed, apparently for the purpose of causing the garage boy, who changed the tire, to notice that there was no mat in the rear compartment. Then, on that day after the work had been done, defendant stole the written order for that work from the garage files, apparently for the purpose of destroying the documentary evidence which would refresh the boy's memory as to the date when he noticed that the mat was not in the rear compartment. Then, when such evidence was not available to refresh the boy's memory, the defendant, as a part of a scheme to create false written evidence that the mat was not in the rear compartment at the time of the murder, induced the boy to give him a written statement to the effect that the boy changed the tire about August 25th (3 days before the murder) and that, at said time, there was no mat in the rear compartment.

A few days after the murder, the defendant had the inside of the rear compartment of his automobile blown out three times with an air hose. After it was blown out the third time, he took the air hose and cleaned the inside of the front of the automobile, including under the front seat.

Along the side road to the place where the body was found there was brush which would touch an automobile that was on the road. Scratches, which appeared to be fresh brush marks, were on the fenders of defendant's automobile. Three days after the body was found, the defendant asked an automobile painter how soon he could paint the automobile, and told him that he was "in a hurry for the car." Six days later (September 8th, about noon) the painter, pursuant to agreement, went to defendant's home to get the automobile. At that time, when the defendant knew that he was under suspicion and that someone had broken the lock on the rear compartment and that the sheriff would interview him soon, he told the painter that he also wanted the inside of the rear compartment painted. The painter told him that it was not customary to paint the inside of the compartment, that no one was going to look in there. Defendant testified that he replied that he wanted "to preserve it—cover it up, cover up those rust spots, give it a shot." The painter called attention to the broken lock on the compartment and to the left window which was broken. (A boy had "put" a ball bat "through the glass.") Defendant told him to disregard the broken lock. No agreement was made to repair the window. The painting of the automobile, including the inside of the rear compartment, was completed the following day (September 9th).

With respect to defendant knowing on September 8th (at the time he ordered the compartment painted) that he was under suspicion and that he would be interviewed soon, there was evidence as follows: The sheriff testified that on September 8th at 12:30 p. m. he saw a typewritten note at the sheriff's office which recited in part: "Nelson [a highway patrolman] tells me you would like to ask me some questions. If you and your father will come by, I'll be glad to talk to you. After 3 P. M. please. I am working nights. Kirkes." Defendant left that note in the sheriff's office. On September 8th, after receiving the note, the sheriff told the defendant by telephone that he would like to talk to him at 3 o'clock on September 9th.

The next day, September 9th at 3:30, defendant went to the sheriff's office and they and the district attorney had a conversation about the case. In that conversation, in response to a question regarding defendant's automobile, he said that it was being painted. Then the district attorney, in the presence of defendant, by telephone asked the painter to hold up the painting. Apparently the painting had been finished at that time.

On September 9th, after the conversation at the sheriff's office, defendant went to the painter's place of business, "picked up the back of the turtle deck, dropped it" and said "not let anybody touch that car until he saw an attorney."

On the day after it was reported that the girl was missing, and before the body was found (when it was not known that she would not return), the defendant tried to obtain evidence showing an alibi for himself. On that day, after making inquiries of a man with whom he had talked on the previous evening, he said, "That is my alibi" and that other persons, if they know what is good for them, "better be getting theirs."

Two days after the body was found, he told the owner of a liquor store that tire imprints were found near the body and that he (defendant) "needed an alibi." At that time, he tried to get a statement from the owner that the defendant was in the store about 7:30 o'clock on the night of the murder. The owner told him he was there about 4:30 o'clock and he was positive it was not 7:30. Defendant testified that he did not tell the owner that he needed an alibi, but that he told him that one of the tire imprints was similar to the design on his tires, that a search might be made to locate cars that could have made such an imprint and he wanted to be able to make an intelligent answer—that it was a matter of forethought in order to be able to answer intelligently the questions he thought might be asked him.

A witness, who was well acquainted with the deceased, saw her get into defendant's automobile, near the school, about 7:50 p. m. on the night of the murder.

The sheriff made an extensive search in the Carpinteria area for 1939 Ford coupes, and the only one found was defendant's automobile.

A witness, who had known defendant about 20 years, saw the defendant, between 6:30 and 7:30 o'clock on the morning after the murder, driving an automobile on Toro Canyon Road toward and near the main highway—driving in a direction away from the place where the body was found.

There was grease on the lock of the rear compartment, and there was grease on the girl's skirt at a place where there was a tear.

Defendant asked the sheriff if Pinker, the investigator, found any hair in the back of the automobile, and then he asked the sheriff "Confidentially" if anyone reported that he saw defendant pick the girl up.

In my opinion the argument of the deputy district attorney did not constitute reversible error. The matter as to the personal opinion of the district attorney was introduced into the case in the argument by defendant's attorney. The attorney for defendant stated in his argument that two former district attorneys, who held that office during part of the 8 years after the murder and prior to the trial, were very able district attorneys and each of them had a reasonable doubt as to the guilt of defendant. He also said that the present district attorney (Mr. Licker), who was then prosecuting the case, had a reasonable doubt as to the guilt of the defendant until September, 1950. (That was the month in which the indictment was returned.) It thus appears that defendant's attorney gratuitously brought before the jury what he considered to be the beliefs of two former, able and respected district attorneys, and what he considered to be the belief of the present district attorney until September, 1950. By those statements he sought to bring to the aid of the defendant the influence and prestige of the office of district attorney during the two former administrations and during a part of the administration of the district attorney who was then prosecuting the defendant. An implication of the argument was that the two former district attorneys, who really were capable of understanding the facts and law involved, had no faith in the case, and by reason thereof it was likely that the present district attorney had no faith in it; and that since the present district attorney was doubtful about the case until recently, when the grand jury indicted the defendant, it might be that he was prosecuting it only because the grand jury had returned the indictment. The present district attorney had announced in his opening argument that his deputy would make the closing argument for the prosecution. That deputy, who made the closing argument, had been a deputy in the office of district attorney for the past nineteen years, which period included of course the administrations of the two former district attorneys referred to by defendant's attorney. Under such circumstances, the argument of defendant's attorney as to beliefs of the former district attorneys and the district attorney who was then prosecuting the case, placed the deputy in a position whereby if he remained silent regarding said implication and did not state his belief concerning the case it might be concluded that he shared the beliefs of the former district attorneys and was making a perfunctory argument; or, on the other hand, he was placed in a position whereby if he replied to the implication and stated his belief, the defendant's counsel might claim, as he is claiming here, that such statement was a foundation for an appeal. In view of the defense argument which was calculated to place the deputy in such a position, and which argument introduced the element of personal opinion of the prosecutor, the deputy was justified in stating his belief. Defendant's counsel did not object to the statement. It might well be that no objection was made for the reason that defendant's counsel realized at that time that, in view of the implication of his own argument, the statement of the deputy was in order. (Additional counsel for defendant appears on appeal.) The denial of the motion for a new trial indicates that the trial judge, who heard the arguments and observed the manner of the attorneys in presenting them, was of the opinion that the argument of the deputy did not amount to prejudicial misconduct. Even though defendant's attorney had made such implication as to the lack of belief on the part of the present district attorney, the deputy should not have said that he knew the defendant was guilty. Such statement by the deputy, however, in my opinion, in view of the strong evidence of guilt and the said insinuation cast upon the present district attorney, was not prejudicial misconduct. In People v. Cowan, 38 Cal.App.2d 231, at page 246, 101 P.2d 125, at page 134, the deputy district attorney said that he was not asking the jury to believe that which he did not believe and "I will tell you I am saturated with the confidence and the knowledge that Morris Malter has told you the truth about what this conspiracy was about." Malter was the deputy's "most important witness." On appeal therein it was said, 38 Cal.App.2d at page 246, 101 P.2d at page 134, the deputy "should not have stated that he had *knowledge* that Malter was telling the truth. Otherwise the statement is nothing more than a summary of what should be common knowledge of the ethics to be used by a reputable prosecutor. No such official should attempt to convict defendants on evidence that he does not believe to be true. This portion of the argument was innocuous and could not be regarded as prejudicial. The insertion of the single word 'knowledge' into what was otherwise a harmless argument hardly had sufficient emphasis, when taken with the context, to mislead the jury, especially in view of the many and often-repeated instructions to the jury that they could not consider any statement of counsel as evidence nor give it any weight as such."

In my opinion the deputy's argument regarding motive does not justify a reversal. The district attorney in his opening argument did not argue the subject of motive, but the defendant's attorney argued that there was no motive. He said, "[W]hat is the motive here? They haven't talked about it. Maybe they will. They haven't yet. What is the reason for this thing? I suppose * * * maybe they will say there was some sex motive but she wasn't touched that way and you would * * * think if that was the motive that she would have been molested, but there is absolutely no evidence of it. * * * Think about a motive, you finally boil it down, I guess there wasn't any." It thus appears that defendant's attorney raised the question as to motive, suggested that the prosecution might say there was a sex motive, and then argued that since there was no physical evidence of sex molestation there was no sex motive or any motive. Although it was not necessary to show a motive, that argument challenged the deputy district attorney to state, in his reply, wherein the evidence showed a sex motive or any motive. The deputy commenced his reply thereto by saying that he had been asked what the motive was in this case. Immediately thereafter he said that the jury had a right "to make inferences or deductions from the evidence. I will tell you what the motive in this case is." He then argued that there could be a sex motive without physical evidence of sexual molestation. He said that the girl, who was in a hurry to get to work, was hailed by car and she saw the defendant in it; she knew him—he was the only police officer in Carpinteria, she had been a baby-sitter in his home; and she got into the car. The deputy then said that the jury had a right "to infer from the evidence in this case, as I am now inferring it to you, from the evidence," that improper advances—which had not reached the state of sex molestation—were made to her, and she told him that she would tell her father and defendant's wife; it meant disaster for defendant if she got home; she jumped out of the car, which probably was stopped, and he followed and grabbed her, and as she lay prone upon the ground he strangled her in the manner described in the opening argument; and then to be sure she did not get home he fractured her skull. The deputy then said, "That can be inferred from the evidence." In view of his several statements that the jury could draw inferences from the evidence, I think his statement that "I will tell you what the motive in this case is" should be understood to mean that he would tell the jury what, in his opinion, it could infer as to motive from the evidence. The deputy was entitled to advance any theory of the case which might reasonably come within the evidence, and to state his opinion as to the inferences that could fairly be drawn from the evidence. That the girl was out of the automobile and lying prone upon the ground when she was killed could be inferred from evidence that there was dirt in her mouth and under her fingernails, one fingernail was bent back, and the strangulation and the breaking of her neck occurred simultaneously (testimony of autopsy surgeon), by means of pressure applied upward and downward at the same time, while she was lying prone upon the ground. The deputy, in making the statement as to the reason she was out of the automobile, was presenting his theory of a part of the case and was arguing that, contrary to the defense argument, there could be a sex motive without physical evidence of sex molestation. Even if he presented for the consideration of the jury an illogical or wrong theory as to motive, that should not be a basis for a reversal. Irrespective of the idea of the deputy regarding inferences as to motive that might be drawn from the evidence, the matter of inferences to be drawn from the evidence was ultimately for the determination of the jury. Furthermore, as above stated, it was not necessary that a motive be shown.

In my opinion the verdict of second degree murder did not indicate that the jury was doubtful as to guilt. In an instruction defining first degree murder it was stated in part: "* * * It is necessary that the act of killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case, the killing is murder of the first degree." In an instruction defining second degree murder it was stated in part: that second degree murder may be defined "as the unlawful killing of a human being * * * without the deliberation, premeditation and preconceived intent to kill essential to the crime of murder in the first degree * * *." Under the evidence herein the jury could find that the murder was without the deliberation, premeditation, and preconceived intent to kill essential to the crime of murder in the first degree. If it so found, then in following the instructions, the verdict would be second degree murder.

In my opinion the giving of the instructions of which defendant complains did not constitute prejudicial error. The first of those instructions was as follows: "The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite state of facts, if, from the whole case, the jury believes that the greater weight of the evidence, considering its reliability and the credibility of the witness, is on the side of the one witness as against the greater number of witnesses." Defendant asserts that the instruction had no application to a criminal case because it pertained to the rule as to preponderance of evidence rather than the rule as to reasonable doubt; and it directed the jury that if it believed from the testimony of one witness that the preponderance of evidence pointed to guilt it would be sufficient to justify a verdict. The instruction pertained to the credibility of witnesses. On pages 38 and 39 of appellant's opening brief, his counsel, in referring to said instruction, said that the court then "gave the special instruction as to *credibility*." (Italics added.) More than twenty instructions were given wherein the jury was advised that in order to convict the defendant it was necessary that his guilt be proved beyond a reasonable doubt. Also several correct instructions on circumstantial evidence were given. When all the instructions given are considered together it appears, in my opinion, that said instruction was not prejudicial and the jury was instructed adequately. It is not necessary to refer specifically to the other instructions of which defendant complains.

In any event, I think that the provisions of article VI, section 4½, of the Constitution of California are applicable herein to defendant's claim of misconduct on the part of the deputy district attorney and his claim of error in instructions. That section provides that "No judgment shall be set aside * * * on the ground of misdirection of the jury, * * * or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." In my opinion there was no miscarriage of justice. The defense argument amounted to an invitation to the deputy district attorney to reply as to his belief regarding the case. The statements by the deputy as to his belief or knowledge were not of sufficient importance at the time of trial, in the estimation of defendant's counsel, to justify an objection. The evidence of defendant's guilt was very strong. Before the body was found, and when defendant had not been suspected, he tried to get evidence of an alibi for himself. Immediately after the body was found he, an experienced officer, obliterated footprints (contrary to instructions) and explained that he did it because he was nervous. He knew that the imprints of tires, near the place where the body was found, were similar to the tread design on his automobile. Soon after the body was found, and when he had not yet been suspected and while he as an officer was purportedly trying to apprehend the murderer, he tried to get other evidence of an alibi. In explanation of his efforts to get such evidence he said that he wanted the evidence so that, if he should be questioned regarding the crime, he could give an intelligent answer. Also, soon after the body was found, he obtained, by trick and theft, a false statement from the garage boy that the mat was not in defendant's automobile on the date prior to the murder. Soon after the murder he had the inside of the rear compartment and the inside of the front of his automobile blown out repeatedly with an air hose. He was in a hurry to get his automobile, upon which there were fresh brush marks, painted. He explained that he had his automobile, which was three years old, painted because it needed it—the paint was beginning to thin. Prior to painting it however, he did not repair the window in which there was a hole that had been made with a ball bat. At a time when he knew he was under suspicion by the sheriff he insisted that the inside of the rear compartment of his automobile be painted, although the painter had told him that such painting was not customary. A witness saw the girl get into defendant's 1939 Ford coupe the evening the girl disappeared. In the early morning after the girl had disappeared, a witness saw defendant driving in a direction which was away from the place where the body was found. The imprint on the girl's body was of the same design as the design on the rubber mat in a 1939 Ford coupe.

Appellant's contention as to the asserted error in giving the instruction regarding the testimony of "one witness," in my opinion, is technical and, in view of all the instructions given, was harmless. Many correct instructions on reasonable doubt and circumstantial evidence were given. The said instruction regarding "one witness" is to be viewed in the light of common understanding of all the instructions given. It seems clear to me that necessarily, under the evidence herein, the verdict could not have been based upon the testimony of any one witness. In the case of People v. Ames, 61 Cal.App.2d 522, 143 P.2d 92, the same instruction (as that involved here) regarding one witness was given as a part of a long instruction. It was said therein, 61 Cal.App.2d at page 534, 143 P.2d at page 98: "This instruction is long * * *. Taken by themselves, the quoted portions, especially the second paragraph, do not correctly state the law applicable in criminal cases—that of reasonable doubt. The closing two and one half pages of the instruction are devoted to a correct statement of the law of the presumption of innocence and of the doctrine of reasonable doubt * * *. Several instructions on the presumption of innocence and reasonable doubt proposed by defendant were also given. It is firmly established that instructions must be considered in their entirety, and their effect on the jury must be weighed after they have been read together as a whole and not from some isolated paragraphs in them. After studying all of the instructions given we deem it a remote possibility that the jury could have been misled by the portions of the instruction we have quoted." The jury herein was instructed not to single out an individual instruction, but to consider all the instructions together as a whole. In the light of all the instructions, especially the many on reasonable doubt, it would be attributing to the jury a disregard of said last mentioned instruction to assume that the jury returned a verdict against the defendant without finding him guilty beyond a reasonable doubt.

In my opinion an examination of the entire cause shows, especially in view of the strong incriminatory evidence and the adequate instructions on reasonable doubt and circumstantial evidence, that no essential right of the defendant has been disregarded and there was no miscarriage of justice.

In my opinion the judgment and the order denying the motion for a new trial should be affirmed.

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110 Cal.App.2d 564

HEFFERNAN v. BENNETT & ARMOUR et al.

No. 14489.

District Court of Appeal, First District, Division 1, California.

April 29, 1952.

Rehearing Denied May 29, 1952.

Hearing Denied June 26, 1952.

Action by F. M. Heffernan against Bennett & Armour, a corporation, and John Lawler, as trustee for benefit of creditors of Bennett & Layton, Inc., to set aside transfer of certain real estate and payment of certain money to defendant Bennett & Armour on ground that same were in fraud of creditors. The Superior Court, City & County of San Francisco, Herbert C. Kaufman, J., entered judgment for plaintiff, and defendant Bennett & Armour. The District Court of Appeal, Wood, J., 239 P.2d 129, reversed judgment with directions. On rehearing, Wood, J., held that action by assignee of creditor of Bennett & Layton to set aside transfer of realty and payment as in fraud of creditors was representative or class suit, and that upon adjudication that there had been fraud, trial court could provide for active participation by absentee creditors upon proper notice to them and filing by them of their claims, with opportunity to defendant to file objections to claims be heard thereon.

Judgment of Superior Court reversed with directions.

1. Time 🔑10(2)

Under statute requiring any action to be brought to trial within five years from date of filing of action, when period from filing of action until bringing same to trial included holidays appointed by President or Governor, sufficient in number when included in computation of five-year period to extend period beyond time of bringing action to trial, action was not barred by five-year period. Code Civ.Proc. §§ 12a, 583.

2. Appeal and Error 🔑931(1)

On determination by appellate court on question whether findings of fact are sustained by evidence, all substantial conflicts must be resolved in favor of respondents, and all legitimate and reasonable inferences indulged in to uphold findings if possible.

3. Corporations 🔑547(4)

In action by creditor of dairy and poultry corporation to set aside conveyance and payment by dairy corporation to defendant corporation on ground that same were in fraud of creditors, wherein it appeared that dairy corporation had subsequently acquired additional capital by acquisition of poultry company, evidence sustained finding that conveyance by dairy corporation and subsequent acquisition of capital were separate and independent transactions, and not exchange of capital.

4. Corporations 🔑547(4)

In action by creditor of dairy corporation to set aside conveyance and payment by dairy corporation to defendant corporation on ground that same were in fraud of creditors, wherein it appeared that payment to defendant corporation had been effected by payment of excessive salaries to officers of dairy corporation, and payment by them of portion of such salaries to defendant corporation, evidence sustained finding that conveyance and payment to defendant corporation were without fair, valuable, or any consideration. Civ.Code 1941, § 342.

5. Corporations ⚷547(4)

In action by creditor of dairy and poultry corporation to set aside conveyance and payment by such corporation to defendant corporation on ground that same were in fraud of creditors, evidence sustained finding that transfer and money payment were made in contemplation of insolvency of dairy corporation at time when it was engaged in or about to engage in business for which its remaining property was unreasonably small capital, and with intent and belief to incur debts beyond ability to pay as they matured, and with actual intent to hinder, delay, defeat, deceive and defraud its existing and future creditors.

6. Fraudulent Conveyances ⚷271(2)

Actual intent to defraud creditors never arises as matter of law from existence of any given set of facts, but must be proved as any other material fact in issue.

7. Corporations ⚷547(4)

In action by creditor of dairy corporation to set aside conveyance and payment by corporation to defendant corporation on ground that same were in fraud of creditors, evidence sustained finding that incorporator of defendant corporation was in control of dairy corporation at time of conveyance.

8. Corporations ⚷543

Where incorporator of defendant corporation was in control of dairy and poultry corporation at time of conveyance and payment by dairy corporation to defendant in alleged fraud of creditors, defendant corporation was charged with its incorporator's knowledge and intent, and was not bona fide purchaser for value.

9. Corporations ⚷547(4)

In action by assignee of creditor of dairy and poultry corporation to set aside conveyance and payment by such corporation to defendant corporation on ground that same were in fraud of creditors, evidence supported finding that trustee of dairy corporation had liquidated its assets in orderly and businesslike manner.

10. Corporations ⚷547(4)

In action by assignee of creditor of dairy and poultry corporation to set aside conveyance and payment by such corporation to defendant corporation on ground that same were in fraud of creditors, evidence supported finding that creditor-assignor had not been creditor at time of questioned conveyance and payment, but that dairy corporation had subsequently become indebted to assignor-creditor.

11. Fraudulent Conveyances ⚷6

Repeal of statute requiring that creditor might avoid act of his debtor for fraud only when fraud obstructed enforcement, by legal process, of his right to take property affected by transfer, was procedural change, and applied retroactively to transfer which occurred prior to repeal. Civ.Code 1937, § 3441; Code Civ.Proc. §§ 338, 343.

12. Corporations ⚷547(4)

In action by assignee of creditor of dairy and poultry corporation to set aside conveyance and payment by such corporation to defendant corporation on ground that same were in fraud of creditors, evidence sustained findings that creditor was not put upon inquiry as to transfer or payment or circumstances surrounding them, and did not acquire knowledge of the fraud until approximately two years after act, and that action was not barred by laches. Civ.Code 1937, § 3441; Code Civ.Proc. §§ 338, 343.

13. Corporations ⚷547(4)

Where transfer and payment by dairy corporation to defendant corporation were made with actual intent to defraud existing and future creditors, transfer and payment were void as against assignee of creditor of transferor and would be set aside. Civ. Code 1937, § 3439; Pen.Code, §§ 154, 531.

14. Fraudulent Conveyances ⚷58, 74(1), 206(1), 208

A transfer made with actual intent to defraud creditors is void for illegality as to any creditor, and may be attacked by either existing or future creditors regardless of whether transferor retains property ample to pay his creditors or whether transferee gave consideration.

15. Fraudulent Conveyances ⚷237(1), 249

Where property has been transferred with actual intent to defraud existing and future creditors, title to property passes to protected class of creditors, each of whom must pursue property in timely and appropriate manner, in order to successfully subject property to his claim.

16. Fraudulent Conveyances ⚿172(1)

A transfer in fraud of creditors is valid as to grantor and all persons claiming under him, and as to all persons, except creditors of grantor, who may question transfer in proper proceeding.

17. Assignment for Benefit of Creditors ⚿179

Assignment for benefit of creditors did not confer upon trustee the title to property which assignor had previously transferred in fraud of creditors, but assignee had only such rights in respect to things in action transferred by assignment, as his assignor had. Civ.Code, § 3460.

18. Assignment for Benefit of Creditors ⚿179

Where court determined that transfer by debtor was in fraud of creditors, order directing that transferee convey property to debtor's assignee for benefit of creditors was improper, since title to property fraudulently conveyed had passed, valid as to grantor and all persons claiming under him, and subject only to claims of creditors in proper proceeding. Civ.Code, § 3439.09.

19. Fraudulent Conveyances ⚿255(4)

One to whom property has been transferred in alleged fraud of creditors is necessary party in action by creditor to declare transfer void as fraudulent.

20. Constitutional Law ⚿305

Where debtor has allegedly made transfer in fraud of creditors, rights of each creditor are separate and independent from those of other creditors, and due process requires that transferee be given his day in court as to claim of each creditor, with opportunity to require each creditor's claim to be proved over any defense which transferee might have.

21. Costs ⚿172

Award of attorney's fees was unauthorized in action by creditor to set aside conveyance by debtor on ground that same was fraudulent. Code Civ.Proc. § 1021.

22. Corporations ⚿557(4)

Where court determined that transfer by debtor was in fraud of creditors, judgment confirming and continuing order which appointed receiver to take possession of business and assets of debtor, and to continue and manage such business as going concern, in absence of facts showing lack of necessity and desirability for appointment of receiver, was proper and not abuse of discretion by court. Code Civ.Proc. §§ 286, 564, subds. 1, 7; Civ.Code, § 3439.11.

23. Trial ⚿21

In action by creditor of dairy and poultry corporation to set aside conveyance and cash payment by corporation to defendant corporation on ground that same were in fraud of creditors, wherein defendant contended that certain orders and findings of fact, conclusions of law, and judgment were void because made during period of suspension from practice of its sole attorney in action, and because no notice was given or demand made upon defendant to appoint another attorney, evidence supported implied finding that during period of suspension defendant had and was represented by other attorneys who were not under suspension. Code Civ.Proc. §§ 286, 564, subds. 1, 7; Civ.Code, § 3439.11.

24. Corporations ⚿547(4)

Action by assignee of creditor of dairy and poultry corporation to set aside conveyance and payment by such corporation to defendant corporation on ground that same were in fraud of creditors was representative or class suit for benefit of assignee and all other creditors of dairy corporation, and upon adjudication that there had been fraud, trial court could provide for active participation by absentee creditors by notice to them and filing of claims, with right to defendant to be heard on objections to claims.

25. Fraudulent Conveyances ⚿318

Determination of how fraudulently transferred property, which is in custody of court, shall be distributed among respective claiming creditors lies within sound discretion of trial judge as chancellor in equity, acting in accordance with the applicable substantive principles and procedural requirements of equity.

26. Parties ⚿10

The doctrine of virtual representation in relation to representative or class suits is exception to general rule of compulsory joinder of all interested parties, and rests upon considerations of necessity and paramount convenience, and operates to prevent failure of justice. Code Civ.Proc. § 382.

27. Parties ⚿11

Maintenance of class suit in accordance with doctrine of virtual representation requires that there be a well-defined community of interest in questions of law and fact involved as affecting parties to be represented. Code Civ.Proc. § 382.

28. Parties ⚿10

Representative or class suits are not confined to those cases in which all unnamed members of class are necessary parties. Code Civ.Proc. § 382.

29. Parties ⚿10

Mere fact that conditions warranting maintenance of class suit exist does not entitle plaintiff to maintain such suit, but he must insist that he represent other creditors, and must allege facts upon which he bases his claim that he does represent other members of his class.

30. Corporations ⚿547(4)

Where it was determined in class suit by creditor of dairy and poultry corporation that conveyance and payment by dairy corporation to defendant were fraudulent, transfers were void as to creditor bringing action, and as to such other creditors who timely filed claim and successfully established same.

31. Appeal and Error ⚿103

Order permitting amendment to complaint is not appealable.

32. Appeal and Error ⚿113(1)

Order denying motion to vacate order was nonappealable.

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Vincent Hallinan, San Francisco, for appellant.

G. D. Schilling and Erskine, Pillsbury & Tulley, San Francisco, for respondent F. M. Heffernan.

Appel, Liebermann & Leonard, San Francisco, for respondent John Lawler as trustee for the benefit of creditors.

FRED B. WOOD, Justice.

Defendant, Bennett & Armour, a corporation, appeals from a judgment rendered against it in an action brought by plaintiff F. M. Heffernan (hereinafter called respondent), assignee of Challenge Cream & Butter Association, a corporation, a creditor of Bennett & Layton, Inc., a corporation, to set aside as fraudulent the transfer of certain assets and the payment of $16,000 by Bennett & Layton, Inc., to Bennett & Armour in 1938 and 1939. Defendant also appeals from orders appointing a receiver, permitting amendment of the complaint to conform to the proof and to add a party defendant, and denying a motion to set aside those orders and the judgment, findings of fact and conclusions of law.

Upon the first hearing of this appeal, we concluded that the trial court had lost jurisdiction of the action because not brought to trial within the five-year period required by section 583 of the Code of Civil Procedure, as extended by the period of the pendency of an appeal from an order denying a motion for change of venue, 230 P.2d 658. Respondent petitioned for a rehearing and brought to attention the fact that the period in question included "holidays (other than special holidays) appointed by the President or by the Governor" Code Civ.Proc., sec. 12a, sufficient in number to extend that period (under section 12a as interpreted and applied by section 7 of chapter 29 of the Statutes of 1933, page 304, at page 306) beyond the day when this action was brought to trial. Accordingly, we granted a rehearing.

Upon the second hearing we held that because of the intervening holidays the action was brought to trial within the five-year period, and considered and determined the remaining issues presented upon this appeal, 239 P.2d 129. Respondent petitioned for a rehearing upon several grounds, including a request for more specific instructions as to further proceedings in the trial court, particularly as concerns some ninety-seven creditors for whose benefit, as well as his own, respondent claims he brought this action. For the purpose of formulating such instructions we granted a rehearing and submitted the cause forthwith. Our decision upon this hearing is substantially the same as that rendered upon the second hearing save for the addition of the requested instructions.

[1] We hold, for the reasons indicated, that this action was brought to trial within the five-year period required by section 583 of the Code of Civil Procedure.

We will next consider the sufficiency of the evidence to support the findings of fact. A summary of certain facts concerning which there is no conflict in the evidence, will aid the discussion.

In 1923 or 1924, A. N. Bennett, purchased a creamery plant in Susanville, California, and engaged in business as a dealer in poultry and dairy products. He incorporated the business under the name of Bennett & Cardinal and, in 1933, then owner of all issued stock of the corporation, sold half of the stock to Walter B. Layton for $50,000, Layton paying $5,000 in cash and giving his note to Bennett for $45,000, secured by a pledge of Layton's stock to Bennett. They changed the name of the corporation to Bennett & Layton, Inc., hereinafter called Bennett & Layton.

Soon thereafter, at the instance of Layton, they enlarged the scope of the business, opening an office in San Francisco. They continued to operate the Susanville plant, through a branch manager. By 1937 differences had arisen between Layton and Bennett, leading to conversations between them concerning a separation of their interests and a parting of the ways, Bennett to take the Susanville properties and Layton to continue on with the remainder of the business. February 24, 1938, Bennett made a written offer to the corporation to exchange his 735 shares of its stock for the real estate, business equipment and current accounts receivable belonging to the corporation in Lassen County, which offer was accepted by the board of directors and the stockholders of the corporation.

Bennett planned to incorporate the Susanville business and for that purpose organized the appellant corporation March 21, 1938, which occurred, as it happened, after some of the instruments of conveyance had been executed. After the incorporation, Bennett transferred to appellant those of the Susanville properties and rights which had been conveyed to him prior to appellant's incorporation.

In effecting this transfer, Bennett & Layton executed and delivered (1) to A. N. Bennett, its bill of sale dated March 1, 1938, conveying all of its Susanville personal property and bills receivable, he to assume all bills payable thereat; (2) to appellant, a deed dated March 15, 1938, conveying the Susanville real estate and improvements; (3) to appellant, an assignment, dated March 23, 1938, of the items listed in its Susanville supply inventory of December 31, 1937, and in its list of accounts receivable of March 2, 1938; and (4) to appellant, its bill of sale dated July 15, 1938, conveying certain automotive equipment, reciting that the transfer thereof had been effected by endorsing the registration cards.

For these properties and rights, appellant issued 1,000 shares of its capital stock, of the par value of $100 each. Of those shares, E. L. Armour purchased half for $50,000, paying Bennett $5,000 and giving Bennett his note for the balance, secured by a pledge of Armour's stock.

In March of 1938, Bennett & Layton acquired the business and assets of General Poultry Company, composed of or owned by Emanuel Compagno and his sons, Louis and Lawrence, engaged in the produce business as wholesalers. The Compagnos received therefor 567.75 shares of the capital stock of Bennett & Layton. Of these, 167.75 shares came from Layton's stock, 400 from the stock which Bennett had turned in for the Susanville properties. As a result, Bennett & Layton then had 1,135.5 shares issued and outstanding, owned in equal amounts by Layton and by the Compagnos.

By March of 1938, Layton's indebtedness to Bennett had increased. He gave Bennett two notes therefor, one for $8,000, the other for $54,148.59, dated March 1, 1938. The larger note was payable at the rate of $500 per month and was secured by a pledge to Bennett (dated March 23, 1938) of Layton's 567.75 shares, a $17,000 note of Emanuel Compagno, and (to the extent of the amount of the latter note) of Compagno's 133.75 shares of Bennett & Layton stock. Layton also gave Bennett a proxy to vote Layton's stock in certain contingencies, until payment of the $54,000 note. As added security, Layton agreed to pay Bennett 90 per cent of all dividends thereafter accruing to him; that he would secure from Compagno an assignment of his dividends; would cause dividends of not less than 50 per cent of net earnings to be declared whenever such earnings exceeded $5,000 annually; that the number of directors of Bennett & Layton would not exceed three; that W. B. Finnell would be a director and officer of and Bennett's representative in the corporation; that the books would be open to the inspection of, and could be audited by, Bennett at any time; that Layton would not draw a salary exceeding $750 per month, nor permit Compagno to do so, nor permit the payment of salaries of personnel which would impair the capital assets; that, without the approval of Bennett, no increase in the salaries of officers or executives, and no investment in real estate or equipment exceeding $5,000, would be made; and if any payment on the note should be in default for 20 days, Bennett could terminate the agreement, sell the collateral at public or private sale, and be a purchaser at the sale. Finnell had been secretary and treasurer of the corporation since 1933. March 23, 1938, he was confirmed in those offices and elected a director. He continued to serve in each of the three offices until June 1940.

During the period March to July 1939, Bennett & Layton paid appellant various sums of money, a total of $16,000.

In June 1940, Bennett & Layton ceased to do business as a going concern and, on July 16, 1940, executed to one John Lawler, as trustee for the benefit of its creditors, an assignment of its assets for the benefit of creditors. He liquidated those assets, realizing thereon and paying to the creditors 14 cents on the dollar.

[2] We will now consider the findings of fact and the asserted insufficiency of the evidence to support them, guided by "the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible." Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593, 596.

[3] (1) *Concerning the transfer of the Susanville business and property,* the trial court found:

March 1, 1938, Bennett & Layton transferred to A. N. Bennett, for transfer by him to appellant, a corporation he was about to form, all of the Susanville business and property except the real property and equipment, which latter it conveyed to appellant on or about March 15, 1938; appellant was incorporated March 21, 1938, whereupon Bennett conveyed to it that portion of the business and property theretofore conveyed to him, and appellant issued to Bennett 499 of its shares of stock, par value $100 each, to E. L. Armour 499 shares, and to Kenneth Cain 2 shares, which Cain held, one for Bennett and one for Armour.

At the time of the transfer, the Susanville assets were unencumbered and worth $100,000, subject to current bills and accounts payable in the sum of $11,000, and constituted the principal unencumbered assets of Bennett & Layton.

After the transfer, Bennett & Layton had net current assets of $12,554.96, unsecured liabilities of $79,814.58, and liabilities of $393,519.16, secured mainly by turkeys in storage in San Francisco and eastern cities subject to great and unpredictable changes in price.

Three or four weeks after said transfer, Bennett & Layton secured additional capital in the form of net assets of General Poultry Company, approximately $57,000, but as a distinct and separate transaction.

In respect to these findings, the principal issues are whether or not the withdrawal of Bennett and the coming in of General Poultry Company constituted a single transaction or separate and independent transactions, and, in either case, the resultant financial condition of Bennett & Layton.

That they were separate and independent finds support in the facts, among others, that Bennett's offer of February 24, 1938, was simply to exchange his stock for the Susanville business and properties (not dependent upon any other factor), which offer the directors and stockholders accepted. The motion of the directors to acquire the assets of General Poultry Company recited that it was agreed to offer therefor "400 shares of treasury stock *heretofore* acquired from A. N. Bennett." (Emphasis added.) Bennett testified he did not like General Poultry Company's way of doing business; thought them unsatisfactory; believed it an unwise move to take them in, and told Layton so; that Layton finally decided to do so but did not tell Bennett that he intended to do so; and that Bennett had nothing to do with the negotiations between Layton and General Poultry. Asked if the Bank of America was a creditor of Compagno Brothers (General Poultry Company), Bennett said he did not know, that he "had nothing to do with Compagno Brothers." Asked if Bennett & Layton assumed the liabilities of Compagno Brothers when they went in, he said, "That was after I stepped out," and that he did not know the condition, that he had nothing to do with Compagno Brothers." Although there is evidence which would support a contrary finding, it but produces a conflict which it was the function of the trial court to resolve. Whether the court really did resolve it, is cast in doubt by a finding, later discussed herein, that Bennett used the control over Bennett & Layton which his agreement of March 21, 1938, with Layton, and the pledge of the Layton and Compagno stock gave him, to effect the transfer and to require the payment of the $16,000. Whether the transfer was a complete transaction with or without the acquisition of the General Poultry assets, is not a determinative factor, as will develop.

The finding as to the value of the Susanville assets is supported by the book value thereof on February 28, 1938 (real estate, buildings and equipment, $65,094; cash, accounts receivable, and merchandise, $33,355.51; current liabilities, $11,079.22); the fact that appellant acquired these assets and assumed the liabilities in exchange for 1,000 shares of its stock, of the par value of $100 each, and, when entering the assets upon its books, included $11,477.35 for the good will of the business; the fact that Armour purchased his half interest in appellant for $50,000; and the fact that Bennett, in a statement which he made to a bank, April 18, 1938, valued the real estate and building at $50,000 and the machinery and equipment at $45,000. Appellant would minimize those values by the fact that the Susanville plant had sustained certain losses during recent years. But those losses had already been written off, reducing the book value of the investment by the amount of those losses, and Bennett, before he withdrew, expressed the belief that if the Susanville plant were properly managed (it had been conducted in recent years by a branch manager) it would be a paying investment.

The findings as to the financial condition of Bennett & Layton after the transfer of the Susanville property and before the acquisition of the assets of General Poultry Company are supported by the books of Bennett & Layton, with some modifying adjustments, according to the testimony of A. G. Strong, certified public accountant, and Fred Watwood, licensed public accountant. The principal adjustment related to a book entry showing a liability of $39,902.93 for accrued salaries of Bennett, Finnell, and Layton, which was written off, as it happened, at the time of the transfer to Bennett & Armour. It never was a real obligation of Bennett & Layton, having been entered for income tax purposes only. Its cancellation had nothing to do with the transfer. Canceling it at the time of the transfer, instead of prior thereto, gave the appearance of an excess of current liabilities over current assets, instead of the opposite, and of a markedly depressed net worth, prior to the transfer.

Appellant claims that the book value of the turkeys in stock on February 28, 1938, was below the then market price and should be adjusted upward, to show the true financial condition of the corporation at and after the transfer. But there was substantial evidence to support the book values. George Makins, engaged in the poultry business for many years, considered the inventory value of the turkeys very fair, said it represented a fair market value in the eastern and domestic markets at the time. Watwood computed the gross market value over book at $34,000, from which he deducted estimated carrying charges of $22,000, making a net increase of $14,000. Strong computed the excess of market price over book value at $22,121.31, from which he deducted carrying charges of $8,792.39, leaving a net of $13,328.92. Strong further testified that it is not good accounting practice to take into account an increase in price, that it is an axiom of accounting and business practice to value inventories at cost or market, whichever is lower. The book values were based upon cost of the turkeys and other products.

The withdrawal of the Susanville business left unchanged the amount of the corporation's current assets (cash, accounts receivable, and merchandise, principally turkeys), $485,888.70, and current liabilities (loans secured by pledge of merchandise, unsecured loans, and accounts payable), $473,333.74. The transfer reduced other assets from $172,164.17 to $79,529.34. The latter included store and office equipment, $2,906.47, and investment in two buying stations at Corning and Willows, $70,282.65, of which about $40,000 represented advances to turkey growers and the remainder investment in buildings and equipment. Finnell testified that the Corning and Willows assets were more or less frozen. Strong, in 1940, appraised the net worth of these two branches at $12,283.86. Upon liquidation, they brought $11,396. J. B. Grassens, who assisted the trustee in liquidating the assets, testified that the Corning and Willows accounts proved practically uncollectible. Bennett wrote the trustee in July 1940 that among the Corning old accounts there were a lot of "stingers," that some of the old accounts were valueless, others could be collected in part. He did not think any of them could be collected in full. This $70,000 item of overvalued assets, not usable for raising money in case of need, is of special significance when considered in the light of the net worth of the corporation: $184,000 before, $92,000 after, the transfer. The evidence would support a finding that the net worth, after, was $34,000. It was susceptible to a further reduction in the amount of a $3,346.41 charge against Bennett, which Bennett never recognized or paid and which was later written off. There is evidence indicating it was entered upon the books to give the appearance of equal net worth to the business and property withdrawn and that which remained. Without such an offset, the withdrawal of the Susanville plant ($95,981.24) would reduce the net worth to $88,737.89. The principal remaining asset was merchandise, mainly turkeys, valued at $402,000, approximately, pledged for loans amounting to $393,000, with unsecured liabilities of $79,000, accounts receivable of $71,000, and $12,000 in cash, or, net current assets of $12,554.96.

General Poultry Company brought to Bennett & Layton current assets, approximately, of $65,100 (cash, $2,700; accounts receivable, $26,900; merchandise, $35,500); current liabilities of $18,700, unsecured. This increased Bennett & Layton's net current assets by $46,400, bringing that item to about $58,954. The only other assets which General Poultry brought to the corporation consisted of equipment, $10,200, and prepaid expenses, $350. The resulting net worth of Bennett & Layton was $149,000. This evidence supports the finding that General Poultry Company brought in assets of $57,000.

[4] (2) *The court found that the transfer was made and the $16,000 was paid without a fair, valuable, or any consideration.* The only consideration for the transfer of the Susanville business and property was the acquisition by the transferor of 735½ shares of its capital stock thereto-

fore owned by Bennett, which the court found was in violation of section 342 of the Civil Code. Although the legality of such acquisition by the corporation may not be subject to direct attack in this action, the corporation by this device stripped itself of a substantial portion of its assets without a tangible return and thereby materially changed its financial position.

The $16,000 was paid by Bennett & Layton directly to appellant, in part by checks payable to appellant, in part by checks to banks in payment of drafts which appellant drew upon Bennett & Layton. The payments were made at the urgent insistence of Bennett, evidenced by a series of letters from him to Layton and to Finnell. There is evidence that during the period of these payments, Bennett & Layton was losing money. In addition, the corporation paid directly to Bennett $12,000 over a period of about two years, as a credit upon the Layton note. Bennett testified that these payments and the $16,000 payment to appellant were made pursuant to the contract between him and Layton whereby Compagno and Layton were to draw $750 a month each, of which they were to receive $500 in cash, each and of the remainder, Compagno was to pay $250 to Layton and Layton to pay $500 to Bennett, to apply on the note; and that he received credit for the $16,000 on appellant's books. It was stipulated that Bennett & Layton charged the $16,000, one-half to Layton and one-half to Compagno. It is clear that Bennett & Layton paid and appellant received the $16,000. That this payment was without consideration, is supported by the inference the trial court drew that the excess salary arrangement was but a device to siphon off to Bennett moneys which the corporation did not owe, a reasonable inference under all of the surrounding circumstances.

[5] (3) *Concerning intent and purpose,* the court found that the transfer was made and the $16,000 was paid (a) in contemplation of the insolvency of Bennett & Layton, (b) at a time when Bennett & Layton was engaged in or about to engage in a business for which the remaining property was an unreasonably small capital (after as well as before the acquisition of the assets of General Poultry Company), and intended and believed it would incur debts beyond its ability to pay as they matured, and (c) with actual intent to hinder, delay, defeat, deceive and defraud its existing and future creditors; facts known to the transferee at the time of the transfer and of the payment of the $16,000.

The evidence supports these findings.

The differences concerning business policies developed in 1937 and culminated in the withdrawal of Bennett. Finnell testified that Layton was expanding the business more rapidly than Bennett desired, and made contracts and deals without consulting Bennett; that Bennett did not consider Layton should make deals without consulting him, because his money was in there and it might be lost. Bennett testified that Layton wanted to carry a big volume of goods for a long profit, a speculative profit, whereas Bennett wanted a rapid turnover at a small profit. When Layton persisted in buying large quantities of turkeys, Bennett objected and threatened to cause the business to be liquidated. Bennett then suggested that Layton buy him out, Bennett to take the Susanville business in part payment. Layton, according to Bennett, did not reply but immediately began to try to get some one interested so they could separate, so that Layton could go on with the business and Bennett could resign and get his money, because Layton did not have any credit and did not have the money to carry it on himself; Layton had to acquire added money in order to operate Bennett & Layton, with or without the Susanville business, if Bennett withdrew his support; Bennett was the financial support of Bennett & Layton, with his securities and personal guaranty to the bank for the firm's indebtedness, without which Layton did not have the money to go ahead unless he could acquire outside moneys. The witness Grassens testified that Bennett told him the reason he "pulled out" of Bennett & Layton was that Layton was a gambler, wanted to speculate heavily in long pull deals, to make a "killing," and that Bennett was somewhat concerned in view of the inclination of Layton to gambling,—something might happen to the affairs of the corporation, thereby putting it in a rather precarious financial condition. Finnell said that upon Bennett's leaving it was necessary for Layton to bring new capital into the business if he were to continue the business on the same scale; what was left was not sufficient to carry on the business as they had previously carried it on; his credit was what hurt him more than anything else. Bennett said that after his withdrawal it would be perfectly natural that Layton would get some credits or moneys or guaranties before he could continue.

The evidence showed that the market price of turkeys is subject to rapid fluctuations, relatively large rises and falls. Strong testified that in view of these fluctuations, such a business was speculative, that net current assets of $12,500 with current liabilities of $473,000, would not be sufficient to properly take care of Bennett & Layton should an adverse situation arise, that a drop of one cent in the market price would have completely offset the working assets. Makins testified that the turkey business is very much a speculative business; that with current assets exceeding current liabilities of $473,000 by $12,500, he would not think the company was in a safe condition, he would think it was "practically broke." He also said that if current assets exceeded current liabilities of $492,000 by $58,000, he would say they were skating on pretty thin ice with that amount of capital. Strong said that with net current assets of $58,000 the corporation would be on the border line of being extended, but its operating position was sounder than before. Its net worth was $184,000 before and $92,000 after Bennett's withdrawal, increasing to $149,000 after acquiring General Poultry. If the Corning and Willows stations were depreciated $58,000, as the evidence would justify, those figures would be $126,000, $34,000, and $91,000, respectively. In contrast, appellant acquired a business that had a net worth of $95,000, which included real estate, building and equipment valued at $65,000, and current assets of $33,000, with total liabilities of but $11,000,—net current assets of $22,000.

These facts support the findings expressed in clauses (a) and (b) of paragraph 3, above, and are corroborated by the fact that Layton continued on the course which had made Bennett apprehensive, inducing him to withdraw. Upon the cessation of business in June 1940, Bennett & Layton had nearly 4,000,000 pounds of turkey on hand, heavily encumbered, with market prices falling. We do not hold that the facts thus found necessarily establish constructive fraud under sections 3439.05 and 3439.06 of the Civil Code, as they were enacted subsequent to the questioned transaction. Such facts are of significance for the bearing they may have upon proof of actual intent to defraud.

These facts, with other facts, and the inferences which reasonably may be drawn therefrom, support the finding of actual intent to defraud creditors.

[6] Such an intent, except as otherwise provided by statute, never arises as a matter of law from the existence of any given set of facts. It must be proved just as any other material fact in issue. Its proof is peculiarly dependent upon the circumstances which surround the questioned transaction, and the inferences which the trier of the facts may reasonably draw therefrom. "From the very nature of the action [to set aside conveyances as having been made in fraud of creditors], direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties." Fross v. Wotton, 3 Cal.2d 384, 393, 44 P.2d 350, 354; see, also, Moore v. McDonald, 122 Cal.App. 61, and authorities reviewed at pages 69–70, 9 P.2d 556.

Bennett's own statements concerning the reasons for his withdrawal furnish some support for an inference that he desired to salvage the Susanville business (which he had developed and thought well of) and keep it out of the reach of creditors, should

Layton's speculative operations result in financial difficulties.

The heavy indebtedness of Bennett & Layton and the depletion of its working assets to a narrow margin, in view of the speculative character of its business and the need for ready assets, coupled with inadequate consideration for the transfer of the Susanville property and lack of consideration for the payment of the $16,000, furnish some basis for the inference of an intent to delay and defraud creditors.

Departures from the usual business routine or practice in consummating the transfer, also tend to show fraudulent intent. These departures include: unauthorized acquisition of its own stock as payment for the property conveyed; failure to publish and record the notice called for by section 3440 of the Civil Code; and neglect for more than a year to record the deed to the Susanville real property. It also appears that on April 12, 1938, Bennett took appellant's application for a permit (to issue 1,000 shares of its capital stock at par for cash) to the Sacramento office of the corporation commissioner and told the deputy there that he had surrendered his stock in Bennett & Layton in exchange for certain of its property in Susanville and proposed to transfer that property to a new corporation, and would have to take the application back and revamp it. The deputy raised a question concerning the acquisition of this property in exchange for the stock and informed Bennett if the new corporation should apply to issue stock in exchange for this property it would be necessary to establish that the method of its acquisition was legal, and suggested that Bennett have his attorney prepare a statement to be filed with the application, covering the legality of the transaction, which Bennett said he would do. Bennett did not file the application at Sacramento, nor was any such statement filed. Instead, Bennett filed the application, unchanged, at the San Francisco office of the corporation commissioner, who on April 16, 1938, issued appellant a permit to sell 1,000 shares of its capital stock, for cash, to Bennett, Armour, and Cain. It appears that appellant actually received the Susanville properties, not cash, for its shares. Its books recited the issuing of 1,000 shares to Bennett for cash, but Bennett was debited with $100,000 for the stock and credited with $100,000 as vendor of the properties.

Certain recitals and entries were made in the books of Bennett & Layton that tend to indicate an effort was made to disguise the transaction and give it the appearance of fairness. The minutes of the meetings of the stockholders and of the directors at which Bennett's offer was accepted, contain recitals that the corporation would thereby be released from debts and liabilities of "nearly $80,000.00" and condition the acceptance upon the release by him of all liabilities of the corporation to him. There was no such indebtedness. The corporation did owe him $12,850 for moneys advanced. That debt was not released. It was subsequently paid to Bennett by the corporation.

These same minutes recite it was certified by stockholder Layton that "all current creditors of said corporation had been protected in said transaction and that no loss had, would or could occur to any creditor of Bennett & Layton, Inc. by virtue of the disposal of said assets in Lassen County." The evidence is conflicting whether the unsecured creditors were paid, and we observe no finding in respect thereto. Bennett said he insisted that all unsecured debts be paid because his then attorney told him that would prevent the transaction from being attacked by any creditors. He said it was not discussed that the deal was of doubtful legality but that if there were no existing creditors it was legal and they could go through with it as they pleased.

The $3,346.41 adjusting entry made on the corporation's books as a charge against Bennett (a charge that was never recognized or paid by him, and was later written off) gave the appearance of an equal division of assets upon the transfer of the Susanville properties.

The writing off, at the time of the transfer, of the $39,900 of salaries which had been entered for tax purposes and were never intended to be paid, gave the appearance of a transaction less disadvantageous to the transferor than it really was.

[7] The facts which we have narrated support also the specific finding of the trial court that the transferor and transferee corporations were under Bennett's control by reason of his agreement with Layton which gave Bennett a representative upon the board of directors of Bennett & Layton, the pledge of the Layton and Compagno stock, the proxy to vote Layton's stock, and the power to approve or disapprove certain types of corporate transactions, coupled with Bennett's ownership of one-half of appellant's stock and pledge of the other half; that he exercised this control to effect the transfer of the Susanville property for the purpose of getting it back free of the claims of creditors, and to require Bennett & Layton to pay Layton's indebtedness to him through the device of paying excess salaries to Layton and to Compagno, all with intent to defraud existing and future creditors of Bennett & Layton. Bennett claimed he had no knowledge of Bennett & Layton's business activities or of its financial condition after the transfer, until its cessation of business in June 1940. But his representative Finnell, had full knowledge, and reported to Bennett about once a month and Bennett conferred with Finnell whenever he came to San Francisco, which occurred about once a month. In July 1939, Layton wrote Bennett that the corporation operated at a loss in March, April and May of that year and would be called upon to take a loss on frozen turkeys, and concurrently Finnell wrote Bennett a letter confirming Layton's statement, adding, "I have been watching out for your interests here and want you to get your money in full as soon as you can, and think you have done pretty well so far." Yet, Bennett continued to demand payment. Bennett admitted that in May or April of 1940 Finnell told him "If the turkey market don't go up we are broke," and that in March or April 1940, he asked Finnell regarding moneys due him, and Finnell said he did not see how Layton or Bennett & Layton could pay, that "Bennett & Layton are broke, but the bank don't know it." Although Bennett & Layton made no payments to Bennett & Armour after July 1939, it continued to make payments directly to Bennett through the bank with whom he had lodged the Layton note for collection. These payments averaged about $500 a month. The first was made April 4, 1938, and the last on May 2, 1940, showing a payment of accrued interest and reduction of the principal to $45,686.92. We cannot say as a matter of law that the court was not justified in inferring that Bennett had and exercised control over both corporations as found, and to the end and with the intent found. As a question of fact, this was peculiarly within the province of the trier of the facts. He had an opportunity to observe the witnesses, including Bennett, who, the record indicates, was quite evasive, by his frequent inability to remember an event or a conversation until confronted with his earlier testimony on the subject, given at the trial or upon deposition or in another action.

[8] Appellant is not a bona fide purchaser for value. Whatever might be said of it as an active participant in the questioned transactions, it is sufficient to observe that appellant is charged with knowledge of Bennett's knowledge and intent. He formed the appellant corporation for the purpose of receiving the Susanville property. He received 1,000 shares of its capital stock for that property and was its president and a director. He acted for and on its behalf.

Armour, who purchased half of appellant's shares from Bennett, disclaimed having had any such knowledge. That claim is not especially significant because his lack of knowledge as a stockholder would have no real bearing upon appellant's knowledge or lack of knowledge as transferee. However, the court did find upon sufficient evidence that Armour knew, at the time, that the transfer was made and the money was paid with actual intent to defraud existing and future creditors. He was in the employ of Bennett & Layton prior to March 1, 1938. Layton sought to interest him in remaining in a proprietary capacity and Bennett invited him to invest in the Susanville project. He investigated and decided in favor of Susanville, buying a half interest in the new corporation. He participated in securing appellant's permit to issue stock. He supervised the keeping of appellant's books. He testified that Bennett talked to him about all the details of the transaction whereby Bennett took over the Susanville plant and Layton took over the San Francisco plant.

[9] (4) *The evidence supports the finding that the trustee liquidated the assets of Bennett & Layton in an orderly and businesslike manner,* but that finding and the finding that Bennett & Layton failed as a proximate result of the questioned transfer because of the unreasonably small capital remaining in its hands after the transfer, do not appear material.

[10] (5) *The evidence supports the finding that respondent's assignor was not a creditor at the time of the questioned transactions, but that subsequently Bennett & Layton became indebted to it* in the sum of $24,277.78, no part of which has been paid except $3,398.84. Bennett & Layton and respondent's assignor had business dealings during the period 1936 to 1940, but no indebtedness accrued until early June 1940.

[11] It appears that no judgment has been heretofore sought or obtained upon the assigned claim, but the requirement that a creditor may avoid the act of his debtor for fraud "only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer" (former sec. 3441, Civil Code, repealed in 1939) no longer obtains. As a procedural change, the repeal applies retroactively to a transfer which occurred prior to the repeal. See Heffernan v. Bennett & Armour, 63 Cal.App.2d 178, 183–184, 146 P.2d 482, and Rice v. Schubert, 101 Cal.App.2d 638, 639, 226 P.2d 50.

[12] (6) *The findings that respondent's assignor was not put upon inquiry* as to the transfer or payment or the circumstances surrounding them *and did not acquire knowledge of the fraud until June of 1940 and that this action is not barred* by laches or by sections 338 or 343 of the Code of Civil Procedure, are supported by the evidence.

Appellant directs attention to a banquet given Bennett in March 1938, attended by officers of respondent's assignor, as putting creditors and potential creditors upon inquiry. But the emphasis there was upon Bennett's "retirement" and there is evidence that the impression given was that he was retiring completely from business, returning to his old home in Susanville. Appellant also invokes a report on Bennett & Layton made by Dun & Bradstreet in April 1938, but there is evidence that respondent's assignor did not see any such report until June 1940. It cannot be asserted as a matter of law that these facts would put a person upon notice of the nature of the questioned transfer, particularly a firm that was doing business with Bennett & Layton on a satisfactory current payment basis before and until more than two years after the transfer.

This action was filed December 7, 1942, about two and one-half years after respondent's assignor was put upon inquiry and its cause of action arose.

(7) *The court found untrue the allegations of appellant's answer that respondent holds the assigned claim for the Bank of America,* that this action was instituted at the instigation of the bank, and that the bank is the real party in interest in this action. The effect of this finding is to indicate that respondent was proceeding upon the strength of the claim of his assignor, Challenge Cream & Butter Association. As indicated below, appellant's defenses, if it has any, to the claims of the other creditors of Bennett & Layton represented by respondent in this action must be determined when those creditors appear or are brought before the court. Thus, it is immaterial and outside of the issues that the court found that the failure of Bennett & Layton was not caused by the alleged carelessness of the bank in lending credit to the corporation to gamble upon the turkey market, and the finding that through this action the bank does not seek to recoup gambling losses incurred by Bennett & Layton with the bank's knowledge, credit, and assistance.

The Conclusions of Law and the Judgment.

[13, 14] From the finding that the property was transferred and the money was paid with actual intent to defraud existing

and future creditors, the trial court correctly concluded and decreed that the transfer and payment were void as against plaintiff as a creditor of the transferor and should be set aside for the benefit of plaintiff, and rendered judgment to that effect. In view of former section 3439 of the Civil Code and sections 154 and 531 of the Penal Code, a transfer made with actual intent to defraud creditors is void, for illegality, as to any creditor and may be attacked by any creditor, whether an existing or a future creditor. Severance v. Knight-Counihan Co., 29 Cal.2d 561, 177 P.2d 4; Sasaki v. Yana Kai, 56 Cal.App.2d 406, 133 P.2d 18. It does not matter if the transferor retains property ample to pay his creditors. Adams v. Bell, 5 Cal.2d 697, 700–701, 56 P.2d 208; Security-First Nat. Bank v. Bruder, 44 Cal. App.2d 767, 773, 113 P.2d 3. Nor is it important to ascertain whether or not a finding of no consideration is supported by the evidence. Puccetti v. Girola, 63 Cal.App.2d 240, 251, 146 P.2d 714. In such a case, the fact that the transferee gave consideration is immaterial. Chichester v. Mason, 43 Cal. App.2d 577, 586, 111 P.2d 362.

The next step, logically, would be for the judgment to provide, in some appropriate manner, for the payment of respondent's claim out of the property and money fraudulently transferred. That, this judgment does not do. Instead, it turns all of the property and the money (with the rents, issues, and profits of the property and interest at 7 per cent on the money) over to Lawler, assignee for the benefit of creditors. Starting with the premise that this transfer and payment was void as to all creditors (correct enough in the abstract), it declares that title to these assets never passed to appellant, that title remained in the debtor and passed to Lawler under the debtor's subsequent assignment to him, and thus are assets (the only remaining assets) of the debtor in Lawler's hands for distribution. The judgment then implements this declaration by directing appellant to transfer these assets to Lawler within 10 days; failing which, the transfer will be made on appellant's behalf by a commissioner appointed by the court.

[15, 16] The first error in this line of reasoning is the assumption that title did not pass to appellant. Title did pass, subject to attack only by members of the protected class, each of whom must pursue the property in a timely and appropriate manner, successfully to subject it to his claim. A transfer in fraud of creditors is valid as to the grantor and all persons claiming under him, "and as to all persons except creditors of the grantor who may question it in a proper proceeding." Moore v. Schneider, 196 Cal. 380, 385, 238 P. 81, 82; see, also, First National Bank v. Eastman, 144 Cal. 487, 489–490, 77 P. 1043. This is not a case in which by the very terms of the fraudulent transfer the transferee holds the bare legal title and the debtor retains full beneficial interest in the property, as was the case in Alhambra Building and Loan Association v. De Celle, 47 Cal.App.2d 409, 412, 118 P.2d 19.

[17] Lawler, as the debtor's assignee for the benefit of its creditors, has no greater right to the properties and moneys involved in this action than has the debtor. An assignee for the benefit of creditors is not "regarded as a purchaser for value, and has no greater rights than his assignor had, in respect to things in action transferred by the assignment." Civ.Code, sec. 3460. The assignment does not carry with it to the trustee title to property which the assignor has previously transferred in fraud of creditors. Such an assignee, as distinguished from the assignee in insolvency, may not bring an action to set aside a conveyance as made in fraud of creditors. Smith v. Kirkpatrick, 208 Cal. 417, 419–420, 281 P. 616, and cases cited. Indeed, Lawler does not even have the status of a statutory assignee. He is a mere voluntary assignee for the benefit of creditors.

[18] The order for a transfer from appellant to Lawler is equally unfounded in law. Respondent contends that this is a representative action, that in such an action it becomes necessary, upon giving judgment for plaintiff, for the court to determine "a proper method by which the creditors should be 'convened' for the apportionment of the fraudulently conveyed property

among them," and that "The simplest and most expeditious way of doing this was through John Lawler, who was already trustee for creditors under the Bennett & Layton assignment." That might be simple and expeditious but it is not legal. Respondent invokes a sound principle, that of doing complete justice by administering and selling the property and distributing the proceeds among those persons who, parties to the proceeding, establish the validity of their claims as creditors. But a conveyance of the property to Lawler is not that. For then the court's jurisdiction and powers of supervision cease. That is taking property from one person and giving it to another without a hearing. What opportunity, in such a case, would appellant have to challenge the validity or the amount of any creditor's claim, his diligence or laches in pursuing it, and whether barred or not by the statute of limitations?

[19] The transferee, in this case the appellant, is a necessary party in an action to declare a transfer void as fraudulent. Liuzza v. Bell, 40 Cal.App.2d 417, 424, 104 P.2d 1095, and cases cited. The residue, if any, after the claims of creditors are satisfied, goes to him, Id., 40 Cal.App.2d at page 430, 104 P.2d 1095. In Miller v. Kehoe, 107 Cal. 340, 40 P. 485, the court affirmed that portion of a decree (in a creditor's suit) which adjudged the transfer void, declared the amounts due the several creditors (parties to the action), ordered that a receiver appointed for the purpose sell the property and distribute the proceeds among the creditors in accordance with their respective rights, and declared that the residue should go to the transferee. In Wright v. Salzberger, 121 Cal.App. 639, 9 P.2d 860, the court reversed a decree which adjudged that the transfer be canceled and declared the plaintiff creditor owner of the property, and directed the trial court to enter a decree declaring, in part, that the transfer "is void as to the plaintiff so far as necessary to liquidate the latter's claim." (121 Cal.App. at page 646, 9 P.2d at page 863); and, if the trial court deemed it necesary, to provide for a sale of the property under the court's direction. The Uniform Fraudulent Conveyance Act, adopted in 1939, observes this limitation upon the remedial rights of a creditor. It declares that a creditor, when his claim has matured, may, as against a person who is not a bona fide purchaser for value or the successor of such a purchaser, "Have the conveyance set aside * * * to the extent necessary to satisfy his claim" (Civ. Code, sec. 3439.09).

[20] The rights of each creditor are separate and independent from those of each of the others. Due process requires that the transferee have his day in court as to each, an opportunity to require each to prove his claim, and to present every defense he may have to each. The mere fact that the creditors seek to satisfy their claims out of the same piece of property, does not alter the nature of their several rights, does not make it legally possible for one who has been diligent and whose claim is not barred by the statute of limitations, to pursue his action to judgment and then share the fruits of his victory with the other creditors free of challenge by the transferee as to the validity and amounts of the claims of the other creditors against the debtor or the diligence of their pursuit of the property.

Another factor which requires that the other creditors submit their claims to a court of competent jurisdiction, in an action to which the transferee is a party, is the possibility that he, by the use of other funds, may have cleared the property from the lien of a just debt, and may have made other expenditures for which he might properly claim a credit, subject, possibly, to an offset for the reasonable value of his use and occupation of the property. See Puccetti v. Girola, supra, 63 Cal.App.2d 240, 249–251, 146 P.2d 714.

The judgment awards respondent $20,000, as the reasonable value of the services of his attorneys in the trial of the action, and directs that this be paid by Lawler, as trustee, "out of any of said real and personal property and moneys recovered and received by him from said Bennett & Armour in pursuance of the terms of this judgment." That means $20,000 in addition to the amount necessary to satisfy respondent's claim.

[21] By what authority was this award made? We have found none. "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys * * * is left to the agreement, express or implied, of the parties * * *." Code Civ.Proc. sec. 1021. We have found no statutory exception applicable to this proceeding. There is an exception, in equity, that when by his action a plaintiff preserves or recovers a fund in which others are interested, all who benefit should share the expense, including the payment of a reasonable attorney's fee in prosecuting the action, conveniently and properly payable out of the fund. That principle might be applicable here if other creditors had intervened and it appeared, after trial and adjudication, that the just claims of the creditors equaled or exceeded the proceeds of the sale of the assets involved and that appellant had no right to share in any of those proceeds. But that, obviously, is not this case. In Miller v. Kehoe, 107 Cal. 340, at pages 343–345, 40 P. 485, supra, in a creditor's action to set aside a fraudulent transfer, the court held it improper to allow such fees, for if allowed they would come out of the residue. The court distinguished the earlier case of Patrick v. Montader, 13 Cal. 434, in which there was no residue. This principle has been consistently adhered to. See In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 239 P. 847. In Farmers & Merchants National Bank v. Peterson, 5 Cal.2d 601, 55 P.2d 867, an action for an accounting from trustees under an assignment for the benefit of creditors, when approving an allowance of fees for plaintiff's attorney, out of the fund, the court was careful to observe that such allowance did "not increase the amount of the recovery against the defendants nor subject them to payment of the plaintiff's attorney's fee." 5 Cal.2d at page 607, 55 P.2d at page 870.

[22] The judgment confirms and continues in effect, during the further pendency of the action, an order theretofore made appointing a receiver to take possession of the business and assets of appellant and to continue and manage that business as a going concern. This the court did in the exercise of powers recognized by statute, Code Civ.Proc., sec. 564, subds. 1, 7; Civ. Code, sec. 3439.11, powers of a court of equity when, in such a proceeding as this, the court finds it necessary and desirable to appoint a receiver to preserve and conserve the property which is the subject matter of the suit. See cases cited in 12 Cal. Jur. 1031–1032, sec. 72. Appellant has directed our attention to no factor which tends to indicate that in providing for this receivership the court abused the sound discretion vested in it, nor have we found any such factor in the record.

[23] We next have to consider appellant's claim that certain orders, and the findings of fact, conclusions of law, and judgment, are void because, assertedly, made during the period of the suspension from practice of its sole attorney in the action, and no notice was given nor demand made upon appellant to appoint another attorney, as required by section 286, Code of Civil Procedure. The orders were those of May 12, 1949, appointing the receiver, and of June 14, 1949, permitting an amendment of the complaint to conform with the proof and to add John Lawler, in his capacity of assignee for the benefit of creditors, as a party defendant thereto. There is a conflict in the evidence on the question whether or not the suspended attorney was appellant's sole attorney in the action during the period of the suspension. We have examined the record, including affidavits considered upon the hearing, after the expiration of the suspension, of motions by appellant to set aside and strike out those orders, the findings of fact, the conclusions of law, and judgment. A superior court judge other than the judge who made the questioned orders, findings, conclusions and judgment heard those motions and denied them by an order dated August 20, 1949. The evidence supports the implied finding of that judge that during the period of the suspension appellant had and was represented by other attorneys who were not under suspension. Accordingly, we deem the point under discussion not well taken.

This brings us to the question: are the other creditors of Bennett & Layton privileged to come in, prove their claims, and participate in such further proceedings in this action as may be appropriate? If so, upon what theory may they be accorded that opportunity and in what manner may it be extended to them?

[24, 25] Our analysis leads us to the conclusion that this is a representative or class suit which the respondent Heffernan brought for his own benefit and for the benefit of all other creditors of Bennett & Layton. The issue common to all of the creditors is whether or not the questioned transfers were made with intent to defraud creditors of Bennett & Layton. That issue has been determined in favor of Heffernan and the other creditors, the persons whom he represents upon that issue. It is now in order for the trial court to provide for active participation of the absentee creditors (the unnamed members of this class) by causing appropriate notice to be given them to come in seasonably, file their claims, and establish their rights. The court will accord the appellant in this action an opportunity to file objections to any of the claims of any of such other creditors, and will hear and determine the issues. The fraudulently transferred property is in the custody of the court, which has the power to order its sale and distribute the proceeds to the several parties in accordance with their respective rights as determined by the court, all in accordance with long established principles of equity. The appellant and the respondent will, of course, be bound by the judgment rendered, when it becomes final. So, also, will the creditors be bound who come in and present their claims or who, after due notice, fail to do so, as indicated in Towle v. Donnell, 6 Cir., 49 F.2d 49, at page 51. In this, we are not directing the trial court as to the specific manner in which it will administer the details of such further proceedings, whether directly by the court or in part through the medium of a reference or a receivership. The determination of such matters lies within the sound discretion of the trial judge as chancellor in equity, acting in accordance with the applicable substantive principles and procedural requirements of equity as they obtain in this state.

[26, 27] "The propriety of representative or class suits has long been recognized in our statutory law as embraced in section 382 of the Code of Civil Procedure, enacted in 1872 and which provides as follows: 'Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; * * * and *when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.'* (Emphasis added.) The italicized portion of this statute is based upon the doctrine of virtual representation, which, as an exception to the general rule of compulsory joinder of all interested parties, 'rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice.' Bernhard v. Wall, 184 Cal. 612, 629, 194 P. 1040, 1048; 20 Cal.Jur., sec. 7, p. 483. Even before the cited statute, as plaintiffs note, this doctrine found expression in this state in such cases as Von Schmidt v. Huntington, 1 Cal. 55, and Gorman v. Russell, 14 Cal. 531, each of which concerned the dissolution of a joint association and the distribution of the company assets, with common interests in a common fund permitting representative or class disposition of the issues before the court in conformity with general principles of equity responsive to the exigencies of the situation showing that it was impracticable to require the joinder of all the numerous members 'interested in the subject matter' of the proceeding, and that their non-participation therein would not affect the full protection of their substantial rights. Pomeroy, Code Remedies, Fifth Edition, sec. 292, p. 444. While the cited statute—typifying the usual provision adopted in the various states—thus re-enacts the long-prevailing equity rule, it applies both to legal and to equitable causes of action, since no restriction or limitation is contained in its language. [Citations, including sec. 290 Pomeroy's Code Remedies, 5th ed.]" Weaver v. Pasadena Tournament of Roses, 32 Cal.2d 833, 836 and 837,

198 P.2d 514. Regardless of which of the alternative conditions of the statute is invoked as authorizing a class proceeding, "it has been uniformly held that there must be a well-defined 'community of interest' in the questions of law and fact involved as affecting the parties to be represented. Pomeroy, Code Remedies, Fifth Edition, sec. 286, p. 436; Noroian v. Bennett, 179 Cal. 806, 809, 179 P. 158; Batman v. Louisville Gas & Electric Co., 187 Ky. 659, 220 S.W. 318, 319; Notes, 114 A.L.R. 1015; see, also, Blume, The 'Common Questions' Principle in the Code Provisons for Representative Suits, 30 Mich.L.Rev. 878." 32 Cal. 2d at pages 837 and 838, 198 P.2d at page 517. "In general, a representative suit is proper because it is in behalf of a common or joint interest of an *ascertained class* in the subject-matter of the controversy": illustrated by the citation of six California cases described respectively as "a suit by one creditor for an accounting on a trust fund held under an assignment for the benefit of all creditors of the company", "an equitable proceeding by some of the stockholders and beneficiaries of a voting trust agreement to remove the trustees", "an attempt to impress a trust upon certain property in behalf of ascertainable beneficiaries", "litigation by a court-appointed liquidator to 'settle certain questions common to all of the subscribers' of a 'reciprocal or interinsurance exchange' ", "an action involving the management of trust property on behalf of 'approximately three thousand individual unit holders' constituting the owners of the beneficial interests therein", and "a foreclosure proceeding on behalf of plaintiff and other bondholders." 32 Cal. 2d at page 839, 198 P.2d at page 518. This enumeration does not include the specific type of action involved upon the appeal before us, but we do not infer that the enumeration was intended to cover all types of action which might come within the principle.

[28] Significantly, the court in the Weaver case held that the class suit is not confined to those cases in which all the unnamed members of the class are necessary parties. 32 Cal.2d at pages 841 and 842, 198 P.2d at pages 519 and 520. That is our type of case. Blume, in 30 Mich.Law Rev. 878, cited in the Weaver case, says, at pp. 880 and 881, that when the object of a suit is to reach assets in the hands of a trustee who holds for the benefit of all the creditors the suit must be one by all or by one or more for the benefit of all, but that when the objective is that of setting aside a fraudulent conveyance of the common debtor joinder of all the creditors is not required; i. e., one may sue alone, two or more may join, or one or more may sue for the benefit of all. In support of the latter statement, Blume cites Edmeston v. Lyde, 1829, 1 Paige, N.Y., 637, and Hammond v. Hudson River Iron & Machine Co., 1855, 20 Barb., N.Y., 378. In the Edmeston case certain judgment creditors had joined as plaintiffs. In overruling an objection that the other judgment creditors were necessary parties, the court said that a judgment creditor might sue "either in his own name and for his own benefit, or might join with others standing in the same situation in a joint suit for their joint benefit * * * or * * *, in the usual way, in behalf of himself and all others standing in the same situation * * * and who might choose to come in under the decree and contribute to the expenses of the suit." 1 Paige at page 638. In the Hammond case, the court, overruling a like objection, said "The creditor may commence the action for his own benefit, or in behalf of himself and all others in the same situation with himself who may choose to come in and contribute to the expenses of the suit." 20 Barb. at page 381.

Also, Pomeroy in section 291 of his Code Remedies, 5th edition, gives particular instances of the class suit. He states that one judgment creditor may sue, on his own behalf and on behalf of all other creditors similarly situated, to set aside a fraudulent conveyance, in view of their common interest in the question to be determined. This section of Pomeroy immediately follows a section (290) cited in the Weaver case in support of the statement that our code section "reenacts the long-prevailing equity rule" and applies it both to legal and equitable causes of action.

Pomeroy in turn, in his section 291, cites Story on Equity Pleadings, sections 99–103.

Story supports the statements made by Pomeroy. See Story, Equity Pleading, 5th ed., 1852, sections 99 and 286. Story states, also, that under equity practice, the other creditors could come in and prove their debts before a master, to whom the cause was referred, and obtain satisfaction of their demands equally with the plaintiffs of record. Under such circumstances they were treated as parties to the suit. If they decided to come in they would be bound by the acts done under authority of the court. (Sec. 99.) In one of the cases cited by Story the court said, "It is an ordinary case in this Court, for creditors to unite, or for one or more, on behalf of themselves, or the rest to sue the representative of their debtor, in possession of the assets, and to seek an account of the estate." Brinkerhoff v. Brown, 1822, 6 Johns.Ch., N.Y., 139, 150, 151. In another case cited by Story, the court observed that "One creditor may undoubtedly file a bill, in many cases, in behalf of himself and all the others" citing an English case. Hendricks v. Robinson, 1816, 2 Johns.Ch., N.Y., 283, at page 296.

The seeming paucity, in California, of class suits by creditors of a common debtor to set aside a conveyance made by him in fraud of creditors, is explained, perhaps, by the fact that until its repeal in 1939 section 3441 of the Civil Code permitted a creditor to avoid such a conveyance only when the fraud obstructed the enforcement, by legal process, of his right to take the property. That, naturally, meant that in most instances, the creditor would have to reduce his debt to judgment. By that time he had other, more convenient remedies for reaching the property. There were some exceptions to the requirement of a judgment as a condition precedent to setting the conveyance aside. See 12 Cal.Jur. 1035, sec. 75. Miller v. Kehoe, 107 Cal. 340, 40 P. 485, illustrates one of the exceptions. There three creditors of the common debtor brought an action to set aside a conveyance made in fraud of creditors. They had not reduced their claims to judgment and were now prevented from doing so because of a proceeding in insolvency which the debtor had commenced. They alleged that they brought the action on their own behalf and on behalf of all other creditors. Some of those creditors did come in. The court found that the conveyance was made with intent to defraud, set the conveyance aside, ordered the property sold, and directed distribution of the proceeds among the creditors in accordance with their respective rights, the residue, if any, to go to the transferee. In these respects the judgment was affirmed. The Miller case is persuasive of the view that the instant case is a representative or class suit, even though it does not appear (from the printed report of the Miller case) precisely at what stage of the proceedings, or in what manner, some of the other creditors came in and presented their claims.

Noroian v. Bennett, 179 Cal. 806, 179 P. 158, is persuasive of the same view. There several makers of their respective promissory notes (each note, as it happened, was given to the same person as payee) joined as plaintiffs in a complaint against the payee, to set the several notes aside on the ground they were procured by fraud. The court held that these several makers could not join their several causes in the same action. There was no community of interest among them. In so holding, the court mentioned, by way of contrast, a number of types of cases in which there is such an interest, including the case "where a single fraudulent conveyance operates to the injury of several separate judgment creditors in the collection of their judgments, in each of which cases a single fact is the sole subject of the inquiry * * *." 179 Cal. at page 809, 179 P. at page 159. While that was not a discussion of the class suit (instead, the propriety of the joinder of the plaintiffs who commenced the suit) it was a discussion of the concept of "a community of interest" and was later cited, by the same court, following the statement that "it has been uniformly held that there must be a well-defined 'community of interest' in the questions of law and fact involved as affecting the parties to be represented." Weaver v. Pasadena Tournament of Roses, supra, 32 Cal.2d 833, 837, 198 P.2d 514, 517. We do not think that the repeal of section 3441 of the Civil Code, subsequent to the decision in the Noroian case, takes from the statement made in that case, concerning the creditors' suit, any of its force or effect. The "community of interest" of defrauded creditors is the same whether their claims have been reduced to judgment or not.

The "common interest," the "community of interest," which respondent Heffernan and the other creditors had at the very commencement of this action, and still have, inheres in the issue presented by their claim that the questioned transfers were made with intent to defraud creditors. If that claim be established, it follows that the transfers were "void against all creditors of the debtor" at the time the transfers were made. Civil Code, sec. 3439, as it read at that time.

It happens that that issue has been decided in favor of Heffernan and the other creditors. It further appears that that issue was the principal issue in the case, viewed in the light of the time and attention given it, overshadowing all other issues. Of the 1961 pages of the reporter's transcript (exclusive of oral argument at the conclusion of the trial) a conservative estimate indicates that approximately 1,600 pages record evidence and argument upon this issue alone. Of the 105 exhibits introduced by the parties, about 90 to 95 appear to bear solely upon this issue. Respondent notes in one of his briefs that the creditors number 97. One of the exhibits tends to support that statement, indicating that as of December 30, 1942, the general creditors numbered 95. This poses the very practical question: Does equity require that each of the creditors other than Heffernan bring a separate suit to try this very same issue, between him and appellant Bennett & Armour? It is appalling to contemplate that such could or would be required. The burden it would impose upon each of the other creditors, the multiple burden it would impose upon Bennett & Armour, the time of the courts it would wastefully consume, the huge cost it would entail, and the long delay in consummating a final determination of this issue between the numerous parties which would ensue, all demand some form of judicial remedy that will avoid such untoward results and at the same time accord justice to all. That remedy is furnished by means of the representative or class suit, developed by equity long years ago and still recognized in this state even though not frequently invoked in a creditors' suit to set aside a conveyance made by a debtor in fraud of his creditors.

[29] It is not enough, of course, that the conditions warranting a class suit exist, for a plaintiff to insist that he represents the other creditors. He must allege the facts upon which he bases his claim that he does represent the other members of his class. This the respondent Heffernan has done. In his complaint he stated that as of the date of the asserted fraudulent conveyance, the debtor had many unpaid creditors; that subsequent to the debtor's cessation of business in June 1940, all other available assets of the debtor have been liquidated and the proceeds apportioned among the creditors; that there are now no funds or properties belonging to the debtor available to its creditors except the property conveyed in fraud of creditors; that this action is brought and prosecuted by Heffernan for his own benefit and for the benefit of all creditors of Bennett & Layton who may intervene and share the expense of the litigation; and, in the prayer of the complaint, he asked that these transfers be adjudged fraudulent and void as against Heffernan and the other creditors, that they be annulled and set aside for the benefit of the creditors, including Heffernan, and that a pro rata distribution of the funds and properties recovered in this action be made to the creditors.

[30] It would be premature, at this stage, for us to undertake to determine as of what date (the date of the filing of this action or some later date) the issue of laches or of the bar of the statute of limitations, concerning the claim of any of the other creditors who later comes in, should be determined.[1] Such an issue will not

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[1] For discussion of such questions, see Graham v. California Drilling, etc., Co., 49 Cal.App.2d 522, 122 P.2d 88; Tubbs v. Delillo, 19 Cal.App. 612, 127 P. 514; Mars v. McKay, 14 Cal. 127; and notes in L.R.A.1917D, 885, and 14 A.L.R.2d 598, 8 A.L.R.2d 6, 166 A.L.R. 767, 128 A.L.R. 1289, 76 A.L.R. 864.

arise if none of those creditors comes in or if no party to the action objects to any creditor's claim on such a ground. Besides, the creditor against whose claim such an objection is made, will be entitled to his day in court on that issue and should not be hampered or embarrassed by the utterance of a dictum on that subject at this time. In this connection, it is desirable to note that we are reversing that portion of the judgment which declares that the questioned transfers "*are* * * * void and of no effect as against * * * *all* other creditors * * * and are hereby cancelled, and set aside [as to such other creditors] with like effect as if they had never been made." (Emphasis added.) The quoted portion is too broad in its sweep. If allowed to stand and become final it well might preclude the appellant from questioning the diligence of any of such other creditors in the pursuit of his remedy to set the transfers aside and participate in the distribution of the proceeds. In addition, it is important to observe that nothing said in this opinion precludes any creditor, including Heffernan, from interposing any objection he may have to the claim of any creditor who later comes in to establish his rights. In making this reservation, we have in mind the possibility that some yet unnamed creditor may assert a claim that in some respect is adverse to those of his fellow creditors. Finally, we note that there are precedents to the effect that even if the plaintiff of record brings the action solely for his own benefit, the court has authority to order that the other creditors be notified and given an opportunity to come in and present their claims, if the court deem that meet and proper. See 1 Glenn, Fraudulent Conveyances and Preferences, Rev.Edition, 161–164, section 93; 15 C.J. 1413, "Creditors" Suits, sec. 112, n. 15; 21 C.J.S., Creditors' Suits, § 55 and cases there cited.

From what has been said, it is apparent that the findings of fact, conclusions of law, and judgment, insofar as they find and declare that the questioned transaction was entered into with actual intent to defraud existing and future creditors and is void as to respondent, are correct and amply supported by the evidence and the law, and should be affirmed. This is equally true of those portions of the findings, conclusions of law, and judgment which relate to the appointment of the receiver and the allowance of costs other than attorney's fees. The balance of the judgment is erroneous and must be reversed.

It is therefore ordered that the judgment be reversed, with directions that the trial court revise the findings of fact and conclusions of law, take such further steps and proceedings in the action as may be meet and proper, and render judgment, all in accordance with the views herein expressed.

[31, 32] The appeals from the order of June 14, 1949, permitting an amendment to the complaint, and from that portion of the order of August 20, 1949, which denied a motion to vacate the order of June 14, are dismissed, for the reason that they were taken from nonappealable orders.

The remaining portion of the order of August 20, 1949, and the order of May 12, 1949, appointing the receiver, are affirmed.

Each party shall bear his own costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

ELBERT, Ltd. v. GROSS et al. *

Civ. 18922.

District Court of Appeal, Second District, Division 1, California.

May 12, 1952.

Hearing Granted July 10, 1952.

Action by Elbert, Ltd., against Joseph M. Gross, and others, for partition of lot to which plaintiff had been issued deed by city treasurer as result of foreclosure of street improvement bond issued in 1925. The named defendant filed cross-complaint to quiet title alleging that he acquired title to property based on tax deed issued to state for 1931–32 delinquent taxes and city treasurer's certificate of sale issued pursuant to foreclosure of bond issued in 1928. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgment for plaintiff, and named defendant appealed. The District Court of Appeal, Hanson, J., held that issuance of city treasurer's deed extinguished lien of city treasurer's certificate of sale.

Judgment affirmed.

1. Municipal Corporations ⚿575

Where grantee under deed from state, which acquired title by tax deed issued for 1931–32 delinquent taxes, also held city treasurer's certificate of sale issued pursuant to foreclosure of improvement bond issued in 1928, service of notice on grantee, or his agent, as required by Streets and Highways Code, was not necessary for validity of City Treasurer's deed issued to another upon foreclosure of street improvement bond issued in 1925. St.1911, p. 730, § 1 et seq., p. 744, § 23, as amended, St. 1927, p. 1407; Streets and Highways Code, § 6550.

2. Municipal Corporations ⚿583

City treasurer's deed issued upon foreclosure of street improvement bond issued in 1925 extinguished lien of city treasurer's certificate of sale issued pursuant to foreclosure of improvement bond issued in 1928. St.1911, p. 730, § 1 et seq., p. 744, § 23, as amended, St.1927, p. 1407.

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Myron J. Glauber, and Alfred L. Armstrong, Los Angeles, for appellant.

John F. Bender, and Gizella M. Allen, Los Angeles, for respondent.

HANSON, Justice pro tem.

Respondent, as plaintiff below, on October 14, 1949, instituted this action for partition of a vacant lot basing its right to partition on a City Treasurer's deed issued to it as a result of the foreclosure of a street improvement bond issued on August 14, 1925, under the provisions of the Improvement Act of 1911. St.1911, p. 730. The appellant as defendant not only answered the complaint but filed a cross-complaint to quiet the title averring that he acquired title to the property on December 11, 1945, by deed from the state of California, which in turn had acquired title by a tax deed issued to it in 1937 for delinquent taxes for the fiscal year 1931–32. He also averred that, through assignment, he held a City Treasurer's Certificate of Sale of the lot which had issued pursuant to the foreclosure of a bond originally issued on August 8, 1928, under the Improvement Act of 1911.

The record in this case does not disclose when the two bonds mentioned above became delinquent or when the proceedings to foreclose them were instituted.

[1] In the court below appellant as defendant and cross-complainant contended that the City Treasurer's deed to plaintiff was invalid because no notice was served upon the owner of the lot or his agent as required by Section 6550 of the Streets and Highways Code. That such a notice was unnecessary was ruled by us in Elbert, Ltd., v. de Gaffey, 108 Cal.App.2d 388, 238 P.2d 1044. In the case before us no other ground of invalidity is raised. Accordingly, we do not have before us for decision questions of the character such as were presented to us in Stafford v. Realty Bond Service Corp., Cal.App., 242 P.2d 936.

[2] The only *other* ground for reversal urged upon us is that the court below erred in holding that the City Treasurer's deed to respondent extinguished the lien appellant had under his own City Treasurer's Certificate of Sale. That the court did not err in so holding is plain as, by the express provisions of the statute, special assessment liens "shall have priority over all special assessment liens which may there-

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* Subsequent opinion 260 P.2d 35.

after be created against the said property." Sec. 23, Improvement Act of 1911, as amended, St.1927, p. 1407. See also Cullinan v. Grey, 18 Cal.2d 247, 115 P.2d 460.

It follows from what we have said that the judgment must be and it is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

110 Cal.App.2d 740

WEXLER v. CITY OF LOS ANGELES.

Civ. 18682.

District Court of Appeal, Second District, Division 1, California.

May 6, 1952.

Rehearing Denied May 28, 1952.

Hearing Denied June 26, 1952.

Action by Henrietta Wexler against the City of Los Angeles, under Public Liability Act, for wrongful death of plaintiff's minor son by drowning in pool of water which had been permitted to accumulate at storm sewer outlet on public beach. The Superior Court of Los Angeles County, J. A. Smith, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained finding that defective and dangerous condition existed on beach and playground within meaning of Public Liability Act, that city had notice of such condition and failed to remedy it, and that this dangerous and defective condition was proximate cause of the drowning.

Judgment affirmed.

1. Municipal Corporations 🔑733(1)

A dangerous or defective condition within meaning of Public Liability Act can be created by use or general plan of operation of governmentally managed property, as well as by structural defect, the theory of the act being that liability is imposed not alone for dangerous condition, but for failure to remedy it, upon knowledge or notice thereof. Government Code, §§ 53050, 53051; Code Civ.Proc. §§ 376, 377.

2. Municipal Corporations 🔑857

In action under Public Liability Act against city for death of plaintiff's minor son by drowning in pool of water which had been permitted to accumulate around outlet of storm drain on public beach, findings of trial court that defective and dangerous condition existed on beach and playground within meaning of Public Liability Act, that city had notice of condition and failed to remedy it, and that such dangerous and defective condition was proximate cause of infant's drowning were amply supported by record. Government Code, §§ 53050, 53051; Code Civ.Proc. §§ 376, 377.

3. Negligence 🔑136(2)

As general rule, contributory negligence is question of fact for trial court.

4. Death 🔑75

In action under Public Liability Act for wrongful death of plaintiff's minor son by drowning in pool which had been permitted to accumulate at outlet of storm drain on public beach maintained by defendant city, wherein evidence was introduced that deceased child was sheltered and well cared for, and that he played in yard completely enclosed by fence, and that child had never been to beach by himself, evidence sustained trial court's finding that plaintiff was not negligent in any way in care of her minor son. Government Code, §§ 53050, 53051; Code Civ.Proc. §§ 376, 377.

5. Death 🔑9

Where statute in existence upon death of plaintiff's minor child, allegedly as result of negligence of defendant city, permitted plaintiff, as child's mother, to bring action for wrongful death without joinder of natural father when parents were divorced and mother had custody of child, plaintiff-mother's right of action for wrongful death of child vested in her on date of its death, and she was not deprived thereof by amendment subsequently enacted. Code Civ.Proc. § 376.

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Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Victor P. Spero, Deputy City Atty., all of Los Angeles, for appellant.

Gilligan & Pratt, Los Angeles, for respondent.

DRAPEAU, Justice.

The instant action for wrongful death of plaintiff's minor son was brought pursuant to the Public Liability Act, sections 53050 and 53051, Government Code.

The complaint alleged that on March 6, 1949, defendant city owned and maintained a public beach and playground in the Venice area; that for nine months prior to that date, due to defendant's negligence a dangerous and defective condition had existed thereon; that defendant had notice of such defective condition as early as September 29, 1948, but failed to act to remedy it or to protect the public against it. It was further alleged that on said March 6, 1949, plaintiff's minor son while playing on said public beach was drowned in an open pool of water which had been allowed to collect and remain at the end of a storm drain on said public beach and playground. There followed allegations of the presentment to and rejection by defendant of plaintiff's claim for damages.

The amended answer denied generally and specifically the allegations of the complaint and set up the affirmative defenses of (1) contributory negligence of the minor; (2) concurring negligence of plaintiff; (3) unavoidable accident; (4) defect in parties plaintiff, the natural father being a necessary party under sections 376 and 377 of Code of Civil Procedure.

From a judgment awarding plaintiff $10,000 damages, defendant city appeals.

Evidence was presented to the effect that defendant in preparing a building site for the Hyperion sewage plant, removed therefrom several million cubic yards of sand which was placed along the shore line of the Pacific Ocean from El Segundo to Santa Monica. This was done under a master plan of shore line development in order to widen the beach oceanward and develop a modern playground.

One of the storm drains in the Venice area had its outlet on the shore line at the end of Thornton Avenue. After the widening operation this outlet was three hundred feet from the mean high tide line. The plan was to extend this outlet when the final width of the beach was determined and the location of the new shore line definitely located. In the meantime, the water from the storm drain ran in an open ditch to the ocean across the public beach. Very often the action of the surf and waves caused sand to block the outlet of the storm drain, resulting in an accumulation of water in a pool on the beach.

Plaintiff and her three and a half year old son lived in a dwelling about a block from the public beach and two blocks north of Thornton Avenue. Early in the morning of March 6, 1949, the little boy went out to play in his yard, which was completely fenced and the gate locked. During the morning, Robert Cummings, aged 5½ years, together with Billy and Susan Black, aged 4 and 3½ years, respectively, all living in the neighborhood, went across the street to play with Jay Wexler, plaintiff's son. Robert unlocked the gate and they all went through into the Wexler yard. After playing there a little while, they took Jay with them and went over to the Black's yard. After a short time, they all went down to the beach where they played in the dry sand. They then went over near the storm drain and took off their shoes. Robert had a carton and they took water out of the drain and made castles. As they played, Robert told Jay not to go in the water. Robert did not see Jay when he went in the water, but Billy Black told him "Jay is in the water". When Robert turned around the water was up to Jay's chest and "He kept on sinking. * * * and before I knew it he was under."

Myron Cox, Chief Lifeguard for the City of Los Angeles, who recovered the body of the drowned child, testified that he entered the shallow end of the pool of water from dry sand on the shoreside; that the water was very muddy, and he first contacted the body with his foot; that it came up freely from the water; that he picked up the child in water that was waist deep, i. e., three and a half feet; that the bottom of the pool was "absolutely concave * * it was solid sand, but your feet would move into it, because it was rather muddy and murky. * * * There was no hole in the bottom * * * there was a little bit of a step-off there from the side of the pool."

There was evidence that the deceased child was sheltered and well cared for; was kept in an enclosed yard where he played with his tricycle; that he was not allowed to run around and had never been down to the beach by himself; that the lock on the gate was a sliding bar type which the child was unable to open.

On the question of notice to defendant, Mr. A. G. Johnson, beach designing engineer for the city, testified that on September 29, 1948, he "recommended to the Board of Public Works that the Director of the Bureau of Sanitation be instructed to excavate a trench across the new fill at each (storm drain) oulet and to maintain these trenches until the storm drains can be extended." He further testified that the trenches were opened from "time to time". However, there was evidence that the trenches or ditches were almost never opened, the witness Caron testifying that he was on the beach frequently around the time of the accident, and never saw the Thornton Avenue ditch open; that there was always sand at the end of the pool which kept the water from running out into the ocean. Likewise, the witness Diebold testified that he wrote letters to the Mayor, the City Council, the City Engineer and to the Board of Public Works as early as October 4, 1948, and complained about the blocked storm drains, but that "absolutely nothing" was done until after the death of plaintiff's son.

The trial court found that "for the last nine months immediately prior to March 6, 1949, due to the carelessness and negligence of the City of Los Angeles, there was a dangerous and defective condition existing on the beach and playground at Venice, near the Thornton Avenue Storm drain, and that the defendant * * * had notice of the dangerous and defective condition as early as September 29, 1948, and continuously thereafter up to and including March 6, 1949, the date of the death of plaintiff's minor son; the Court further finds that notwithstanding the notice which the defendant had of the dangerous and defective condition, the defendant failed and refused to take any action to remedy the dangerous and defective condition, or to protect the public against said dangerous and defective condition. * * *

"The Court finds further that due to the carelessness and negligence of the defendant * * * and due to the dangerous and defective condition of the public beach at Venice, the said minor child * * was drowned in an open pool of water which was allowed to collect and remain at the end of the storm drain on the public beach and playground."

The Court also found that the deceased minor child "did not know or realize the danger of wading in or falling into the open pool of water complained of * * * that Jay Marlin Wexler was not negligent or careless in entering into said pool of water, and he did not know the purpose for which the pool was intended to be used, and had a right to assume that the pool would be safe for him to use and that the pool of water was on a public beach intended for the use of children."

It is here contended by appellant that the beach was not in a dangerous or defective condition by reason of the existence of the pool of water; that there was nothing dangerous or defective about the pool in which the drowning occurred; that the respondent was guilty of contributory negligence, and that the father of the deceased minor is a necessary party to the action.

Section 53051, Gov.Code, Public Liability Act, provides that

> "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:
>
> "(a) Had knowledge or notice of the defective or dangerous condition.
>
> "(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or

to take action reasonably necessary to protect the public against the condition."

This case was brought and tried on the theory that the outlet of the storm drain should never have been left in the middle of the newly widened beach in the first place. Secondly, since it was permitted to remain there, it should have been kept open so that the water could drain into the ocean and not collect in a deep pool on the public beach. The very presence of the pool on the beach was the result of appellant's negligence in failing to properly maintain the storm drain.

[1] And, as stated in Bauman v. San Francisco, 42 Cal.App.2d 144, 153, 108 P.2d 989, 995, a dangerous or defective condition within the meaning of the Public Liability Act "can be created by the use or general plan of operation of government operated property, as well as by a structural defect."

In Arellano v. City of Burbank, 13 Cal. 2d 248, 254, 255, 89 P.2d 113, 117, our Supreme Court held that "The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. * * * It is well settled in this state that when dealing with cases falling under the provisions of the Public Liability Act * * * each of such cases must depend upon its own state of facts and that no hard and fast rule can be applied in the great majority of cases."

The court in Long v. Standard Oil Co., 92 Cal.App.2d 455, 466, 207 P.2d 837, 844, stated: "Whether the condition was one which defendant should have known involved an unreasonable risk of death or serious injury to children was a question of fact."

[2] The evidence shows that the water in the pool was muddy and murky; that the pool was shallow at one end but that the depth of the water quickly increased to three and a half feet. The deceased child was three and a half years old, was three feet, two and a half inches tall and weighed thirty-nine pounds. When his companion saw him in the pool, the water had reached the child's chest; he was then sinking and immediately disappeared from view.

The hazard here in question was the direct result of appellant's failure to follow the recommendation of its engineer, to-wit: To excavate a trench across the widened beach from the outlet of the storm drain, and to keep the trench open and free from sand so that the water therefrom could run into the ocean.

In the circumstances presented, the findings of the trial court that a defective and dangerous condition existed on the beach and playground within the meaning of the Public Liability Act; that appellant had notice of the condition and failed to remedy it; and that this dangerous and defective condition was the proximate cause of the drowning, are amply supported by the record.

Appellant urges that there was an entire lack of parental supervision or control over the movements or wanderings of the deceased minor, and therefore the mother was guilty of contributory negligence as a matter of law.

[3] Ordinarily, contributory negligence is a question of fact for the trial court. And in Christiana v. Rattaro, 81 Cal.App. 2d 597, 599, 184 P.2d 682, the court held that it was a question of fact for the jury whether the mother's lack of continuous supervision over a young boy was negligence under all the circumstances there shown.

As hereinbefore stated, evidence was presented to the effect that the deceased child in this case was sheltered and well cared for; that he played in a yard completely enclosed by a fence and that the lock on the gate was of a type which he could not open; that he was not permitted to run around the neighborhood unattended and had never been to the beach by himself.

[4] This evidence was sufficient to support the trial court's finding that respondent was not negligent in any way in the care of her minor son. Appellant also

urges that the natural father of the deceased minor is a proper, necessary and indispensable party to this action.

On the date of the death of respondent's minor child, section 376 of the Code of Civil Procedure read in part as follows:

> "A father of a minor, or if the father is dead or the parents of said minor are living separate or apart and the mother of the minor then has care or custody of said minor, then the mother, may maintain an action for the injury or death of said minor child".

An amendment to this section effective October 1, 1949, provides that "The parents of a legitimate unmarried minor child, acting jointly, may maintain an action for injury to such child caused by the wrongful act or neglect of another. If either parent shall fail on demand to join as plaintiff in such action or is dead or cannot be found, then the other parent may maintain such action and the parent, if living, who does not join as plaintiff must be joined as a defendant and, before trial or hearing of any question of fact, must be served with summons either personally or by sending a copy of the summons and complaint by registered mail with proper postage prepaid addressed to such parent's last known address with request for a return receipt. * * * The respective rights of the parents to any award shall be determined by the court."

The record herein discloses that respondent was granted a divorce from the father of the deceased child on December 10, 1946 in the State of Ohio. Custody of the child was then given to her. Respondent testified that she married her present husband in Ohio and they left that state early in 1947; that the last time she saw the father of her son was about three months before the divorce and she had known nothing of his whereabouts since that time. The deceased child was supported by his stepfather, whose name he bore.

[5] The court found that the present sections 376 and 377, Code of Civil Procedure, were not in effect on March 6, 1949, and that respondent was entitled to proceed with this action under section 376 as it existed on March 6, 1949, the date of the death of the child.

Respondent's right of action for the wrongful death of her minor child vested in her on the date of his death and it is not within the power of the legislature to impair such vested right. See 5 Cal.Jur. 751, section 145 and authorities there cited; and also California Emp., etc., Comm. v. Payne, 31 Cal.2d 210, 215, 187 P.2d 702, 704, where it is stated: "Where a statute operates immediately to cut off an existing remedy and by retroactive application deprives a person of a vested right, it is ordinarily invalid because it conflicts with the due process clauses of the federal and state constitutions."

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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111 Cal.App.2d 106

PEOPLE v. BOOTH.

Cr. 4730.

District Court of Appeal, Second District, Division 3, Califorina.

May 14, 1952.

The defendant was convicted in the Superior Court of Los Angeles County, Philip H. Richards, J., of lewd and lascivious acts with a child under 14 years of age, and from an order denying a motion for new trial he appealed. The District Court of Appeal, Shinn, P. J., held that giving of instruction on general intent was improper, but did not constitute reversible error.

Order affirmed.

1. Criminal Law 🔑772(5)

In every prosecution involving specific intent, an instruction on specific intent is sufficient for all purposes and instruction on general intent is unnecessary.

2. Criminal Law 🔑772(5)

When instructions are given on both general and special intent, a third instruction is necessary which states that instruction on general intent does not relate to crimes which require proof of specific intent.

3. Infants ⚷20

In prosecution for committing lewd and lascivious acts with a child under 14 years of age, instruction on general intent should not be given at all. Pen.Code, § 288.

4. Criminal Law ⚷814(6)

Unless evidence presents question whether act charged was committed knowingly and voluntarily, an instruction on general intent is irrelevant and redundant.

5. Infants ⚷20

Where defendant in prosecution for committing lewd and lascivious acts with child under 14 years of age denied that he committed the alleged acts, and no facts were in evidence even remotely suggesting that the alleged acts could have been committed innocently, it was improper to give an instruction on general intent. Pen.Code, § 288.

6. Criminal Law ⚷1172(1)

Where nature of alleged acts by defendant charged with lewd and lascivious acts with child under 14 years of age was such as to preclude belief that they were committed without criminal intent or were committed innocently, giving of improper instruction with reference to general intent did not warrant a reversal. Pen.Code, § 288.

7. Infants ⚷20

In prosecution for committing lewd and lascivious acts with a child under 14 years of age, it was not error to instruct that defendant could be convicted of contributing to delinquency of a minor as an included offense. Pen.Code, § 288; Welfare and Institutions Code, § 702.

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Horace H. Appel, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant Booth was convicted by a jury of violation of section 288, Penal Code. He moved for a new trial, which was denied, and he was placed on probation for seven years. He appeals from the order denying his motion for a new trial, claiming error in the instructions.

The court gave an instruction reading: "Every person who wilfully and lewdly commits any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child is guilty of a crime."

Also one reading as follows: "In every crime or public offense there must exist a union or joint operation of act and intent. To constitute criminal intent it is merely necessary that a person intend to do an act which, if committed, will constitute a crime. When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive."

The two instructions are in direct conflict. One states that in order to constitute the offense the act must be committed with the intent of arousing the passions, etc. of the accused or the child, the other that criminal intent is merely the intent to commit the act which constitutes the crime, even though there be no bad motive. The first describes the specific intent which is an element of the crime here charged, the second the general intent or volition of the actor which is an element of every crime or public offense. Since the second instruction relates to all crimes, it embraces those which require proof of a specific intent. Under this instruction defendant could have been convicted without evidence or a finding of a specific intent, and to give it was error. People v. Geibel, 93 Cal.App.2d 147, 176, 208 P.2d 743.

[1–4] We are at a loss to understand why it was given, or why it is given in so many cases where it can serve no purpose and tends to create confusion. To be sure it states the law as declared in the Penal Code, but that is no reason for giving an instruction which expounds legal principles that are wholly irrelevant to the issues. In every case involving specific intent an instruction on specific intent is sufficient for all purposes. It embraces all the elements of general intent. When instructions are given on both general and specific intent a third instruction is necessary which states that the instruction on general intent does not relate to crimes which require proof of specific intent. The instruction on general intent should not be given at all in a prosecution for violation of section 288. In fact it is only in rare cases that it will serve any purpose. Occasionally the question will arise as an issue for the jury whether the act charged was committed knowingly and voluntarily. But unless the evidence presents that question the rule on general intent is irrelevant and redundant. We think the trend toward overinstructing juries should be reversed by the discontinuance of the use of instructions which state only irrelevant and meaningless abstractions.

[5, 6] The error in the instructions, when considered with the evidence, would not warrant a reversal of the order. The only question for the jury was whether defendant committed the acts which were described by the girl. The nature of the acts was such as to preclude the belief they were committed without criminal intent. The question of intent may be the principal one in a prosecution under section 288, see People v. Barton, 103 Cal.App.2d 1, 228 P.2d 852, but not in a case like this, where the defendant denies he committed the acts and no facts are in evidence which even remotely suggest that they could have been committed innocently. The testimony of the girl and her mother was deemed satisfactory by the jury; defendant was disbelieved. It is clear to us that the error in the instructions did not influence the verdict and that defendant was not harmed by it.

Defendant also contends that is was prejudical error to instruct that he could be convicted of contributing to the delinquency of a minor as an included offense. There was no error. There was no evidence of any act upon defendant's part which would not have amounted to contributing. Upon either charge the evidence would have been the same. All minors who are protected by section 288 are necessarily included among those who are protected by section 702, Welfare and Institutions Code (contributing). Violation of section 288 is necessarily violation of section 702, and the latter is therefore an included offense. People v. Greer, 30 Cal.2d 589, 598, 184 P.2d 512. But even if the instructions had been more favorable to defendant than he deserved he would have had no reason to complain.

The order is affirmed.

WOOD and VALLÉE, JJ., concur.

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110 Cal.App.2d 731

PEOPLE v. CONLEY.

Cr. 838.

District Court of Appeal, Fourth District, California.

May 5, 1952.

Rehearing Denied May 14, 1952.

Hearing Denied May 29, 1952.

Defendant was convicted in the Superior Court of Tulare County, Glenn L. Moran, J., of assault by means likely to produce great bodily injury. Defendant appealed from the "judgment of conviction" and from order denying his motion for new trial. The District Court of Appeal in and for the Fourth Appellate District, Barnard, P. J., held that evidence was sufficient to sustain the conviction.

Appeal dismissed and order denying new trial affirmed.

1. Criminal Law ⚷1168(2)

Where prosecution withheld testimony of witness to alleged assault and introduced it only as rebuttal evidence, and such testimony was a denial of new matter which had been brought out by defendant, and other portions of his testimony were along the same lines as that of witness' daughter who had previously testified in case-in-chief, and witness had suffered a prior conviction of a felony which defense brought out for purpose of impeaching him, permitting prosecuting attorney to withhold the testimony was not a ground for reversal.

2. Criminal Law 🔑1170½(5)

In prosecution for assault, in a cafe containing a bar, by means likely to cause great bodily injury, wherein court restricted cross-examination of state's rebuttal witness relating to what witness' husband had told bartender about the case and that if defendant would come to see husband the husband might forget what husband knew and bartender was later permitted to testify on same subject, and defense counsel dropped matter and asked no further questions in that regard alleged restriction of cross-examination of state's rebuttal witness was not reversible error, since opportunity was given to bring out such evidence if any existed.

3. Assault and Battery 🔑96(3)
Criminal Law 🔑773(1), 774

In prosecution for assault by means likely to produce great bodily harm, the giving of instructions relating to self-defense, insanity and intoxication were not erroneous or harmful, where such matters were not vital to the defense, and jury was not confused or misled, and there was some evidence of intoxication, and jury might have concluded from the evidence that defendant was justified in using force to prevent being "pawed" by victim, and insanity instruction was merely a general instruction on matter of intent.

4. Assault and Battery 🔑96(9)

In prosecution for assault by means likely to produce great bodily harm, wherein defendant testified that he did not intend to hurt victim when defendant shoved victim out of front door of cafe, instruction that the prosecution need not prove that defendant intended to severely injure the victim had a proper relation to the evidence and was a correct statement of the law and was not error.

5. Assault and Battery 🔑92

Evidence warranted conviction for an assault by means likely to produce great bodily injury.

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John T. Fuller, Don G. Christenson, Porterville, A. P. G. Steffes, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with an assault by means likely to produce great bodily injury upon one Higgins. A jury found him guilty, and his motion for a new trial was denied. Imposition of sentence was suspended for three years and he was given probation with the condition that he serve six months in the "custody" of the sheriff. He has appealed from the "judgment of conviction" and from the order denying his motion for a new trial.

The defendant was the proprietor of a "cafe" in Porterville which had a bar along one side and a food counter on the other, the two being some ten feet apart. There were swinging doors at the entrance, portions of which were made of clear glass, and a short incline from the doors to the sidewalk. A parking meter stood directly across the sidewalk from the doors.

The incident here involved occurred shortly before midnight on March 17, 1951. There were a number of people seated at the bar including two women, and a number of people seated at the food counter, including one Burkhart and his 12-year old daughter. The defendant got into an argument with one McIntyre, who had formerly worked for him, which started when McIntyre called him a "slave driver". The defendant became abusive, talked loud, used profane and obscene language, and challenged McIntyre to go to the alley and fight. Higgins, who had been seated near the front end of the bar, went to the rear end of the bar and placed one hand on the defendant's shoulder and the other on Mc-

Intyre's shoulder, saying "Come on fellows let's be friends." The defendant turned around and told him to get back. Higgins stepped back with a surprised look, and asked the defendant if he wanted a nickel. The bartender came and took hold of Higgins' right arm and started to lead him out. Higgins went along without resisting. The defendant left his stool, went to Higgins' left side and grabbing him by the back of the neck and by the belt started to take him briskly toward the front doors. When they got to the doors the bartender let go of Higgins and opened the right-hand door. The defendant pushed the left door open with his shoulder, proceeded through the door, and then pushed or shoved Higgins with such force that he struck his head against the parking meter and fell to the sidewalk. The defendant reentered the cafe and made a remark to the effect that the meter was good for something besides putting money in it; that it was good for knocking a man's brains out. He also asked everybody in general, and McIntyre in particular, if they wanted any of the same thing.

Higgins received rather serious injuries as a result of which he spent about twenty days in a hospital. The doctor testified that his injuries could have been caused by stumbling into the meter "if the man had enough propulsion from behind him." When police officers arrived at the cafe a few minutes later and asked the defendant what had happened, he replied: "Nothing happened". When asked why he had not called the police if someone was bothering him he said it was not his fault that the meter got in the way. He also complained that the officers had not come when called on a previous occasion, and became quite abusive toward them.

The defendant took the stand and told the same general story about this occurrence, although he gave a different version of some of the details. He said he had had three drinks of whiskey to which some creme de menthe had been added, but that he was not drunk. He admitted that he was angry and that he had used obscene language in his argument with McIntyre. He said that when Higgins interrupted his argument he asked him several times to leave the building but Higgins continued to "paw" him; that Higgins said something he didn't know what; that he took him by the collar and the belt and escorted him to the front door; that he gave Higgins a shove and turned around and walked back; that "I probably shoved him harder than I realized"; that he did not think of the parking meter in front of the cafe; that the bartender came and took Higgins' right arm as he was ushering him out; that neither he nor the bartender went through the doorway; that as soon as he released Higgins he turned and walked toward the rear of the cafe; and that he did not then know that Higgins had been hurt. He denied that he had invited McIntyre out to fight, saying he had invited him out to wrestle. He denied asking if any one else wanted some of the same thing, or that he had made any statement about a parking meter being good for something besides putting money in. He produced a number of witnesses who corroborated his story, most of them being his employees and the wife of an employee. They rather overdid this, however, as they all denied seeing or hearing obvious things which the defendant himself admitted had occurred.

Three witnesses were called in rebuttal. One Bullard, a customer, testified that the bartender took hold of Higgins and was leading him toward the door "when the defendant got up and got hold of him and helped him toward the door"; that he turned around and did not see them arrive at the door; and that the defendant came back in a minute or so and remarked "Maybe you would like a little of the same stuff, too." Burkhart testified that Higgins just put a hand on the shoulder of the two men and that there was no stroking or "pawing"; that the bartender was leading Higgins out when the defendant "come along and grabbed him and finished the job"; that Higgins made no resistance and the defendant took him out "with great speed and ran his head into that meter"; that the defendant was out on the sidewalk for about fifteen seconds; that when he came back into the room he said he was going to call somebody at the city hall and tell him that the "meter was good for something besides putting money in, that it was good for knocking a man's brains out"; that the defendant then asked whether anybody wanted any of it; and that after the defendant came back in he could see through part of the door and saw Higgins "laying out there crossways on the walk." A Mrs. Maxon, who lived in an apartment across the street, testified that she was looking through her window; that she saw three men come rushing through the door; that the bartender turned around and went back; that the defendant walked to about the middle of the sidewalk; that he had his hand on the back of Higgins' neck "and he give him an awful shove"; that the defendant stood on the sidewalk until after Higgins struck the meter and slipped to the sidewalk; and that he then turned and walked back into the cafe.

[1] Appellant's main contention is that the court abused its discretion in permitting the prosecution to introduce testimony in the guise of rebuttal which was properly a part of the People's case in chief. When the People rested defense counsel expressed surprise that Mr. Burkhart had not been called. The deputy district attorney stated that he would be a rebuttal witness. Out of the presence of the jury defense counsel stated that he would object to this procedure, that Burkhart had been a witness before the grand jury, that his testimony would be corroborative of the testimony of his daughter who had already testified, and that it would be prejudicial error to hold this witness or any other witnesses back for rebuttal. At the conclusion of the defense's case the defendant moved to exclude the testimony of Burkhart. This motion was denied and he was allowed to testify. It is now argued that this was prejudicial error, citing People v. Schmitz, 7 Cal.App. 330, 94 P. 407, 419, 15 L.R.A.,N.S., 717; People v. Rodriguez, 58 Cal.App.2d 415, 136 P.2d 626; People v. Leach, 137 Cal.App. 753, 31 P.2d 449; People v. Avery, 35 Cal.2d 487, 218 P.2d 527; People v. McCarthy, 88 Cal.App.2d 883, 200 P.2d 69. The practice of holding back witnesses for rebuttal when the testimony is more properly a part of the People's case in chief is disapproved in these cases, and some of them suggest that under some circumstances this might constitute prejudicial error. We find nothing in those cases which would justify or compel a reversal under the facts in this case. A large part of Burkhart's testimony was a denial of new matter which had been brought out by the appellant, and was properly rebuttal. While other portions of his testimony were along the same lines as that of his daughter who had previously testified and could properly have been presented on the case in chief, it was a part of the background showing that the witness was in a position to see the things to which he testified and it is difficult to see how any particular prejudice resulted because it was brought in at one time rather than at another. Moreover, this witness had suffered a prior conviction of a felony, which fact the defense brought out for the purpose of impeaching him. Knowing that he would be thus impeached, the prosecution might well prefer not to use him on its main case. A good reason appears for using the testimony of Mrs. Maxon in rebuttal. The appellant had admitted before the grand jury, possibly by inadvertence, that he went through the doors on this occasion and it would not have been necessary to use Mrs. Maxon if he had not insisted at the trial that he did not go through these doors. Her testimony was proper rebuttal. No argument is made with respect to the other rebuttal witness, Mr. Bullard. Under the facts here appearing, it cannot be held that reversible error appears in this connection.

[2] It is next contended that the court erred in restricting the cross-examination of Mrs. Maxon. The defense counsel started to ask whether she had ever talked with her husband about his going over and telling the bartender something. An objection was made before the question was completed and, out of the presence of the jury, the appellant offered to prove that her husband had told the bartender that he knew all about the case, and that if the appellant would come to see him he might forget what he knew. The dis-

trict attorney objected to the offer of proof, suggesting that the bartender and the husband were the proper persons to testify in that regard. The court sustained the objection to the question and to the offer of proof. Defense counsel stated that he did not want to call Mr. Maxon because he did not want to be bound by his testimony. When he later called the bartender and asked him what Mr. Maxon had done an objection was sustained. After some discussion the court reversed his ruling and told the defense counsel he would permit him to have the witness testify about Mr. Maxon. Defense counsel dropped the matter and asked no further question in that regard. Opportunity was given to bring out such evidence if any existed, and no reversible error appears.

[3] It is next contended that the court erred in giving three instructions. The first stated the usual rule as to the kind and degree of force which a person may lawfully use in self-defense, and that any use of force beyond that is regarded by the law as excessive. The second was the usual instruction that the intent with which an act is done is manifested by the surrounding circumstances and the sound mind of the accused, and that it must be presumed that the defendant was sane at the time in question. The third was the usual instruction to the effect that no act is less criminal because it was committed by a person while in a state of voluntary intoxication. It is argued that these instructions were improper since no such defenses were raised. The appellant relies on People v. Silver, 16 Cal.2d 714, 108 P.2d 4, where it was held that in a close case a misleading instruction on an issue not raised is prejudicial where it may have confused the jury on a matter vital to the defense. No such situation here appears. These matters were not vital to the defense and there is nothing to indicate that the jury was confused or misled. There was some basis for the instruction on self-defense, since the appellant testified that Higgins continued to "paw" him, and the jury might otherwise have concluded that he was justified in using any amount of force to prevent this physical contact. The instruction on insanity was merely a general instruction on the matter of intent, and was neither erroneous nor prejudicial. While the appellant testified that he was not drunk, there was evidence to support a contrary inference, and the instruction on intoxication was neither erroneous nor harmful.

[4] It is next contended that the court erred in instructing the jury "that the prosecution need not prove that the defendant intended to severely injure the complaining witness." The appellant had testified that he did not intend to hurt Higgins when he shoved him out the front door. This instruction had a proper relation to the evidence, and it was a correct statement of the law.

[5] It is next contended that the evidence was insufficient to sustain a conviction since it conclusively appears that Higgins' injury resulted from an unusual accident, and that appellant's conduct amounted to nothing more than a simple assault or battery. This contention is without merit. The evidence for the prosecution showed a vicious attack, with unnecessary force, and without any reasonable provocation. The evidence for the appellant disclosed an attack with a degree of force entirely uncalled for, and with no provocation worthy of the name. The evidence was sufficient to sustain the implied finding that the force used was one which was likely to produce great bodily injury.

The appellant's final contention, that the court erred in denying a motion for a new trial, is based upon the contentions already considered and may not be sustained.

The purported appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

110 Cal.App.2d 814

ROYAT et al. v. ROBERTS et al.

Civ. 8032.

District Court of Appeal, Third District, California.

May 9, 1952.

As Modified May 28, 1952.

Leonard W. Royat and another, individually and as partners doing business under the firm name and style of Dobbins Logging Company, brought action in claim and delivery and for damages against George Roberts, also known as George W. Roberts, the Bank of America National Trust and Saving Association, and another, based on wrongful repossession of tractor which plaintiffs had purchased from individual defendants and assumed a chattel mortgage held by bank. The Superior Court, Humboldt County, Carl L. Christensen, Jr., J., entered a judgment against the individual defendants and in favor of the bank, and plaintiffs appealed from judgment in favor of bank. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that wrongful repossession was act of sellers and not as agents for bank.

Judgment affirmed.

1. Banks and Banking ⚷118

In buyers' action in claim and delivery and for damages against bank and sellers who had sold tractor upon which there was chattel mortgage held by bank and assumed by buyers, based on sellers' alleged wrongful repossession of tractor, evidence sustained finding that sellers in repossessing were acting for themselves and not as agents for bank, and that there was no ratification of such repossession by bank.

2. Banks and Banking ⚷114

Where sellers wrongfully repossessed tractor upon which there was chattel mortgage held by bank and assumed by buyers, if bank thereafter and while tractor was in sellers' possession took mortgage upon it, for whatever such mortgage might be worth, in order to secure theretofore unsecured debts owing it by sellers, such acts did not constitute ratification by bank of wrongful taking.

3. Principal and Agent ⚷163(1)

Before an act or contract may be subject of ratification, there must be some relationship, actual or assumed, of principal and agent.

4. Chattel Mortgages ⚷172(1)

In buyers' action in claim and delivery and for damages against bank and sellers who had sold tractor upon which there was chattel mortgage held by bank and assumed by buyers, based on sellers' wrongful repossession of tractor, wherein issues were right of buyers to possession, wrongful deprivation of possession, and wrongful detention of property after taking, it was not necessary or proper for court to pass upon validity of bank's chattel mortgages or amounts secured thereby in view of fact that bank did not assert any right to possession.

5. Action ⚷6

In buyers' action in claim and delivery and for damages against bank and sellers who had sold tractor upon which there was chattel mortgage held by bank and assumed by buyers, based on sellers' wrongful repossession of tractor, wherein trial court declared seizure to be unlawful and awarded damages for wrongful taking as against sellers, question of propriety of findings that balance of purchase price after bank's mortgage was, under oral agreement, to be paid when final mortgage installment was due, and that title to tractor was by agreement reserved to sellers, was moot.

6. Sales ⚷403

In buyer's action in claim and delivery and for damages against sellers who had sold tractor upon which there was chattel mortgage held by bank and assumed by buyers, based on sellers' wrongful repossession of tractor, evidence supported finding as to amount of balance owed by buyers on purchase price of tractor.

7. Sales ⚷403

In buyers' action in claim and delivery and for damages against sellers who had sold tractor upon which there was chattel mortgage held by bank and assumed by buyers, based on sellers' wrongful repossession of tractor, amount of balance of purchase price owing by buyers was material only because buyers were entitled to have a decree that they are entitled to possession of tractor and if that could not be had, entitled to recover value of it, which would have to be reduced by amount buyers owed upon purchase price.

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Morris M. Grupp, San Francisco, for appellants.

Dorman & Stokes, Arcata, Samuel B. Stewart, Jr., and Christopher M. Jenks, San Francisco, for respondents.

VAN DYKE, Justice.

Plaintiffs and appellants herein brought action in claim and delivery and for damages. They complained against defendants George and Lawrence Roberts who have not appealed from the judgment rendered against them, and against Bank of America National Trust and Savings Association, in whose favor the trial court gave judgment. Plaintiffs have appealed from the judgment in favor of the bank and with respect to the judgment against the Roberts they appeal, contending that insufficient relief was given. The bank has filed a brief in reply, but the Roberts made no appearance in this Court.

Prior to May, 1947 defendants Roberts owned a tractor upon which the bank held a chattel mortgage. In May appellants purchased the tractor, under an oral contract, for a purchase price of $9,500. They paid $1,000 down. At that time the sellers owed the bank $5,200 secured by the chattel mortgage. By the oral agreement appellants were to assume the mortgage debt and to make the payments thereon as they fell due under the terms of the mortgage. The trial court found that the balance was to be paid to the Roberts on or before the time for the making of the last payment to the bank on the mortgage. While the agreement was quite indefinite about this we think the trial court's conclusions on that point are supported by what was proven. By December 14, 1948 appellants had paid to the bank all moneys called for by the chattel mortgage save $327.08, which amount was delinquent. At that time defendants Roberts repossessed the tractor and, despite demands for its return, continued to detain the same. Claiming that the repossession was wrongful, appellants filed this action, charging that both the Roberts and the bank had been guilty of unlawfully taking and detaining plaintiffs' chattel to their damage in the sum of $25,000. They prayed that they recover the tractor or have judgment for its value if recovery could not be had and that they have judgment further for the damages alleged as arising from the unlawful taking and keeping. The trial court found in effect that the bank had had nothing to do with either the wrongful taking or the wrongful detention and entered judgment in its favor accordingly. As to the Roberts, the trial court found the taking and the detention had been wrongful and had damaged plaintiffs in the sum of $3,000. It gave judgment in plaintiffs' favor for the recovery of the tractor or for its value if recovery could not be had, for the damages found and for costs. It appears that this judgment was partly executed in that upon process issued the tractor was recovered by plaintiffs. These facts were made the basis of a motion herein to dismiss the appeal, which was denied. Royat v. Roberts, 107 Cal.App.2d 447, 237 P.2d 25. The court found that "the value of the interest of plaintiffs and the amount of the interest of plaintiffs, in said tractor, winch and blade, as against the defendants Roberts, at the time of the taking thereof and at the time of trial herein, was and is the sum of $3380.40, being the market value of said equipment [found to be $7,000.00] less the amount remaining unpaid on said contract of conditional sale." The conclusions of law were that the plaintiffs recover from defendants Roberts the sum of $3,000 damages for wrongful taking and detention, and that they recover possession of the tractor, or if that could not be had, then in lieu thereof that they should recover the sum of $3,380.40, the net value of their interest in the property.

[1] Appellants contend that the trial court erred in holding that the respondent Bank of America had no part in the commission of the tort. Appellants argue that the court should have rendered judgment against the bank "identical to that rendered against the Roberts." This contention can-

not be sustained because there was substantial evidence in support of the court's decision. Specifically, the court found that "defendant Bank of America National Trust and Savings Association did not take said equipment from plaintiffs at any time, and was not at any time either prior to or after the commencement of this action in possession thereof, and did not at any time secrete or transfer the same to any one, and was not at any time either the agent or the principal of either of the defendants Roberts, and at all times the said defendants Roberts were acting for their own purposes and not as the agent of, or the principal of, the said defendant Bank of America." Appellants do not contend that the bank through any of its officers or employees took physical possession of the tractor or kept or detained it. Their argument is that the bank was a joint tort-feasor with the Roberts in the wrongful taking and detention of the property; that the Roberts, in what they did, were agents of the bank. On this appeal we are not concerned with whether or not a finding in accordance with appellants' contentions would find support in the evidence. We are concerned only with whether or not the contrary findings made by the court are sustained. Leonard Royat testified that the bank had at no time, to him, threatened repossession for nonpayment; defendant George Roberts testified that he had no authority from the bank to repossess the chattel. When the Roberts appeared to repossess the tractor, one of the appellants called the bank, long distance, and asked if the bank would be satisfied if the balance of its account were mailed in and the reply was that it would be all right as far as the bank was concerned, whereupon Lawrence Roberts told appellants that it might be all right with the bank but that unless they paid him the balance due to the Roberts the machine would be taken. From the foregoing the trial court could conclude, as it did, that whatever may have been the status of the bank when the repossession proceedings started, the bank withdrew when told that its payment would be mailed in, and that the Roberts went on to repossess under their own claim of right to do so.

[2, 3] Appellants next contend that if there was no agency whereby the bank, through its agents, the Roberts, repossessed the chattel, nevertheless the bank so acted thereafter as to create such precedent authority by subsequent ratification of what the others did. Herein they depend upon these events: The Roberts, aside from the amount directly secured by the chattel mortgage, owed the bank money on unsecured loans; after the Roberts had taken the tractor the bank took from them a new mortgage thereon to secure these theretofore unsecured loans; in its answer herein the bank claimed that it had a security interest evidenced by this new mortgage; the bank did not "repudiate" in any way the wrongful acts of the Roberts. From the evidence recited, the court was warranted in concluding that the Roberts not only did not purport to be acting for the bank but professed to be acting solely on their account and for their own interests. If the bank thereafter, and while the tractor was in the Roberts' possession took a mortgage upon it, for whatever such mortgage might be worth, in order to secure theretofore unsecured debts owing it by the Roberts these acts did not constitute ratification of the wrongful taking. Impliedly, the court found that the bank did not ratify and this finding is supported by the circumstances recited, for the acts of the bank relied upon to constitute such ratification are not conclusive of ratification. Whether there was agency and whether there was ratification, were questions of fact and enough has been stated to show that the court had support for its findings that agency did not exist and ratification did not occur. Moreover, before an act or contract may be the subject of ratification there must be some relationship, actual or assumed, of principal and agent. 2 Am.Jur. p. 177, Agency, sec. 222. The trial court, upon substantial evidence, found there was no agency in fact, and that no agency or right to act as agent was assumed or professed and that on the contrary the Roberts claimed to act solely on their own account.

[4] Appellants complain that the trial court did not decide all issues presented by the pleadings and the evidence and in par-

ticular they say that whereas the complaint alleged that the defendants unlawfully asserted an interest in the tractor and the bank alleged in its answer that it had a chattel mortgage thereon which had not been released, no findings specifically were made as to these matters. Appellants' contentions are without merit. The issues were, the right of appellants to possession, the wrongful deprivation thereof by defendants, and the wrongful detention of the property after its taking. These issues were all decided. It was not necessary or proper for the court to pass upon the validity of the bank's mortgages or the amount secured thereby since the bank was not asserting any right to possession. Tuohy v. Linder, 144 Cal. 790, 78 P. 233.

[5] Appellants complain that certain findings of fact are unsupported by the evidence or contrary thereto. Under this assignment of error they list the court's findings that the balance of the purchase price after payment of the bank's mortgage was, under the oral agreement, to be paid when the final mortgage installment was due and that title to the tractor was by the agreement of the parties reserved to the Roberts. Assuming that these findings were not justified, they were immaterial, for the court declared the seizure to be unlawful and awarded damages for its wrongful taking and detention and thus gave to appellants all of the relief they would have been entitled to if their contentions above stated were correct. This is not to say the findings complained of were not proper; it is to say the matter is moot.

[6, 7] Appellants next complain that the court erred in finding the exact unpaid balance of the purchase price of the tractor to be $3,619.60, and in finding that the value of the tractor at the time it was wrongfully taken amounted to $7,000, with the result that the "net value of appellants' equity therein" amounted to $3,380.40. It must be said that the evidence as to the amount still owing to the Roberts on the purchase price of the tractor was most unsatisfactory, but we think it cannot be said that there is not substantial support for the court's finding. The matter was material only because the appellants were entitled, if they were successful in fastening upon the Roberts liability for wrongful taking, to have it decreed they were entitled to possession of the tractor and if that could not be had, entitled to recover the value of it. In ascertaining the amount which would measure the alternative remedy if possession could not be regained, the court had to subtract from the total value of the chattel the amount still owed the Roberts therefor by the appellants, and it thus became proper for the court to determine what that unpaid balance of purchase price amounted to. Bunnel v. Baker, 104 Cal.App. 313, 317, 285 P. 877, 286 P. 1090. One of the Roberts testified that while at the scene of repossession the parties were arguing about the Roberts' right to repossession, both the appellants admitted that $3,700 was still owed on the purchase price to the Roberts. Also a witness by the name of Ralph Crane testified that he was present at the place of repossession and had heard one of the Roberts claim to the Royats that the amount owing exceeded $4,000, whereas the Royats claimed it was between $3,700 and $3,800. It appeared that records kept by the Roberts which would have shown the status of the account had been burned and no other records were available. It was for the trial court to determine as best it could from the evidence available how much was still owed. It fixed the figure within the permissible limits as shown by the foregoing testimony which it had a right to believe, and therefore the court's findings cannot be disturbed here. Appellants did introduce various records of their own, constituting books, checks and summaries drawn therefrom, but on appeal these matters must be treated as doing no more than to raise a conflict upon a question of fact. The trial court's finding to the contrary is supported and must be upheld.

The judgment appealed from is affirmed.

ADAMS, P. J., and PEEK, J., concur.

110 Cal.App.2d 802

GOLDSWORTHY et al. v. DOBBINS et al.

Civ. 18833.

District Court of Appeal, Second District, Division 3, California.

May 8, 1952.

Hearing Denied July 7, 1952.

Action by Edgar C. Goldsworthy and Liliane C. Goldsworthy against Charles E. Dobbins and others for specific performance of contract by which defendants had agreed to purchase certain realty from plaintiff. The Superior Court of Los Angeles County, James H. Pope, Judge Assigned, entered interlocutory judgment, nunc pro tunc order amending interlocutory judgment, and final judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Vallée, J., held that final judgment in action by vendor for specific performance should be modified to contain provision compelling conveyance by vendors upon terms and conditions specified in contract upon receipt of purchase price.

Judgment modified and affirmed, appeals from nunc pro tunc order amending interlocutory judgment, from interlocutory judgment as originally entered, and from interlocutory judgment as amended, dismissed.

1. Appeal and Error ⟹113(5)

Nunc pro tunc order amending interlocutory judgment, interlocutory order as originally entered, and interlocutory judgment as amended, were nonappealable, and appeals therefrom would be dismissed.

2. Appeal and Error ⟹870(1)

On appeal from final judgment, the rulings and decisions of the court on all issues are reviewable. Code Civ.Proc. § 956.

3. Parties ⟹51(1)

The general rule is that court will not order new party defendant brought in unless presence of new party is necessary to determination of the action. Code Civ. Proc. § 389.

4. Specific Performance ⟹106(4)

Where vendors brought action against purchasers for specific performance of contract for purchase of realty, and contract provided for payment of $10,000 in cash and assumption by purchaser of first deed of trust and execution of new deed of trust to holders of second deed of trust, decree for specific performance would not affect or prejudice holders of second deed of trust, and they were consequently not indispensable parties to determination of issues. Code Civ.Proc. § 389.

5. Specific Performance ⟹2, 66

Statute providing that no deficiency judgment shall lie in any event after any sale of real property for failure of purchaser to complete his contract of sale, did not abolish remedy of specific performance in action brought by seller against buyer to enforce contract to purchase real property when obligation of buyer was to pay money and value of property equaled purchase price, and statutes dealing with such right of vendor were not repealed by implication. Code Civ.Proc. § 580b; Civ. Code, §§ 3384–3395; Pol.Code, §§ 4481, 4482.

6. Specific Performance ⟹66

Statute providing in part that no deficiency judgment shall lie in any event after any sale of real property for failure of purchaser to complete his contract of sale, applies only to contracts of sale where credit is involved, and did not apply when vendor sought specific performance of contract for sale for cash. Code Civ.Proc. § 580b; Civ.Code, §§ 3384–3395; Pol.Code, §§ 4481, 4482.

7. Specific Performance ⟹126(1)

A decree for specific performance, in addition to ordering conveyance, may make such delivery conditional upon payment by purchaser of amount due on purchase price, together with interest from date it fell due, and if parties have agreed that policy of title insurance shall be furnished, judgment in action brought by vendor, may require payment to be made by purchaser only upon tender to him of policy of insurance showing title to be in vendor, free and clear of all encumbrances except those agreed upon.

8. Specific Performance ⟹126(1)

Where property which is subject of specific performance suit is encumbered, court may direct amount of encumbrance to be paid directly to holder thereof instead of to vendor, even though such holder is not before court.

9. Specific Performance ⚷131

When judgment for specific performance of contract for sale of realty includes order that vendor convey realty to purchaser, it effects transfer of title as effectively as voluntary conveyance.

10. Appeal and Error ⚷1152
Specific Performance ⚷131

Interlocutory judgment in vendor's specific performance suit allowing purchaser a specified time to pay purchase price and accept deed and title documents deposited in escrow, and providing that if purchaser failed to do so, final judgment for purchase price shall be entered, was proper, but final judgment as entered would be so modified as to compel conveyance by vendors in accordance with contract upon receipt of purchase price.

11. Judgment ⚷527

Resort may be had to findings of fact, conclusions of law, and interlocutory judgment, for purpose of clarifying any uncertainty in final judgment.

12. Specific Performance ⚷132

Where judgment in specific performance suit directs vendors, upon receipt of purchase price, to convey to purchasers upon terms and conditions specified in agreement, if vendors, after receipt of purchase price, disobey command to convey, or prevent delivery of deed, specific performance judgment can be enforced against them by contempt proceedings.

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Shepherd & Shepherd, Los Angeles, for defendants-appellants.

Glenn R. Watson, Los Angeles, for plaintiffs and respondents.

VALLÉE, Justice.

Appeal by defendants Dobbins on the judgment roll in a suit for specific performance brought by the vendors to compel the purchasers to perform a contract for the sale of realty situated in Los Angeles.

On February 7, 1950, plaintiffs and defendants Dobbins, referred to as defendants, entered into a contract in writing whereby plaintiffs agreed to sell and defendants agreed to buy a parcel of improved realty. The purchase price was $33,496.78 to be paid $10,000 in cash and the balance by the assumption of a first trust deed on which there was an unpaid balance of about $11,146.78 and a second trust deed securing $12,350. At the time the contract was made there was a second trust deed on the property securing $16,179.88. The contract provided that $2,000 of the $10,000 cash be paid to the Griswolds, holders of the second trust deed then on the property, and that a new trust deed be executed to them securing $12,350. The Griswolds, in writing, separately agreed with defendants to accept $2,000 cash and a new second trust deed for $12,350 in lieu of that for $16,179.88. The contract of February 7, 1950, provided that if an action was instituted thereon the defendants would "pay such sums as the Court may fix as attorney's fees."

On February 8, 1950, the parties opened an escrow and signed escrow instructions. On March 13, 1950, plaintiffs, defendants, and the Griswolds entered into an additional written contract by which it was agreed that plaintiffs would pay the monthly payments on the first trust deed as they fell due and defendants would make up "the difference which is paid to principal same to be adjusted in cash to purchase price at close of this escrow."

Plaintiffs executed a good and sufficient deed of the realty to defendants and delivered it to the escrow holder in conformity with the escrow instructions, took all steps necessary to have a policy of title insurance issued showing title vested as agreed, and performed all of the terms of the contract on their part to be performed. The Griswolds caused the trustee of the existing trust deed to execute a full reconveyance thereof which was deposited in the escrow. Nothing further remained to be done by plaintiffs or the Griswolds to complete the escrow and the escrow holder was ready to proceed.

Defendants deposited $100 and a note and trust deed for $12,350 in favor of the Griswolds in the escrow. In all other respects they failed and refused to perform the contracts. On May 26, 1950, having decided to move from Los Angeles to Oakland, they delivered a document to plaintiffs in which they attempted to rescind the contracts and the escrow instructions in their entirety.

The court found that: 1) the fair and reasonable value of the property was $33,496.78, the purchase price; 2) the contracts are fair and reasonable; 3) since opening of the escrow plaintiffs have paid $984.90 on the principal of the first trust deed; 4) under the contracts defendants are indebted to plaintiffs in these amounts: a) $8,079.58 for the equity in the realty with interest, b) $984.90 to reimburse plaintiffs for payments on principal of the first trust deed, and c) $1,500 attorney fees. It was also found that defendants had paid $100 on their obligation.

On June 5, 1951, an interlocutory judgment was entered in which it was decreed that the contracts be specifically performed and that defendants "within fifteen (15) days from the date of service upon them of notice of entry of this interlocutory judgment, pay into the escrow between the parties the sum of $7,979.58, the sum of $2,000.00, the sum of $984.90, and any additional installments of principal on the first trust deed on the premises involved in this action after date of trial and prior to the expiration of said fifteen (15) days; upon said sums having been paid by defendants, plaintiffs obtain, or cause to be obtained and deliver to the first lien holder, a standard policy of title insurance with a liability of not less than $31,496.76, showing title vested in Charles E. Dobbins and Avis O. Dobbins, his wife, as joint tenants, free of encumbrances" except 1) those specified in the escrow instructions, 2) the first trust deed, 3) a second trust deed in favor of the Griswolds for $12,350; and that taxes, rentals, insurance premiums, and interest on the trust deeds be prorated as of the date of close of escrow as provided in the escrow instructions.

It was further decreed that in the event defendants failed to perform the contracts on their part or pay said sums into escrow within the fifteen days that final judgment be made and entered in favor of plaintiffs and against defendants in the sum of $7,979.58 with interest from May 26, 1950, and in the sum of $984.90 with interest from March 1, 1950, "jurisdiction being hereby retained to enter such judgment, and at such time such judgment shall finally determine all the rights of the parties herein." Plaintiffs were also awarded $1,500 attorney fees.

Defendants moved for a new trial which was denied. On the hearing of the motion on July 6, 1951, the conclusions of law were amended to provide that upon payment of the amounts specified in the interlocutory judgment defendants were entitled to a conveyance of the realty; and the interlocutory judgment was amended *nunc pro tunc* as of June 5, 1951, to provide that "upon payment of such judgment that plaintiffs' conveyance of said premises be delivered to said defendants. * * *"

On July 6, 1951, a final judgment was rendered which recited that defendants had not complied with the interlocutory judgment, and adjudged that plaintiffs take judgment against defendants for $8,964.48 and interest, and that on payment of the judgment the realty be conveyed to defendants.

[1, 2] Defendants appealed from 1) the *nunc pro tunc* order amending the interlocutory judgment, 2) the interlocutory judgment as originally entered, 3) the interlocutory judgment as amended, and 4) the final judgment. As numbers 1), 2) and 3) are nonappealable the appeals therefrom must be dismissed. Mather v. Mather, 22 Cal.2d 713, 720, 140 P.2d 808; Bakewell v. Bakewell, 21 Cal.2d 224, 226–228, 130 P.2d 975. On the appeal from the final judgment the rulings and decisions of the court on all the issues are reviewable. (Code Civ. Proc., § 956.)

The assignments of error are: 1) the Griswolds were necessary parties to the action; 2) the findings do not support the judgment for $984.90 and interest; 3) the final judgment did not reserve jurisdiction to finally settle the matter; 4) the final judgment contravenes the provisions of section 580b of the Code of Civil Procedure because, in effect, it awards the plaintiffs a deficiency judgment; 5) the final judgment fails to take into consideration the fact that the plaintiffs have a vendors lien on the real property to secure their judgment; and 6) the final judgment, in effect, awards to the plaintiffs money by way of a penalty or forfeiture, contrary to the law of California as laid down in recent decisions.

The contention that the Griswolds were indispensable parties is without merit. Code of Civil Procedure, section 389 provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in * * *."

[3] It is only when a complete determination of the controversy cannot be had without the "presence" of a party that the court "must" order him brought in. The general rule is that the court will not order a new party defendant brought in unless the presence of the new party is necessary to the determination of the action. East Riverside, Etc., Dist. v. Holcomb, 126 Cal. 315, 320, 58 P. 817; Ambassador Petroleum Co. v. Superior Court of Los Angeles County, 208 Cal. 67, 673, 284 P. 445.

[4] A complete determination of the controversy can be had without the presence of the Griswolds. The controversy as to specific performance is solely between plaintiffs and defendants. It is only the persons whose interest in the subject matter will be affected by the decree, who are indispensable parties. The Griswolds are not affected or prejudiced by the decree; hence they are not indispensable parties to a determination of the issues between plaintiffs and defendants. Baines v. Zuieback, 84 Cal.App.2d 483, 493, 191 P.2d 67.

Plaintiffs agreed to make the payments on the first trust deed during escrow, and defendants agreed to reimburse them for that part of the payments which should be credited to principal. This was obviously done because, as found by the court, the escrow was prolonged for several months for defendants' convenience. The judgment for $984.90 represents the payments made by plaintiff on the principal of the first trust deed, and defendants received the benefit by reduction of the principal of the trust deed.

Defendants say they should not be charged with the $984.90 without a corresponding credit for rentals received by plaintiffs from the property during the same period of time. The parties agreed that plaintiffs should have the rentals during escrow while burdened with the management of the property and the expense of interest, taxes and insurance. Defendants say they would have no objection to the inclusion of the $984.90 in the judgment "if payment of it were set up as a condition precedent for the Dobbins receiving a conveyance of the real property." The effect of the judgment will be considered in later discussion.

[5] Section 580b of the Code of Civil Procedure, in pertinent part, provides: "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale * * *." Defendants argue that the enactment of section 580b in 1935 abolished the remedy of specific performance in an action brought by a seller against a buyer to enforce a contract to purchase real property where the only obligation of the buyer is to pay money and the value of the property equals the purchase price. The argument is untenable. To give section 580b the construction defendants seek would be to hold that sections 3384–3395 found in title III, chapter II of the Civil Code, treating of specific performance, were in part repealed by implication. No such consequence resulted. The effect of the enactment of section 580b on then existing provisions of law was ably and exhaustively discussed by Mr. Presiding Justice Peters in Kerrigan v. Maloof, 98 Cal.App.2d 605, 614–617, 221 P.2d 153. No purpose would be served in repeating it. It was there held, in conformity with the rules of construction stated in Political Code sections 4481 and 4482, that if the

provisions of any title of the codes conflict with or contravene the provisions of another title, or if the provisions of any chapter of the codes conflict with or contravene the provisions of another chapter, the provisions of each title or chapter must prevail as to all matters and questions arising out of the subject matter of such title or chapter, and that section 785 found in title X of the Code of Civil Procedure controlled the general language of section 580b found in title VIII of the same code. In Laske v. Lampasona, 1948, 89 Cal.App. 2d 284, 287, 200 P.2d 871, this court said it is well established that a vendor of real property has the right to have specific performance of a valid agreement of purchase.

[6] Defendants also argue that under the final judgment plaintiffs may have execution levied and end up with a deficiency judgment contrary to the mandate of section 580b. Kerrigan v. Maloof, supra, held that section 580b only applies to contracts of sale where credit is involved and does not apply to sales for cash. In the present case the sale was for cash.

Defendants say the facts of this case bring it within the principles announced in Freedman v. Rector, Wardens & Vestrymen, etc., 37 Cal.2d 16, 230 P.2d 629. The Freedman case was an action by a purchaser against a vendor, under a contract for the sale of real property, for specific performance or for damages. The plaintiff had made a down payment of $2,000. The court held he was not entitled to specific performance or damages for breach of contract because he had repudiated the contract. The question remained whether the plaintiff was entitled to the return of any part of his down payment. The defendant had resold the property for $2,000 more than the plaintiff had agreed to pay for it. The court held that the plaintiff was entitled to recover the $2,000 down payment less the defendant's expenses. Its reasoning was epitomized thus, p. 19: "If defendant is allowed to retain the amount of the down payment in excess of its expenses in connection with the contract it will be enriched and plaintiff will suffer a penalty in excess of any damages he caused." No such state of facts exists in the case at bar. This is not an action for damages. Plaintiffs do not seek to retain the defendants' down payment as a penalty for breach of the contracts. Plaintiffs will not be unjustly enriched nor will defendants suffer a penalty by performance of the contracts. Plaintiffs merely seek to compel defendants to specifically perform their contracts—to pay the amount they agreed to pay for the property, which the court has found to be just and reasonable, and on payment to receive a conveyance. Freedman v. Rector, Wardens & Vestrymen, etc., is not analogous.

Defendants' principal contention appears to be that the final judgment does not contain the provisions of the interlocutory judgment but merely provides that on payment of the money the property be conveyed to defendants, and that, therefore, it does not give them the legal rights to which they are entitled.

[7–9] A decree for specific performance, in addition to ordering a conveyance, may make such delivery conditional upon payment by the purchaser of the amount due on the purchase price, together with interest from the date it fell due. Such a condition protects the rights of the purchaser. Clyne v. Benicia Water Co., 100 Cal. 310, 315, 34 P. 714; Bird v. Potter, 146 Cal. 286, 289, 79 P. 970. If the parties have agreed that a policy of title insurance shall be furnished, the judgment, in an action by a vendor, may require payment to be made by the purchaser only upon the tender to him of a policy of title insurance showing title to the property to be in the vendor, free and clear of all encumbrances, except those agreed upon. Jackson v. Snow, 62 Cal.App. 56, 62, 216 P. 60. The court in an action for specific performance may direct that the amount of an encumbrance be paid directly to the holder instead of to the vendor even though such holder is not before the court. Grant v. Beronio, 97 Cal. 496, 498–499, 32 P. 556; Whittier v. Gormley, 3 Cal.App. 489, 492, 86 P. 726. When the judgment includes an order that plaintiff convey the realty involved to the defendant it effects a transfer of title as effectually as a voluntary conveyance. Scott v. Warden, 111 Cal. App. 587, 593, 296 P. 95.

[10, 11] The procedure followed in the present case—entry of an interlocutory judgment allowing the purchasers a specified time to pay the purchase price and accept the deed and title documents deposited in escrow, and if the purchaser fails to do so, the entry of a final judgment for the purchase price—was approved in Moser v. Pearce, 124 Cal.App. 478, 482–484, 12 P.2d 977. The final judgment should be modified to compel a conveyance by plaintiffs upon the terms and conditions specified in the contracts and in the escrow instructions on receipt of the purchase price. Such modification will eliminate the basis of defendants' claim that the final judgment disregards plaintiffs' vendors lien because, so it is argued, plaintiffs can levy and collect all sums less than the whole of the judgment and still retain title to the property. Resort may be had to the findings of fact, the conclusions of law, and the interlocutory judgment to clarify any uncertainty in the final judgment. Gelfand v. O'Haver, 33 Cal.2d 218, 222, 200 P.2d 790.

[12] Should plaintiffs, after receipt of the purchase price, in anywise disobey the command to convey, or prevent delivery of the deed, the judgment can be enforced against them by contempt proceedings. Code Civ.Proc., §§ 684, 1209(5), 1219; '76 Land & Water Co. v. Superior Court, 93 Cal. 139, 143, 28 P. 813; 58 C.J. 1277, §§ 633–5; 49 Am.Jur. 202, § 179. Cf. Ex parte Joutsen, 154 Cal. 540, 545, 98 P. 391; Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 41, 53 P. 440.

That part of the final judgment providing that the property be conveyed to defendants is modified to read as follows: It is further ordered that upon receipt of payment of such judgment plaintiffs Edgar C. Goldsworthy and Lilliane C. Goldsworthy 1) shall execute, acknowledge and deliver to defendants Charles E. Dobbins and Avis O. Dobbins a grant deed conveying to them, as joint tenants, the property described as: The South 40 feet of Lot 220 of Hyde Park as per map recorded in Book 14 Page 21 of Miscellaneous Records in the office of the County Recorder of said County; and, 2) cause to be obtained and delivered to the holder of the first deed of trust on said property a standard policy of title insurance with a liability of not less than $31,496.76, showing title thereto to be vested in defendants Charles E. Dobbins and Avis O. Dobbins, as joint tenants, free of encumbrances except (a) current taxes, conditions, restrictions, reservations, easements, and rights of way of record, if any, affecting the use and occupancy of said property, (b) exception or reservation of oil, gas, or mineral rights, if any, (c) a first deed of trust in the amount of about $10,161.88, (d) a second deed of trust in favor of S. E. Griswold and Edith K. Griswold in the amount of $12,350; the above mentioned deeds of trust and corresponding notes to be in the terms provided in the contracts and escrow instructions set out in the pleadings and referred to in the findings. Defendants are ordered to pay to plaintiffs any additional installments of principal on the first deed of trust on said property that have been paid by plaintiffs since the sum of $984.90 accrued. Defendants are ordered to pay to S. E. Griswold and Edith K. Griswold the sum of $2,000. It is further ordered that taxes on said property, rentals therefrom, insurance premiums thereon, and interest on the deeds of trust on said property be prorated between plaintiffs and defendants Dobbins as of the date that plaintiffs shall receive payment of such judgment. The court retains jurisdiction to make such further orders as may be proper or necessary to effectuate and enforce the provisions of this judgment.

As thus modified the judgment is affirmed. The appeals from the *nunc pro tunc* order amending the interlocutory judgment, from the interlocutory judgment as originally entered, and from the interlocutory judgment as amended, are dismissed.

WOOD, J., concurs.

SHINN, P. J., concurs in the judgment.

111 Cal.App.2d 83

In re MILLS' ESTATE.

Civ. 15379.

District Court of Appeal, First District,
Division 2, California.
May 14, 1952.

Proceedings in the matter of the estate of Edwin B. Mills, deceased, in which the Superior Court, Marin County, Donald K. Quayle, J., entered order settling an account and allowing certain fees for extraordinary services. On motion to dismiss appeal, the District Court of Appeal, Dooling, J., held that even though there was no direction in minute order for preparation of written order, when minute order omitted finding requisite to valid order, minute order would not be the appealable order, but time for filing notice of appeal was to be computed from time of formal written order.

Motion to dismiss denied.

1. Appeal and Error ⟹347(1)

Under appellate rule providing that date of entry of appealable order which is entered in minutes shall be date of entry in permanent minutes, unless such minute order as entered expressly directs that written order be prepared, signed and filed, in which case date of entry shall be date of filing of signed order, even though there be no direction in minute order for preparation of written order, if minute order omits any essential portion of a valid order, including findings when necessary, the minute order is not the appealable order from which the time for notice of appeal is to be measured. Rules on Appeal, rule 2(b)(2); Probate Code, § 1200.

2. Executors and Administrators ⟹510(6)

Where minute order entered in proceedings for settlement of account in probate contained no direction for written order, but written order was subsequently entered, when minute order failed to contain required finding of giving of notice of hearing, minute order was not the appealable order, and time for filing notice of appeal was to be measured from entry of formal written order. Rules on Appeal, rule 2(b)(2); Probate Code, § 1200.

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Donahue, Richards, Rowell & Gallagher, Wagener & Brailsford, Oakland, for appellant.

Nichols, Elerding & Sherman, Berkeley, for respondent.

DOOLING, Justice.

This is a motion to dismiss an appeal from an order settling an account and allowing certain fees for extraordinary services. A minute order was entered in the matter on December 21, 1951 and a more formal written order signed by the judge on December 27. The minute order contained no direction for a written order and the movant asserts that under Rule 2(b)(2) Rules on Appeal the minute order is the appealable order in which event the notice of appeal filed on February 25 was not in time.

[1] It is settled that under Rule 2(b)(2) even though there is no direction in the minute order for the preparation of a written order if the minute order omits any essential portion of a valid order, such as findings when necessary, the minute order is not the appealable order. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 346–347, 182 P.2d 182; People v. Gordon, 105 Cal.App.2d 711, 717, 234 P.2d 287; In re Estate of Dow, 91 Cal.App.2d 420, 423, 205 P.2d 698; Hirschberg v. Oser, 82 Cal.App.2d 282, 286, 186 P.2d 53.

[2] In probate proceedings the code expressly requires a finding of the giving of the required notice of the hearing. Probate Code, section 1200; In re Estate of Kauffman, 63 Cal.App.2d 655, 659–660, 147 P.2d 11; Estate of Dow, supra, 91 Cal.App.2d at page 432, 205 P.2d 698. This essential finding does not appear in the minute order of December 21.

Motion to dismiss denied.

NOURSE, P. J., and GOODELL, J., concur.

110 Cal.App.2d 826

VITA-PHARMACALS, Inc., et al. v. BOARD OF PHARMACY et al.

Civ. 18885.

District Court of Appeal, Second District, Division 2, California.

May 9, 1952.

Hearing Denied July 7, 1952.

Vita-Pharmacals, Inc., and another sued the Board of Pharmacy and others to have nullified a Board regulation classifying hormones as "dangerous drugs". The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment in favor of defendants, and plaintiffs appealed. The District Court of Appeals, Moore, P. J., held that the evidence would not sustain the contention that the Board had acted arbitrarily.

Affirmed.

1. Administrative Law and Procedure 🔑106
Druggists 🔑5

In acting upon proposal to amend Administrative Code and Register, Board of Pharmacy sits in its legislative capacity to enact regulation and not in its quasi judicial character. Health and Safety Code, §§ 29001, 29041; Government Code, § 11422.

2. Administrative Law and Procedure 🔑322
Druggists 🔑5

Delegation by Board of Pharmacy to committee of task of reviewing evidence submitted to Board at hearings to determine whether certain substances should be classified as dangerous involved only ministerial functions, where committee was granted no power to decide anything and was merely charged with task of analyzing in detail totality of evidence and presenting it in intelligible language easily understood by members of Board; and such action did not constitute a prohibited delegation of power of regulation to subordinates or to group lesser than whole. Government Code, § 11425.

3. Administrative Law and Procedure 🔑302
Constitutional Law 🔑318

Essential requirement of due process is met when administrative body is required to determine existence or nonexistence of necessary facts before any decision is made.

4. Constitutional Law 🔑251

Due process is not concerned with mere technical formalism, but rather it is the substance that determines whether a litigant has been deprived of it.

5. Administrative Law and Procedure 🔑322

The rule against delegation of power by local board is not violated by board's authorizing a committee of one or more members or other persons to discharge duties ministerial in character and not calling upon such persons to exercise discretion or judgment.

6. Constitutional Law 🔑60

Ascertainment of facts is, in its essence, not legislative function but simply ancillary to legislation, and Constitution does not prohibit delegation by legislature to committee of its own members or others, of incidental and subordinate tasks, such as correlation of information and making of recommendations.

7. Administrative Law and Procedure 🔑755, 763
Druggists 🔑5

In suit to have nullified regulation of Board of Pharmacy classifying hormones as "dangerous drugs," to be restricted to prescription only, evidence would not sustain plaintiffs' contention that Board had acted arbitrarily without considering all relevant evidence, or that it had otherwise abused its discretion. Health and Safety Code, §§ 29001, 29041; Government Code, § 11420 et seq.

8. Administrative Law and Procedure 🔑764
Druggists 🔑5

In suit to have nullified regulation Board of Pharmacy classifying hormones as "dangerous drugs," to be restricted to prescription only, plaintiff suffered no prejudice by reason of trial court's refusal to permit certain doctor to testify, where Board had had before it transcript of testimony given by such doctor in federal court action in which attempt had been made to restrict sale of hormone products in interstate commerce, and where, insofar as witness might have reported results of research and study in hormone field made by him subsequent to Board's hearings, such evidence could not have borne upon alleged impropriety of Board's action. Health and Safety Code, §§ 29001, 29041; Government Code, § 11422.

9. Administrative Law and Procedure ⚷751
Druggists ⚷5

In suit to have nullified regulation of Board of Pharmacy classifying hormones as "dangerous drugs," to be restricted to prescription only, judicial review was limited to examination of proceedings before Board to determine whether action taken was arbitrary or capricious or lacking in evidentiary support and whether procedure followed was calculated to provide fair hearing pursuant to statutory requirements. Government Code, § 11440.

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Edwin M. Rosendahl, Los Angeles, Eugene M. Elson, Los Angeles, of counsel, for appellants.

Edmund G. Brown, Atty. Gen., of California, Carl W. Wynkoop, Deputy Atty. Gen., for respondents.

MOORE, Presiding Justice.

In July, 1950, the Board of Pharmacy adopted, as a new rule, regulation numbered 1747 to be a part of the California Administrative Code and Register.[1] The meeting of the board was held December 16, 1949, pursuant to section 29041 of the Health and Safety Code.[2] The first indication to the public of the purpose of the board was contained in a letter of January 17, 1950, which implied that a decision had been made to include hormones in the dangerous drug list. It stated that "the purpose of the hearing is to amend the Dangerous Drug Act to officially incorporate therein as dangerous drugs substances with estrogenic and androgenic action to be classified as dangerous drugs, and to be restricted to prescription only." The rule was adopted at the board's meeting of July 24, 1950, and on November 13, 1950, it caused the rule to be filed in the office of the Secretary of State. It became effective after the lapse of 30 days. Government Code, section 11422.

Appellants attended some of the hearings of the board and presented a transcript of the evidence theretofore taken in the District Court of the United States for the Southern District of California in an action in which the Pure Food and Drug Division of the Federal government had attempted to restrict the sale of hormone products in interstate commerce. Thereafter, appellants sought to have the board reconsider its action and requested open hearings on their petition on new evidence to be submitted and on their arguments to show that the board had acted outside the scope of the authority vested in it. The petition was denied.

Thereupon appellants filed this action wherein they charged that respondent board and its constituent members had predetermined arbitrarily and in abuse of discretion to restrict the sales of the substances named in the rule, alleged that respondents had not read or considered the evidence contained in the transcript presented by appellants, and had refused to grant appellants a hearing. They allege other facts upon which they claim, because a controversy has arisen between them and respondents, that irreparable damage will result to them by virtue of the enforcement of the regulation; that pursuant to Government Code section 11440 they are entitled to a decree that regulation 1747 be nullified and that estrogenic[3] and androgenic substances, commonly called male hormones, be declared not dangerous to the public health and safety, salable without a physician's prescription. Following a trial of the issues presented by the pleadings the trial court found in favor of respondents, against the contentions of appellants and adjudged that regulation 1747 is valid and that in the proceedings relating thereto there was no substantial failure to comply with the provisions of Title 2, Division 3, Part 1, Chapter 4, Article 4 of the Government Code relating to procedure for adoption of administrative regulations.

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[1] *Article 6. Dangerous Drugs.* Rule 1747. All estrogenic and androgenic substances, except whole glands and external preparations containing 10,000 international units or less per ounce, constitute dangerous drugs as defined by Section 29001 of the Health and Safety Code.

[2] Section 29041, Health & Safety Code. "The board, if after open hearing following due notice to persons who have filed written requests for such notice to the board it shall find any drug to be dangerous to the public health or safety, may make other rules, not inconsistent with this division, limiting or restricting the furnishing of such drug. Any violation of any such rule shall be punished in the same manner as is respectively provided in Sections 29026, 29027 and 29028."

Appellants now seek a reversal of the judgment on the grounds that (1) they were not afforded a fair hearing by respondent board, and (2) the trial court erred in rejecting certain testimony offered in appellants' behalf.

The record reveals that respondent board pursuant to authority vested in it by section 29041 of the Health and Safety Code held two meetings, one in Los Angeles on February 7, 1950, and a second in San Francisco one week later to determine whether the androgenic and estrogenic substances should be classified as dangerous within the definition prescribed by section 29001 of that code. At the Los Angeles meeting, the board received into evidence on behalf of appellants the transcript of testimony reported at a previous proceeding in which the Pure Food and Drug Division of the United States Government had sought to enjoin appellants' sale of the same drug here involved without prescription.[4] In addition to that evidence, various newspaper articles, statements of medical doctors, and publications pertaining to hormones were introduced into evidence before the board. On May 26 and 27, 1950, in Sacramento a group known as the Dangerous Drug Committee met to review the evidence submitted to the board at the prior hearings. This committee was composed of Messrs. Affleck, Ramsay and Waterman, three members of respondent board whose full complement is seven. On July 29 the committee reported to the board and reviewed in detail its analysis of the evidence. When in October, 1950, a final board meeting was held to discuss the evidence, all members voted in favor of the regulation now under attack.

The testimony of the three committee members established that they had made an exhaustive study at their May session of all material presented to the board. All statements and documents were considered as well as the portions of the federal transcript designated by appellants as relevant and material. Such evidence was thoroughly discussed, analyzed and evaluated. A summary of all documentary evidence introduced as well as the testimony of expert witnesses was prepared and it was read and discussed before the board at subsequent meetings. This testimony of the committee members was supported by the witness Linnet M. Walsh, Executive Secretary of the board. He testified that the substance of the proof on both sides of the controversy, the written statements of medical doctors and the federal court transcript were listed and discussed and that the participants made notes of the discussion and all material was thoroughly reviewed. All board members testified that a complete report was given to the board at the July meeting and that the committee's written findings were presented and fully discussed before any vote was taken. It was admitted that the board members other than those present at the committee meetings had not read in its entirety the documentary evidence introduced.

Appellants contend that the record, briefly summarized above, establishes that they did not receive a fair hearing; that Government Code, section 11425, provides in part that the "state agency shall consider all relevant matter presented to it before adopting, amending or repealing any regulation"; that the term "agency" could mean only that at least a majority or quorum of a state agency must consider all "relevant matter" before any valid action can be taken by the agency. Moreover, they contend that when by statute the duty of considering evidence is given to an agency consisting of several members it cannot in turn delegate such power to a sub-committee since such action amounts to a decision by a minority of those in whom the legislature has seen fit to vest the power of regulation.

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[3] Androgen: Any substance which possesses masculinizing activities such as testis hormone. Estrogen: A generic term for estrus producing compounds. American Illustrated Medical Dictionary, 22d Edition, 1951, Dorland.

[4] Such injunction was denied by the Federal District Court, but on appeal the judgment was reversed and the case remanded with directions to issue a permanent injunction. See USA v. El-O-Pathic Pharmacy (Hudson Product Company), 192 F.2d 62.

[1, 2] The answer to such argument is that, contrary to appellants' assertion, the decision here was made by the board and not by the committee. Only after full and complete discussion of the facts was a vote had. They considered the written statements of the doctors filed in lieu of oral statements, the federal transcript, all excerpts, newspaper clippings, all documents on file, all exhibits. The reports of the committees, the exhibits, the testimony and documents were reviewed at open hearings at which there was considerable discussion. The committee was granted no power to decide anything. They were to analyze in detail the totality of the evidence and present it in intelligible language easily understood by the members of the board. They were not invested with power, but merely served as the mixing machine to make the compound more agreeable, more readily grasped. Such ministerial functions, see Bouvier's Law Dictionary, p. 2219, do not denote the delegation of powers to subordinates or to a group lesser than the whole. Holley v. County of Orange, 106 Cal. 420, 424, 39 P. 790; House v. Los Angeles County, 104 Cal. 73, 79, 37 P. 796; Ruttledge v. City of Eureka, 195 Cal. 404, 413, 234 P. 82. Moreover, in acting upon a proposal to amend the Administrative Code and Register, the Board of Pharmacy sits in its legislative capacity to enact a regulation and not in its quasi-judicial character in which it determines the rights of petitioners and others properly brought before them for consideration.

[3–6] A contention similar to that now made by appellants was before the United States Court of Appeal for the Ninth Circuit in National Labor Relations Board v. Biles Coleman Lumber Co., 98 F.2d 16. In reply to the argument that due process had been denied the defendant when the board members had not read and examined all the evidence and exhibits before it for consideration, the court held that such action did not necessarily constitute an unfair hearing. It relied on Morgan v. U.S., 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288, where it was pointed out that such evidence could properly be sifted and analyzed by competent subordinates without doing violence to the concept of due process in administrative hearings. In the Morgan case, the Secretary of Agriculture did not read the transcript and knew the evidence only as reported to him by his subordinates. The essential requirement of due process is met when the administrative agency is required to determine the existence or otherwise of the necessary facts before any decision is made. Such a discretion is not so unguided as to invalidate the statute. Wheeler v. Gregg, 90 Cal.App.2d 348, 362, 203 P.2d 37. Due process is not concerned with mere technical formalism: it is the substance that determines whether a litigant has been deprived of it. Hohreiter v. Garrison, 81 Cal.App.2d 384, 401, 184 P.2d 323. The rule against the delegation of power by local boards is not violated by a board's authorizing a committee of one or more members or other persons to discharge duties ministerial in character and not calling upon such persons to exercise discretion or judgment. Holley v. County of Orange, supra. Even the legislature of this state may delegate a committee of its own members or others to correlate information and make recommendations. The Constitution does not prohibit the delegation of such incidental and subordinate tasks. "The ascertainment of facts in its essence is not a legislative function. It is simply ancillary to legislation." Parker

v. Riley, 18 Cal.2d 83, 90, 113 P.2d 873, 877, 134 A.L.R. 1405.

[7] State ex rel. Madison Airport Co. v. Wrabetz, 231 Wis. 147, 285 N.W. 504, 507, emphatically relied upon by appellants, is not persuasive. There the evidence was presented to two different hearing officers who in turn, in disregard of the State agency, made the ultimate determination. That decision was subject to review by a commission upon petition by the aggrieved party. The Wisconsin statute provided that any action taken upon review "shall be based on a review of the evidence." It was held that the commission's action in affirming the findings of the hearing officer was void, since it had been shown that the commissioners had failed to read or have read to them a transcript of the evidence or phonographic notes thereof, *"or to otherwise duly address themselves to that evidence"*. Such is not the situation in the action at bar. Respondent board has afforded all interested parties a full and fair hearing. Before adopting its regulation 1747, it considered all relevant evidence submitted to it pursuant to the requirements of section 11425. Not in the least does the record reveal any arbitrary action or other abuse of discretion.

[8] No prejudice was suffered by appellants by reason of the trial court's refusal to admit the testimony of Dr. Swim offered on behalf of appellants. Dr. Swim had testified at the trial in the federal court and presumably such testimony was considered by the committee during its scrutiny of the transcript thereof. Moreover, insofar as the witness might have reported the results of research and study in the hormone field subsequent to the board hearings here under consideration, it could not in the slightest bear upon the alleged impropriety of respondent's action when such evidence was not in existence at the time of the hearings by respondent board upon appellants' petition.

[9] The judicial review below was limited to an examination of the proceedings before the board to determine whether the action taken was arbitrary or capricious or lacking in evidentiary support and whether the procedure followed was calculated to provide a fair hearing pursuant to statutory requirements. Brock v. Superior Court, 109 Cal.App.2d 594, 241 P.2d 283

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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110 Cal.App.2d 792

McCALLUM et al. v. HOWE.

Civ. 18789.

District Court of Appeal, Second District,
Division 1, California.
May 8, 1952.

Actions by Patricia Ann McCallum and another against Paul Leeander Howe for injuries sustained by minor plaintiffs when they were struck by defendant's automobile while crossing the street. The Superior Court, Los Angeles County, Gregory P. Maushart, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Doran, J., held that the evidence as to contributory negligence, and as to whether defendant had violated the statute relating to headlights, and as to whether such alleged violation proximately contributed to plaintiffs' injuries presented questions for the jury.

Affirmed.

1. Automobiles ⚷245(8, 57)

In action by minor pedestrians against motorist for personal injuries allegedly sustained as result of motorist's negligent operation of automobile, evidence presented questions of whether motorist had violated statute relating to headlights and whether such alleged violation proximately contributed to minors' injuries for the jury. Vehicle Code, §§ 618, 648(d).

2. Automobiles ⚷246(35)

In action by seven and eight year old minor pedestrians against motorist for personal injuries allegedly sustained because of motorist's negligent operation of automobile, instruction to effect that jury should consider whether conduct of minors measured up to standard of care reasonably to be expected from children of such ages, capacity and experience under the same or similar circumstances was proper.

3. Trial ⚿243

In action by minor pedestrians against motorist for injuries allegedly sustained because of motorist's negligent operation of automobile while minors were crossing street, instructions as to separability of case of each minor were not confusing.

4. Automobiles ⚿242(8)

Claimed presumption that seven year old pedestrian took due care for her own safety so as not to be guilty of negligence contributing to her injuries sustained when automobile struck her while she was crossing street was, at best, rebuttable.

5. Automobiles ⚿245(74)

In action by minors against motorist for injuries allegedly sustained because of motorist's negligent operation of automobile which struck minors while they were crossing the street, evidence presented question for jury as to minors' contributory negligence.

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Dunlap, Holmes, Ross & Woodson, Pasadena, for appellants.

James V. Brewer, Los Angeles, for respondent.

DORAN, Justice.

The complaint alleges that plaintiffs, Patricia, aged 8, and Reianne, aged 7, suffered personal injuries as a result of defendant's negligent operation of an automobile on October 31, 1949 at or near the intersection of Avenue 64 and Crescent Street in Los Angeles. A jury rendered a verdict for the defendant, and plaintiffs' appeal is from the judgment entered thereon.

At the time of the accident, about 5:35 p. m. it was dark, and the respondent's headlights were lighted and set on "low beam". The respondent testified that "he neither saw appellants nor heard anything at the time of the collision; that the first indication he had of an accident was: * * * my wife says, 'I think we have hit something. Stop.' and I immediately hit my brakes and stopped". Respondent then found the two little girls lying on the pavement some six to eight feet to the rear of the car and about ten to twelve inches from the east curb of Avenue 64. The only eye witness testified that the girls were running or skipping diagonally across the avenue, not at a crosswalk, holding hands, and with their backs half turned to respondent's car. Respondent's car knocked the girls down but did not run over them.

It is appellants' contention that "respondent was negligent as a matter of law", in that the automobile was not equipped with headlights rendering persons visible for a distance of at least 100 feet ahead, as required by Sections 618 and 648(d) of the Vehicle Code. This is predicated upon respondent's testimony that the headlights shone only 12 to 15 feet ahead. The respondent also testified that the headlights were set on low beam; that respondent was able to see a parked car at a considerable distance; that the lights of approaching cars blinded respondent "to a certain extent" but that at the time the driver was not conscious of any interference with vision from such lights.

A survey of the record indicates that appellants' contention that respondent was guilty of negligence per se is based upon a partial and partisan interpretation of the evidence. As pointed out in respondent's brief it is not established that there was a violation of the regulation in question, and even if such violation were present, "lack of adequate or lawful lights on respondent's vehicle could not have been the proximate cause of appellants' injuries, for there is no evidence that they were within the beam of the lights on respondent's vehicle, or ever were in front of his vehicle before they were hit".

[1] Whether there was a violation of law and whether such violation proximately contributed to appellants' injuries, were, under the evidence in the instant case, questions of fact within the jury's province to decide. These questions were decided in favor of the respondent and the decision

is supported by substantial evidence and reasonable inferences therefrom. That there was evidence from which other and contrary inferences might have been drawn does not alter the situation in so far as appellate review is concerned.

Appellants also complain that the instructions as given were erroneous in respect to respondent's degree of care, and that the jury should have been told, as requested, that a greater burden rested upon defendant as the driver of a motor vehicle. It is also argued that instructions were erroneous "as to the standard of care required of appellant children", and that "The instructions as to separability of the case of each plaintiff were confusing".

It is suggested by respondent that appellants' requested instruction as to relative care of driver and pedestrian was erroneous in using the word "degree" in place of "amount", as stated in Calif. Jury Instructions (Civil), 1950 Supplement, page 219. Attention is also called to the fact that since appellants were crossing the street some 54 feet from an intersection, "That fact alone enhances the amount of care required of them, and in addition places them within the provisions of Section 562 (a) of the Vehicle Code: 'Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway' ". Aside from these observations, however, the record fails to reveal any prejudicial error when the charge as a whole is considered, and in view of the evidence which was before the jury.

From the record evidence one or more of several conclusions may well have been drawn by the jury, namely that the respondent exercised ordinary care; that the accident was unavoidable; that no law was violated by respondent; that appellants were guilty of contributory negligence. The verdict rendered may thus be justified and supported by any one of several theories reasonably drawn from the evidence.

[2] Appellants likewise assign error in reference to instructions as to the standard of care required on the part of the victims. However, as pointed out by respondent, the instruction given was requested by appellants who now complain because the trial court refused to give another requested instruction on this subject. The instruction given correctly directed the jury to "consider whether the conduct of that plaintiff measured up to the standard of care reasonably to be expected from a child of like age, capacity and experience under the same or similar circumstances". The requested instruction although phrased in different words, carried no significant difference in meaning. The instructions given could not have led the jury to believe that the two girls were required to exercise the same care as adults would be expected to use. No reversible error is apparent.

[3] As stated in respondent's brief, "There does not appear to be any merit to appellants' point No. 4 (that instructions as to separability of the case of each plaintiff were confusing) * * * because the court, in advising the jury that the appellants' claims were separate, * * * gave over thirteen instructions, from which no reasonable person could have drawn the conclusion that both claims were one".

As requested by appellants, the jury was told that "There are two plaintiffs in this action, Patricia Ann McCallum and Reianne McCallum. The claim of each is separate from and independent of the claim of the other. Their rights, if any, are separate, not joint". The jury was also instructed, as requested, that "The burden is upon each plaintiff", etc., and that "If either plaintiff has not fulfilled this burden, the defendant is entitled to your verdict as to that plaintiff".

[4, 5] Appellants' final contention is that "There is no evidence of contributory negligence on appellant Reianne, the younger child". In this connection it is averred that "the child Reianne is entitled to the benefit of the presumption that she took due care for her own safety". As respondent states, Reianne was present in court but did not testify, nor was any reason given why this appellant did not testify. At best the presumption mentioned is a rebuttable one, and as pointed out by respondent, all the known facts concerning the accident were brought out in detail,

from which evidence it was for the jury to decide what actually happened and the existence or non-existence of contributory negligence. The decision reached is not devoid of supporting evidence. No reversible error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

111 Cal.App.2d 45

BLODGET v. HOUSING AUTHORITY OF KERN COUNTY et al.

Civ. 4377.

District Court of Appeal, Fourth District, California.

May 9, 1952.

Mandamus proceeding by Claude R. Blodget against Housing Authority of the County of Kern and another to compel them to call an election in the City of Bakersfield to determine whether or not the majority of the electorate of the city approved the development, construction and acquisition of the low rent housing project therein. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment denying the writ of mandamus and petitioner appealed. The District Court of Appeal, Mussell, J., held that there was in existence a valid contract for financial assistance between the housing authority and the public housing administration for the development of low rent housing projects and therefore an election was not required to be held prior to the actual construction of the low rent housing projects.

Judgment affirmed.

1. Municipal Corporations 🔑328

Under article of constitution providing that for the purpose of article the term lower rent housing project shall mean any "development" composed of urban or rural dwellings, etc., quoted term means any and all undertakings necessary for the planning, financing, land acquisition and construction of low rent housing project. Const. art. 34, § 1.

2. Municipal Corporations 🔑328

Under constitutional article providing that for the purposes of article there shall be excluded from the term low rent "housing project" any project where there shall be in existence on effective date thereof a contract for financial assistance between any state public body and federal government in respect to such project, quoted term could be applied to the planning of buildings and improvements or the acquisition of property and it was not necessary that there be in existence a tangible building or buildings on a definitely located site to authorize execution of a valid contract for financial assistance. Const. art. 34, § 1; Gen. Laws, Act 3483, §§ 3(i), 21; United States Housing Act of 1937 §§ 2(5), 9, as amended, 42 U.S.C.A. §§ 1402(5), 1409.

3. Mandamus 🔑168(4)

In mandamus proceeding to compel housing authority of county to call election to determine whether majority of electorate of city approved low rent housing project, evidence supported finding that preliminary loan contract executed by the housing authority and public housing administration before adoption of constitutional provision authorizing election was a valid contract for financial assistance. Const. art. 34, § 1.

4. Municipal Corporations 🔑328

Under constitutional amendment providing for low rent housing project elections, an agreement, entered into before effective date of amendment, by which housing authority proposed to develop low rent projects with financial assistance from public housing administration, was a contract for "financial assistance", and election was not necessary in view of exception to amendment providing that there should be excluded from term low rent housing project, any such project where there shall be in existence on effective date thereof, a contract for financial assistance between any state public body and federal government in respect to such project. Const. art. 34, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Financial Assistance".

Roland S. Woodruff, Bakersfield, for appellant.

Stewart, Shaw & Murphey, Los Angeles, for respondents.

MUSSELL, Justice.

On March 13, 1951, appellant, as a taxpayer, filed a petition for a writ of mandamus against the Housing Authority of the County of Kern and its executive director to compel them to call an election in the city of Bakersfield to determine whether or not a majority of the electorate of the city approved the development, construction and acquisition of a low-rent housing project therein.

Article XXXIV, Section 1, of the Constitution of the State of California, which became effective on *December 24, 1950,* and upon which petitioner bases his cause of action, is as follows:

> "No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any State public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develope, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.
>
> "For the purposes of this Article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a State public body or to which the Federal Government or a State public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this Article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any State public body and the Federal Government in respect to such project."

Respondents filed an answer and counterclaim and in a cross-complaint sought declaratory relief. They alleged in substance that an actual controversy existed between the parties as to the rights, duties and obligations of respondents to obtain the approval of the majority of the electorate as a condition precedent to the further development, construction and operation of the housing projects involved. Respondents alleged that there was no duty to obtain approval of the electorate of said city and county of the said projects by reason of the existence of a valid contract for financial assistance between the Housing Authority of the county of Kern (hereinafter referred to as the Housing Authority) and the Public Housing Administration (hereinafter called P.H.A.) on the effective date of the adoption of the said constitutional amendment. Respondents further alleged that if the said constitutional provision be construed as requiring an election in the city of Bakersfield or the county of Kern as to said projects, then the provision was unconstitutional under Article 1, Section 10, Clause 1, of the Constitution of the United States as an impairment of the obligations of contracts entered into by the Housing Authority, the P.H.A. and the county of Kern.

The petitioner alleged and contended that there was no contract for "financial assistance" in existence on the effective date of the constitutional provision and that even if said provision be interpreted as requiring the approval of the electorate in said city and county as to the projects involved, there would be no impairment of the obligations of the contracts with the P.H.A. and the county of Kern.

There is no dispute as to the pertinent facts. The Housing authority of the county of Kern was created by the enactment of the Housing Authority Laws, Stats.Ex.Sess. 1938, Ch. 4, P. 9, embodied in Act 3483 of the General Laws of the State of California and by resolution of the board of supervisors of the county of Kern, dated May 10, 1949. The United States Housing Act of 1937, as amended, 42 U.S.C.A. § 1401 et seq., authorized the public housing administration of the United States to give financial assistance to local governments for the development, acquisition, or administration of slum-clearance and low-rent housing projects. The assistance may be in the form of a grant or a loan for the making of preliminary investigations, surveys, planning and grants or loans for the acquisition, construction and operation of such projects.

On August 22, 1949, the Kern county board of supervisors adopted a resolution authorizing and approving an application by the Housing Authority to P.H.A. for a preliminary loan contract for $130,000 to cover the cost of surveys and planning in connection with the development of 750 units of low-rent housing in the county of Kern and declaring its intention to thereafter enter into a cooperation agreement with the Housing Authority. On September 19, 1949, the Housing Authority applied to the P.H.A. for a program reservation for 350 units of low-rent housing project or projects, known as Cal 8–A, to be located in the county of Kern. In this application the Housing Authority represented that, if a program reservation was made by P. H.A., it would in good faith expeditiously proceed with the provision for the low-rent housing requested. On October 19, 1949, the P.H.A. issued its program reservation for 350 units of low-rent housing known as No. Cal 8–A and declared its intention to enter into a preliminary loan contract in the amount of $115,000 and to reserve a loan in that amount, and annual contribution funds sufficient to provide required financial aid for the number of low-rent dwelling units covered by the reservation. On *January 18, 1950,* the commissioners of the Housing Authority adopted a resolution authorizing the execution of a loan contract with P.H.A. in the sum of $115,000 to enable the Housing Authority to make surveys and plan the construction of 350 low-rent houses and improvements, and for the acquisition of property, fixtures and furnishings therefor in the county of Kern. Concurrently with the last mentioned resolution, the Housing Authority executed a preliminary loan contract with P.H. A. in which the Housing Authority proposed to develop low-rent housing projects with financial assistance from P.H.A. pursuant to the United States Housing Act of 1937, as amended. The Housing Authority agreed to undertake preliminary surveys and planning necessary for the preparation and submission of preliminary and final development programs for each project. The P.H.A. agreed therein to loan the Housing Authority the sum of $115,000, of which $23,000 was to be advanced immediately, upon the execution of the agreement, for use in preliminary surveys and planning for low-rent housing projects in the county of Kern. It was agreed that the cost of said surveys and planning would be a part of the total development cost of the projects and included in any annual contribution contracts executed. The Housing Authority further agreed to complete the surveys and planning and to provide necessary architectural and engineering surveys, qualified surveys of experts for obtaining land surveys, title information and appraisals for each project to be developed.

On February 2, 1950, the Housing Authority procured a loan from P.H.A., one in the sum of $23,000, and on September 28, 1950, procured another loan in the sum of $21,000 under said preliminary loan contract and executed and delivered to P.H.A. two promissory notes for said loans. On January 26, 1950, the board of supervisors of the county of Kern adopted a resolution authorizing the execution of a cooperation agreement with the Housing Authority in connection with the program reservation for 400 units of low-rent housing in the county and on *July 12, 1950,* executed the agreement with the county. In the executed cooperation agreement the Housing Authority agreed to develop and administer one or more low-rent housing projects and the county agreed to furnish the Housing Authority and the tenants of each project with public survey facilities and agreed to repair streets, to furnish street lighting, sewer services, to accept dedication of streets and to cooperate with the Housing Authority in the development of the projects.

The original program reservation, Cal 8–A, for 350 units of low-rent housing, as provided in the preliminary loan contract was subsequent to the execution of said contract, divided into two projects designated as Cal 8–5 and Cal 8–6, and on *December 26, 1950,* the city of Bakersfield adopted an ordinance approving the annexation of real property to the city upon which the Housing Authority intended to construct housing project 8–6. The city then gave its consent to the Housing Authority to operate and transact business in the city, approved the development and construction of 250 housing units and approved a preliminary loan for surveys and planning thereof. The city and the Housing Authority then entered into a cooperation agreement and on February 19, 1951, the Housing Authority completed its final development program for the construction and acquisition of 244 housing units, known as Cal 8–6.

On or before *December 24, 1950,* the effective date of Article XXXIV of the State Constitution, the Housing Authority had expended, in the development of projects Cal 8–5 and 8–6 the sum of $9,982.96 in technical and nontechnical wages, legal and travel expense, overhead, interest, housing surveys, planning costs, construction and equipment, and had authorized the employment of engineers, architects and economists for the making of plans and surveys. After December 24, 1950, the Housing Authority had expended $25,972.67 for the same purposes and in addition thereto, had expended approximately $10,000 for surveys and maps, appraisals, title information and option negotiations for the site acquisition of project Cal 8–6, and for appraisals in connection with project Cal 8–5.

It is admitted that no election has been held within the city of Bakersfield, as provided in Article XXXIV, Section 1, of the State Constitution. The principal question involved is whether, on December 24, 1950, there was in existence a valid contract for financial assistance between the Housing Authority and P.H.A. for the development of projects Cal 8–5 and 8–6 within the exception stated in Article XXXIV of the State Constitution. We conclude that this question must be answered in the affirmative.

Appellant first argues that the term "low-rent housing project", as defined in the Constitutional exception, must be interpreted as meaning an existing tangible group of dwellings, apartments or other living accommodations. This contention is without merit. A "low-rent housing project" is defined in the constitutional provision as any "development" composed of urban or rural dwellings, apartments, or other living accommodations for persons of low income. The word "development" is defined in Title 42, Section 1402 (5) of the United States Housing Act of 1937, as amended, as follows:

> "The term 'development' means any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low-rent housing project."

Section 1409 of said act, as amended, authorizes the P.H.A. to make loans to public housing agencies, to assist in the development, acquisition or administration of low-rent housing or slum clearance projects by such agencies.

Section 21 of the Housing Authorities Law of California provides

> "In addition to the powers conferred upon an authority by other provisions of this act, an authority is empowered to borrow money or accept grants or other financial assistance from the Federal Government for or in aid of any housing project within its area of operation, * * * It is the purpose and intent of this act to authorize every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the Federal Government in the undertaking, construction, maintenance or operation of any housing project by such authority."

Section 3 (i) of said law, in defining "housing project", states in part as follows:

> "*'Housing project'* shall mean any work or undertaking to be financed in

> whole or in part by the Federal Government or to which the Federal Government extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens or otherwise: * * * to provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income * * * The term 'housing project' also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith."

[1, 2] It seems clear that the term "development", as defined, means any and all undertakings necessary for the planning, financing, land acquisition and construction of low-rent housing projects; that the term "housing project" may be applied to the planning of buildings and improvements or the acquisition of property. It is not necessary, as contended by appellant that there be in existence a tangible building or buildings on a definitely located site to authorize the execution of a valid contract for financial assistance within the meaning of the constitutional exception.

[3] The trial court found that the preliminary loan contract of June 18, 1950, executed by the Housing Authority and P. H.A. is a valid contract for "financial assistance" between the parties to it, within the meaning of the exception of the constitutional provision. This finding is supported by substantial evidence and cannot here be disturbed.

In the loan contract, the Housing Authority proposed to develop low-rent housing projects "with financial assistance" from P. H.A. and agreed to undertake preliminary surveys and planning necessary for the preparation and submission of preliminary and final development programs for each project, serving as the basis for applications for annual contribution contracts. It was agreed that the cost of the surveys and planning would be a part of the total development cost of such projects. The P.H.A. agreed therein to lend the Housing Authority $115,000, of which $23,000 was to be advanced immediately for use in such preliminary surveys and planning. This agreement was clearly a contract for "financial assistance" pursuant to which the P.H.A. loaned substantial sums of money to the Housing Authority which sums were expended by it in accordance with the provisions of said contract.

[4] It is our conclusion that, under the circumstances presented by the record before us, the provisions of Article XXXIV, Section 1, of the State Constitution do not require that an election be held prior to the actual construction of the low-rent housing projects involved. Since we have reached this conclusion, it is not necessary to pass upon the question as to whether the trial court erred in declaring (as set forth in paragraph (B) 2. of the judgment) that if the constitutional provision were to be interpreted so as to require the approval of the electors as a condition precedent to the further development and construction of the projects involved, that then the said provisions of the Constitution would be unconstitutional under Article I, Section 10, Clause 1 of the Constitution of the United States as an impairment of the contracts here involved.

The petition herein seeks a writ of mandamus against the respondents, Housing Authority of Kern county and Fred Widmer, its executive director, to compel them to call an election in the city of Bakersfield as provided in the State Constitution. The City Council of Bakersfield and the Board of Supervisors of Kern county are not made parties to the proceedings and our attention has not been directed to any authority, duty or power of respondents to call or conduct such an election.

The judgment denying a writ of mandamus is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

110 Cal.App.2d 696

PEOPLE'S FEDERAL SAVINGS & LOAN ASS'N et al. v. STATE FRANCHISE TAX BOARD.

Civ. 18566.

District Court of Appeal, Second District, Division 3, California.

May 1, 1952.

Rehearing Denied May 21, 1952.

Action by People's Federal Savings & Loan Association, and others, consisting of 29 federal savings and loan associations and mutual share companies, against State Franchise Tax Board for refund of varying amounts of taxes paid under Franchise Tax Act. The Superior Court of Los Angeles County, Roger Alton Pfaff, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Vallée, J., held, inter alia, when but single question of law was involved which was common to all plaintiffs, and decision of that question involved necessarily a determination of the rights of all plaintiffs, there was no misjoinder of parties plaintiff.

Affirmed.

1. Taxation ⚷543(5)

Where same question of law is involved in action to obtain refund of taxes paid by several parties, and parties, if successful, will be entitled to same relief, differing only as to amount of refund each claims to be entitled to, it is permissible for several parties to join as plaintiffs in one action instead of instituting several suits for same relief. Gen.Laws, Act 8488, § 8(j); Code Civ.Proc. § 378.

2. Taxation ⚷543(5)

Where action brought by 29 federal savings and loan associations and mutual share companies involved question of law common to all plaintiffs as to validity of assessments under franchise tax, and decision of question of law involved necessarily would determine rights of all plaintiffs, there was not misjoinder of parties plaintiff. Gen.Laws, Act 8488, § 8(j); Code Civ.Proc. § 378.

3. Constitutional Law ⚷62

Taxation ⚷37.8

Provision of Bank and Corporations Franchise Tax Act which authorized building and loan commissioner to determine amount that could be deducted by building and loan associations throughout state for return paid or credited on or apportioned to the withdrawable shares of association, by computing average rate paid by all associations in state or by those in particular locality, as commissioner might determine, gave commissioner absolute discretion to select state as a whole, or any locality or part of state, regardless of its size and to determine therefrom, an average rate of his own selection, and was void as an attempt to delegate legislative power to an administrative officer. Gen.Laws, Act 8488, § 8(j); Code Civ.Proc. § 378.

4. Statutes ⚷64(8)

Severability provision of Bank and Corporations Franchise Tax Act imposes upon courts the duty of supporting the legislative will as manifested by such act, as far as possible. Gen.Laws, Act 8488, § 8(j); Code Civ.Proc. § 378.

5. Statutes ⚷64(1)

A portion of a statute may be declared unconstitutional without affecting remainder of act when result of deletion of unconstitutional portion will not make statute meaningless and it can be said to have been intention of Legislature to have act stand with such deletion.

6. Statutes ⚷64(8)

In view of severability provision of Bank and Corporations Franchise Tax Act, unconstitutionality of portion of section which gave loan commissioner unguided power to determine average rate to be deducted by building and loan associations on franchise returns for amounts paid, credited on or apportioned to the withdrawable shares, did not effect validity of remainder of section which permitted deduction by each association of entire amount paid, credited or apportioned. Gen.Laws, Act 8488, § 8(j); Code Civ.Proc. § 378.

◆

Edmund G. Brown, Atty. Gen., James E. Sabine and Edward Sumner, Deputies Atty. Gen., for appellant.

Leo Shapiro, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in an action for refund of varying amounts of taxes paid under the Bank and Corporations Franchise Tax Act, Stat. 1929, p. 19, as amended, 3 Deering's Gen. Laws, Act 8488, referred to as the Tax Act, for the taxable years 1943 and 1944 (income years 1942–1943).

The action was brought by twenty-nine plaintiffs. They are either mutual share federal savings and loan associations created under the Federal Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1464 et seq., or mutual share companies organized under the California Building and Loan Act. Stat.1931, ch. 269, as amended, 1 Deering's Gen.Laws, Act 986.

In filing their returns for the taxable years 1943 and 1944, plaintiffs deducted all of the amounts paid, credited on, or apportioned to their withdrawable shares. As required by section 8(j) of the Tax Act as amended in 1937, Stat.1931, ch. 64, pp. 60, 62, § 8(i), as amended Stat.1937, ch. 836, pp. 2324, 2326, § 8(j), the Building and Loan Commissioner certified to the Franchise Tax Commissioner the rates specified therein to be 3.2% for the taxable year 1943 and 2.9% for the taxable year 1944. The Franchise Tax Commissioner then assessed additional franchise taxes against each plaintiff, disallowing deduction of the amounts paid, credited on, or apportioned to their withdrawable shares in excess of 3.2% for the taxable year 1943 and in excess of 2.9% for the taxable year 1944. Plaintiffs paid the additional assessments.

Within the time provided by law each plaintiff filed a claim for refund which was denied. Each plaintiff then appealed to the Board of Equalization which sustained the denial of the claims. This action was then instituted for the recovery of the additional taxes with interest. Stat. 1929, p. 19, as amended, 3 Deering's Gen. Laws, Act 8488, § 30. The claim of each respective plaintiff is pleaded in a separate cause of action, and, with the exception of the amounts of taxes paid, identical allegations are made in each cause of action. The validity of the assessments is attacked by each plaintiff on identical grounds and each cause of action alleges the filing of a verified claim for refund on identical grounds.

The court concluded that the limitation of the allowable deduction on account of the return paid, credited on, or apportioned to the withdrawable shares of each plaintiff for the taxable years 1943 and 1944 to 3.2% and 2.9% respectively, was invalid, unconstitutional, and void. The plaintiffs had judgment as prayed. Defendant appeals.

Each plaintiff paid to the holders of its withdrawable shares a rate in excess of the average rate determined by the Building and Loan Commissioner for the taxable years 1943 and 1944 respectively, the amount of such excess being the amount of additional taxes paid and the amount sought to be recovered in this action with interest.

Section 8(j) of the Tax Act during the years in question read: "§ 8. Deductions allowed. In computing 'net income' the following deductions shall be allowed: * * * (j) [Return on mutual building and loan association shares.] In the case of a building and loan association, organized and operating wholly or partly on a mutual plan, the return paid or credited on or apportioned to the withdrawable shares of such association, but not exceeding the return such shares would receive computed at the average rate paid by all such associations in this State, or by such associations in a particular locality, as the Building and Loan Commissioner of this State may determine, on money borrowed or obtained through the issue during the income year of the association of all classes of notes and investment certificates not evidencing any proprietary interest in the association, such rate to be determined by the Building and Loan Commissioner and certified by him to the Franchise Tax Commissioner on or before the first day of March of each year." Stat.1929, ch. 13, pp. 19, 23, § 8(i), as amended Stat.1937, ch. 836, pp. 2324, 2326, § 8(j), 3 Deering's Gen.Laws, Act 8488, § 8(j).

Section 8(j) was amended in 1945 to read: "In the case of a building and loan association, organized and operating wholly or partly on a mutual plan, or a federal savings and loan association, organized and operating wholly or partly on a mutual plan, the return paid or credited on or apportioned to their withdrawable shares." Stat.1945, pp. 1779, 1791, 3 Deering's Gen. Laws, 1949 Supp., Act 8488, § 8(j).

Two questions are presented. First: Is there a misjoinder of parties-plaintiff? Second: Was that portion of section 8(j) of the Tax Act limiting the deduction of the return paid, credited on, or apportioned to the withdrawable shares of mutual building and loan associations to the average rate as determined by the Building and Loan Commissioner unconstitutional, and if so, were plaintiffs entitled to deduct the entire return paid, or credited on, or apportioned to their withdrawable shares?

[1, 2] There is no misjoinder of parties-plaintiff. In an action to obtain refunds of taxes paid by several parties in which the same question of law is involved and the parties, if successful, will be entitled to the same relief, differing only as to the amount of refund each claims to be entitled to, it is permissible for the several parties to join as plaintiffs in one action instead of instituting several suits for the same relief. Code Civ.Proc. § 378; DeMille v. County of Los Angeles, 25 Cal.App.2d 506, 508, 77 P.2d 905; Parmely v. Boone, 35 Cal.App.2d 517, 519, 96 P.2d 164. In the case at bar there is only one question of law involved. It is common to all plaintiffs. The validity of the assessments is attacked on the same ground by all plaintiffs. A decision of the question of law involved necessarily determines the rights of all plaintiffs.

Plaintiffs-respondents argue that the phrase in section 8(j) "but not exceeding the return such shares would receive computed at the average rate paid by all such associations in this State, or by such associations in a particular locality, as the Building and Loan Commissioner of this State may determine," was unconstitutional in that it conferred an unlimited and uncontrolled discretion on the Building and Loan Commissioner in the selection of the particular locality to be used in determining the average rate; and that, therefore, they were entitled to deduct the entire return paid, or credited on, or apportioned to their withdrawable shares. Defendants-appellants do not discuss the constitutional question in their brief, but argue that to permit deduction of the entire return would constitute judicial legislation. We have concluded that plaintiffs' contention is well taken and that the judgment should be affirmed.

[3] Section 8(j) authorized the commissioner to determine the amount that could be deducted by building and loan associations throughout the state by computing the average rate paid by all associations in the state, or by those in a particular locality, as he "may determine." The statute did not empower the commissioner to take any locality in the state and determine an average rate for that locality. It authorized him to determine the average rate in any locality he selected and apply that rate to all associations in the state. The commissioner was given unlimited and uncontrolled discretion to determine the particular locality to be used in computing the average rate. He had absolute discretion to select the state as a whole, or any locality or part of the state. He could select any area or locality, large or small. He was given the power to select such area or locality without restriction or limitation, with no rules or directions from the Legislature to guide him. No guide or standard of any kind was prescribed by the Tax Act. The statute gave him uncontrolled and unguided power to determine an average rate entirely of his own selection. The delegation of such uncontrolled power was void as an attempt to delegate legislative power to an administrative officer. Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 484, 238 P. 703; In re Peppers, 189 Cal. 682, 685–688, 209 P. 896; Hewitt v. Board of Medical Examiners, 148 Cal. 590, 591–595, 84 P. 39, 3 L.R.A.,N.S., 896; In re Williams, 74 Cal.App. 331, 240 P. 42; In re Application

of Blanc, 81 Cal.App. 105, 109–112, 252 P. 1053.

In Dominguez Land Corp. v. Daugherty, 196 Cal. 468, at page 484, 238 P. at page 709, it was stated: "It is well settled that the Legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the Legislature for his governance. * * * If, however, no standard by which the officer is to be governed be prescribed by the lawmakers, then there is an attempt to intrust a mere administrative officer with the plenary power of the Legislature, and there will then be no guard against possible arbitrary action."

The Building and Loan Commissioner recognized that it was impossible to compute the average rate for want of guide or standard. On July 28, 1944, he wrote the Franchise Tax Commissioner: "In our opinion the section is needlessly complicated and ambiguous, and the computation required of the Building and Loan Commissioner is impossible to make." Furthermore it appears that for many years the Franchise Tax Commissioner permitted deduction of the entire return paid, credited on, or apportioned to the withdrawable shares of mutual building and loan associations, and that it was not until the amendment of section 8(j) in 1945, providing for deduction of the entire amount, that he for the first time declined to allow deduction in prior years of the amount in excess of the average rate and assessed additional taxes.

The next question is whether the invalid portion of section 8(j) was severable and, if so, what effect its severance has on the amounts which plaintiffs were required to pay. Plaintiffs say the invalid portion was severable; that the result is the same as if it had never been enacted; and the consequence is that the entire return paid, credited on, or apportioned to the withdrawable shares, was deductible in computing their net incomes. Defendant says the portion in question, if invalid, was not severable.

[4, 5] The Bank and Corporation Franchise Tax Act at all times has contained the usual severability clause declaring that if any portion of the act is invalid it was the intention of the Legislature to have passed the remainder without the invalid portion; and that it was its intention that the remainder operate. Stat.1929, pp. 19, 35, § 38, 3 Deering's Gen.Laws, Act 8488, § 38. This provision imposes on the courts the duty of supporting the legislative will as far as possible. Matter of Application of Schuler, 167 Cal. 282, 289, 139 P. 685. A portion of a statute may be declared unconstitutional without affecting the remainder of the act where the result of the deletion of the unconstitutional portion will not make the statute meaningless and it can be said to have been the intention of the Legislature to have the act stand with such deletion. Estate of Childs, 18 Cal.2d 237, 245, 115 P.2d 432, 136 A.L.R. 333; In re Bell, 19 Cal.2d 488, 497–498, 122 P.2d 22. The Legislature clearly expressed the intention that the valid portion of section 8(j) should operate should any portion thereof be invalid.

[6] When the invalid portion of section 8(j) is excluded it is clear that the remainder of the section contained all of the elements of a completely operative statute and that the Legislature intended it so to be. The section was in the status it would have been had the invalid portion not have been included originally. Section 8(j) of the act must be read as though the invalid portion "had never been written into it." City of Los Angeles v. Abbott, 114 Cal.App. 180, 184–185, 299 P. 807, 809. With the invalid portion deleted the section read: "In the case of a building and loan association, organized and operating wholly or partly on a mutual plan, the return paid or credited on or apportioned to the withdrawable shares of such association". This is the identical wording of the section after it was amended in 1945 except that the amendment added federal savings and loan associations. (Stat.1945, p. 1791, § 8(j), 3 Deering's Gen.Laws, 1949 Supp., Act 8488, § 8(j). This conclusion does not result in judicial legislation as

urged by defendant. Bacon Service Corporation v. Huss, 199 Cal. 21, 36, 248 P. 235.

We conclude that: 1) there was no misjoinder of parties-plaintiff; 2) the portion of section 8(j) of the Franchise Tax Act attacked was unconstitutional and void; 3) the invalid portion of the section was severable from the remainder; 4) the remainder of the section was operative; and 5) plaintiffs were entitled to deduct the entire amount paid on, credited on, or apportioned to their withdrawable shares in computing their taxes for the taxable years 1943 and 1944 (income years 1942 and 1943).

Affirmed.

SHINN, P. J., and WOOD, J., concur.

111 Cal.App.2d 131

GRACE et al. v. RODRIGUES.

Civ. 14820.

District Court of Appeal, First District, Division 2, California.

May 16, 1952.

Rehearing Denied June 14, 1952.

Hearing Denied July 10, 1952.

Louisa Grace and Manuel M. Govey sued Mary M. Rodrigues seeking a decree establishing that defendant held the title to certain property in trust for plaintiffs and herself in equal shares. The Superior Court, Alameda County, A. J. Woolsey, J., rendered judgment in favor of plaintiffs, and defendant appealed. The District Court of Appeal, Goodell, J., held that the evidence sustained the trial court's findings as to the existence of a constructive trust which should be enforced.

Affirmed.

1. Trusts 🔑110

In suit for decree establishing that plaintiffs' sister held title to realty in trust for plaintiffs and herself in equal shares, evidence sustained finding that mother of defendant had conveyed property to her upon her promise to divide proceeds realized from sale of said property after death of mother equally between plaintiffs and herself and that defendant had repudiated such agreement after her mother's death and refused to divide the property or sell the same and divide the proceeds.

2. Trusts 🔑110

In suit to establish constructive trust, burden rests on plaintiffs to show by clear and convincing evidence that deed or other transfer absolute on its face is not what it purports on its face to be, but such evidence need not be conclusive and may be indirect, consisting of acts, conduct, and circumstances; and question as to whether showing is clear and convincing is primarily one for trial court.

3. Executors and Administrators 🔑3(1)

Where mother had no property left subject to probate at time of her death, fact that mother's estate had not gone through probate would not deprive court of power to declare trust with regard to property conveyed by mother to her daughter.

4. Appeal and Error 🔑176

In suit for decree establishing that plaintiffs' sister held title to property conveyed to her by her mother in trust for plaintiffs and herself in equal shares, where complaint alleged that on date of deed mother was owner of property, and answer expressly admitted such allegation, there was no issue as to mother's ownership, and it would have to be treated as admitted on appeal.

5. Trusts 🔑373

In suit to establish trust in property conveyed by plaintiffs' mother to defendant, trial court's finding that property conveyed was community property was wholly outside issues and could be disregarded, where pleadings admitted that plaintiffs' mother held title when she deeded property to defendant.

6. Trusts 🔑103(2)

Where mother conveyed property to daughter in reliance upon daughter's oral promise that she would, after mother's death, divide property equally between herself and her brother and sister, constructive trust would be enforced.

◆

A. Q. Lomba, Fred B. Hart, Oakland, for appellant.

J. Elwood Andresen, Oakland, for respondent.

GOODELL, Justice.

The respondents, who are sister and brother, sued the appellant, their sister, seeking a decree establishing that she holds the title to a piece of improved real property on 90th Avenue in Elmhurst in trust for respondents and herself in equal shares. The complaint alleges that on August 9, 1938 Louisa M. Govey, the mother of the parties, was the owner of the property and on that day "in reliance upon the defendant's oral promise that she would after the death of said Louisa M. Govey, divide the said property equally between herself and the plaintiffs, the said Louisa M. Govey executed and delivered to defendant a deed conveying the * * * property to said defendant" which was recorded August 17, 1939, and that in 1946 appellant "repudiated the aforesaid trust and agreement and refuses to divide said property and claims to be the owner thereof."

The answer admits that on August 9, 1938 the mother owned the property and that the deed was recorded as alleged, but denies the other allegations and pleads "that there were no conditions attached to the said conveyance and no trust was intended or created upon said premises by the grantor; there were no promises by grantee either express or implied, that after the death of grantor the grantee would divide the said premises with the plaintiffs herein."

The court found that a confidential relationship existed between the mother and appellant; that "no consideration was paid by the defendant to her mother for the conveyance * * * and said conveyance was made * * * to said defendant upon her promise to divide the proceeds realized from a sale of said property after the death of said Louise M. Govey and the payment of all debts of said Louise M. Govey, equally between plaintiffs and the defendant" and that on July 7, 1946 defendant "repudiated her trust agreement and refused to divide the property or to sell the same and divide the proceeds with the plaintiffs and since said date defendant claims to be the owner of said property." The judgment decreed that appellant holds the title in trust for Louisa Grace, Manuel M. Govey and herself in equal shares.

[1] The only question presented is whether the evidence is sufficient to support the findings.

Appellant attacks the finding that a confidential relationship existed between her and her mother, claiming that there is no evidence to support it. Mrs. Grace testified that appellant managed the business affairs for her mother because the latter "couldn't do much writing English at all"; also that appellant "kept everything, nobody could get hold of them [deeds], she put it in the bank in the safe deposit box so nobody could get their hands on anything." Respondent Govey testified that appellant took care of the business affairs of both their mother and father. All this testimony stands uncontradicted, and of course is sufficient to support the finding.

With respect to the finding that no consideration was given for the deed, appellant testified that she had given her mother $500 for the deed, and admitted of course that the property was worth more than that. The record shows that it was valued at from $18,000 to $21,000. Later she admitted that she did not give her mother this $500 in cash or on the date of the deed, but at "certain times when she was sick, I had to pay her hospital bills—I mean her sickness, the doctor bills and food"; in short, it appears that the $500 claimed to have been paid was not in a lump sum but was spread over some time. Respondent Govey testified that during a conversation with appellant at her home he said "I see you gave mama $10 for this property" to which she replied "I didn't give her nothing". The finding that no consideration for the deed was given by appellant is amply supported.

With respect to the circumstances attending the delivery of the deed, respondents rely principally, if not entirely, upon admissions made and assurances given by appellant to them, all of which appellant denies. The mother died on December 30, 1945, which was over seven years after the deed from her to appellant, and none of the admissions or assurances on which respondents rely was earlier than about the time of the mother's death.

Mrs. Grace testified that while appellant was in the hospital (which was about the time of the mother's death) appellant "said when she came out she would make everything all right." She testified further that on July 7, 1946 in the presence of respondent Govey, his wife, and Mrs. Rose Almeida, appellant had at first said "my mother said to sell the property and divide it between my brother and I. * * * Then after, when she was offered this price I said, 'Why don't you sell it?' She said 'By the time I give you a little bit and brother, I will have nothing.' So then we left her alone." She also testified that after she had taken care of appellant after her hospitalization and the latter had left the Grace home she said: "I will give you what's coming to you, you have been very good to me." Mrs. Grace was asked on cross-examination if she did not say to Mrs. Augusta Lopes that it was right that appellant should have the property since she took care of their mother, and answered: "No sir, I said my sister should have at least half of the property and split the other half between us, * * * for taking care of her for ten years." On rebuttal she made a somewhat similar statement. When asked if she did not say that the property belonged to appellant and that respondents had no claim on it she replied "Never. I said she should get a little more because she took care of the folks we shouldn't get as much as her", and again, "No, she should get more than the two of us, because she stayed with them longer * * * I always said that and I will always stick with that."

Respondent Govey testified that at the conversation to which Mrs. Grace referred at which Mrs. Almeida was present, "there had been quite a little conversation in reference to being equalized between us three" and that appellant had said "that it was no more than right that each one of us should have our share as my mother wanted it". On cross-examination he said: "I told her I wanted her to live up with what she said my mother wanted. Q. And she said she was not going to do it? A. She said, no." He also testified that when he was called by appellant to his mother's death-bed appellant said "Let's not have any trouble * * * you know mother said this property was for the three of us".

Mrs. Rose Almeida testified that she was present at a conversation where there were present respondent Govey, his wife, "Joe Grace, me and her" when appellant had returned from the hospital after her illness, at which appellant said "just as soon as she gets better she is going to give Manuel —put it for sale and they were going to divide it among the three, 'Because Louise has been taking care of me and she has been so good,' she said, 'Manuel is so good' * * * She said she was going to divide it up. * * *" She testified that later on they met and appellant said "I ain't going to give them nothing" to which the witness replied "You said you were going to give it half and half, divide it up". On cross-examination she said "Yes, she was going to divide it up." And again, on cross-examination "She told me she was going to divide it up; the last time she told me, her husband was there. * * *"

Mrs. Irene Govey, wife of respondent, testified that she was at Mrs. Grace's home when appellant was sick there and that they were talking about the property, and appellant said "Well, I will sell the property and divide it between you and Louisa and the three of us. * * * They said that was agreeable with them."

Appellant testified to at least two conversations with respondents, the first at Mrs. Grace's home in early February, 1946, on returning from the hospital and the other on July 7, 1946 on 90th Avenue. She denied that at any time, in either her home or her sister's home, she had promised to give them a share in this property. She explained that at the February meeting "they wanted me to sell—they were forcing me to get a real estate man to put my property for sale". She repeated her denial of any promise to respondents. With respect to the death-bed incident she said she sent for her brother because she felt it to be her duty, but definitely denied having said "Mother says this property is for the three of us" and said that the property was not discussed at all. She testified that at the last meeting, on July 7, 1946 she told respondents that "if they did what was right, they wouldn't be sorry" and that what she meant was "if they do what was right, after my death I would do what was right, that's all. * * *" On redirect she testified that her mother in discussing the deed did not say "to give it to your brother", and that when the Notary asked the mother if she wanted $3 in documentary stamps on the deed "She said as long as it protected me."

Rose Marie Davis, the step-daughter of appellant, testified "Q. Did your mother make any promise to either one of them to give them any interest in the property standing in her name? A. I never heard anything about a promise. Q. Did Mrs. Grace say she wanted the property divided? A. No, Louise always said 'I have no right to anything, neither has my brother, because Mamie has taken care of my mother for so many years." She testified also that after respondent Govey left on July 7, "his sister said, 'Well, we have no right to say anything, we have no right to anything, to be here'."

In rebuttal Mrs. Grace testified that Mrs. Lopes was not present at the meeting on July 7. She also testified that Mrs. Davis, was not present during all of that meeting but went outdoors to take some pictures. She denied that she had ever discussed this matter with Mrs. Lopes.

The issue tendered by the complaint was whether, when the mother made the deed to appellant, it was made in reliance upon the defendant's oral promise that she would after the death of the mother, divide the property equally between herself and her sister and brother. There was no attempt by respondents to prove anything that was said by the mother to appellant imposing such trust on appellant, or the latter's acceptance of it, other than by the testimony just summarized of admissions and assurances made about the time of the mother's death and during the six or seven months following it.

The first of these, asserted by respondent Govey and flatly denied by appellant, was the death-bed episode where he quotes appellant as saying "Let's not have any trouble * * * you know mother said this property was for the three of us." If the court accepted his version and rejected hers, you have a clearcut admission against appellant's proprietary interest, bearing in mind that legal title then stood in her name by virtue of a deed absolute on its face made seven years earlier. This if believed went far toward supporting the finding of a trust relation. However it is buttressed by a number of other admissions testified to by not only the respondents but by their witnesses, and it is to be implied from the findings that the trier of fact accepted them and rejected appellant's denials and the testimony of her witnesses. The record presents simply another case of conflicting testimony, with respect to which the rule is familiar.

Appellant's counsel in moving for a nonsuit said: "* * * its a mere promise here that she promised to divide her property, it wasn't a consideration whatsoever, therefore, they have not made a prima facie case." Appellant still adheres to this theory, arguing on this appeal as though she had received the deed from her mother with no trust imposed and no conditions attached, and then seven years later had magnanimously promised her sister and brother to divide equally with them, without any consideration moving from them to her. The pleadings tender no such issue; the evidence makes no such case, and the case was tried on no such theory.

[2] Appellant argues that in a case such as this the burden rests on the plaintiffs to show by clear and convincing evidence that a deed or other transfer absolute on its face is not what it purports on its face to be. That is true, but as was said in Hansen v.

Bear Film Co. Inc., 28 Cal.2d 154, 173, 168 P.2d 946, 958;

> "Although it is necessary, in order to establish a trust, to offer clear and convincing proof, such proof may be indirect, consisting of acts, conduct, and circumstances (Airola v. Gorham, 56 Cal.App.2d 42, 49, 133 P.2d 78; Kobida v. Hinkelmann, 53 Cal.App.2d 186, 127 P.2d 657; Cooper v. Cooper, 3 Cal. App.2d 154, 39 P.2d 820), and the question whether the showing is clear and convincing is primarily one for the trial court. Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732." Such evidence need not be "conclusive". Hobart v. Hobart Estate Co., 26 Cal.2d 412, 444–446, 159 P. 2d 958.

[3] Appellant contends that the court had no power to declare a trust since the estate of Mrs. Govey had not gone through probate. The evidence clearly shows that the deed was made on August 9, 1938, that she died on December 30, 1945, and that on her death there was no property left subject to probate. It had been conveyed by the deed now in question.

This brings us to another point made by appellant, i. e., that neither the complaint nor the findings state the death of Mrs. Govey, the mother. The findings contain a statement showing that both parents were deceased.

[4] Another point made by appellant is that "No title in Louise M. Govey is shown at the time of this deed to appellant or even later, and therefore there is no property as to which a trust can be declared." The complaint alleges that on the date of the deed Louisa M. Govey was the owner of the property. The answer expressly admits this, hence there was no issue as to that, Munfrey v. Cleary, 75 C.A. 2d 779, 784, 171 P.2d 750, and it "must be treated as admitted on appeal". Palpar, Inc., v. Thayer, 82 Cal.App.2d 578, 583, 186 P.2d 748, 751.

[5] Appellant complains that the finding that this was community property is without any support in the record. The complaint did not allege that it had been community property and such allegation would have been surplusage, since the father had conveyed to the mother and she admittedly held title when she deeded to appellant, hence the finding respecting community property was wholly outside the issues and may be disregarded.

[6] The court decreed that appellant holds the title to the property in trust for the two respondents and herself in equal shares. There are numerous cases in this state enforcing constructive trusts under similar circumstances and it suffices simply to cite 25 Cal.Jur. pp. 159–161, § 31, where the rule is stated.

The judgment is affirmed.

NOURSE, P. J., and JONES, J., pro tem., concur.

SAPORITO et al. v. PUREX CORP., Limited. *

Civ. 18908.

District Court of Appeal, Second District, Division 2, California.

May 2, 1952.

Rehearing Denied May 14, 1952.
Hearing Granted June 26, 1952.

Lenora Frances Saporito and another sued Purex Corporation, for personal injuries sustained when a bottle of cleaning fluid exploded. The Superior Court, Los Angeles County, A. A. Scott, J., rendered judgment in favor of plaintiff, and defendant appealed. The District Court of Appeal, Fox, J., held that it could not be said as a matter of law that the evidence was insufficient to support the trial court's findings and the judgment.

Affirmed.

1. Negligence 🔑136(6)

In order for plaintiff to get to trier of facts on theory of res ipsa loquitur where instrumentality has passed out of possession of defendant at time of mishap, evidence must directly show, or reasonably justify inference, that instrumentality has been carefully handled by plaintiff and all intermediate persons, but evidence need not go so far as to eliminate every remote possibility of injury by third person.

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* Subsequent opinion 255 P.2d 7.

2. Explosives ⚿8

In action against manufacturer for damages resulting from explosion of bottle containing cleaning fluid, whether plaintiff sufficiently proved absence of intervening harmful forces after defendant shipped bottle to entitle plaintiff to rely on inference inherent in res ipsa loquitur doctrine that defendant's lack of care was proximate cause of plaintiff's injury was for trier of facts.

3. Explosives ⚿8

In action for damages resulting from explosion of bottle containing cleaning fluid, fact question was presented as to whether gas pressure was partially responsible for bottle bursting and as to whether explosion resulted from any negligent act or omission on part of defendant manufacturer.

◆

Moss, Lyon & Dunn, Sidney A. Moss, Los Angeles, Bert W. Hendrickson, New York City and Henry F. Walker, Los Angeles, for appellants.

Gray, Binkley & Pfaelzer and John T. Binkley, Los Angeles, for respondents.

FOX, Justice.

From a judgment in favor of plaintiffs in an action to recover damages for personal injuries, defendant appeals.

The accident occurred when a bottle of Purex burst in the hands of plaintiff Lenora Saporito as she started to open it, causing the contents to be propelled into her face and onto her clothing, with particles of glass being driven into her hair, face and eyes.

Appellant contends (1) the evidence is insufficient to invoke the doctrine of res ipsa loquitur, and (2) without the application of that doctrine the evidence is not sufficient to support a finding of negligence.

There is no substantial dispute as to the facts. The bottle in question was purchased by Mrs. Saporito at Jarman's Grocery, a small neighborhood store in Columbus, Kansas. Mr. Jarman took the bottle from the shelf and handed it to plaintiff's daughter and watched her as she walked out to Mrs. Saporito, who was waiting in her car in front of the store. Mrs. Saporito and her daughter drove to their home, about three blocks away, and Mrs. Saporito took the bottle from the automobile to her garage where she intended to do the family washing. She walked to and stood directly in front of the wash bench which was about three feet high. She held the bottle in her left hand about level with her breasts so that it was 15 to 18 inches from her face. As she started to unscrew the cap with her right hand the accident occurred with the resulting injuries.

The Purex was bottled at defendant's St. Louis plant. No pressure test was employed by defendant to discover weakness in or injury to the bottles. Some forty odd bottles were broken a day in the bottling process.

About ten days prior to the accident Mr. Jarman purchased from different concerns two cartons of Purex which were delivered to him by truck, one from Joplin, Missouri, and the other from Pittsburg, Kansas. The bottle in question came from one or the other of those cartons. Mr. Jarman testified the Purex was delivered to his store in sealed, corrugated, cardboard cartons; that he did not see any holes, tears or breaks in them; that they "appeared to be in good condition," and that while they were in his possession (prior to being unpacked) he did not know of their being dropped or damaged. Although Mr. Jarman did not recall personally placing these bottles on the shelf he was present in the store when it was done and was sure none of them were dropped. He did not know of anything that happened to any of these bottles that could have injured them in any way. This store was only 18 x 24 feet, and was operated by Mr. Jarman, his wife, and a high school girl who assisted from 3:00 to 6:00 P.M. He only carried about a dozen bottles of Purex at a time, and when a new carton was opened the bottles were placed on the shelf, behind the bottles already there so that the older bottles would be sold first.

The evidence is clear that the bottle was carefully handled by Mrs. Saporito; that it was not bumped against anything from the time it was taken by Mr. Jarman from the shelf and handed to plaintiff's daughter until it burst in Mrs. Saporito's hands.

Plaintiffs' expert testified the bursting of the bottle was due to a combination of three things: (1) a bruise on the bottle; (2) internal pressure, and (3) the force used by Mrs. Saporito in starting to open the bottle.

[1] The first question to be determined is, whether on the facts presented, the plaintiffs were entitled to rely on the doctrine of res ipsa loquitur. In Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, the court rejected the contention that the instrumentality must have been in the possession of the defendant at the time of the accident. It was there said: "Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession." 24 Cal.2d at page 458, 150 P.2d at page 438. In order for plaintiff to get to the jury—in this case to the court as a trier of the facts—on the theory of res ipsa loquitur where the instrumentality has passed out of the possession of the defendant at the time of the mishap, the evidence must directly show or reasonably justify the inference that it has been carefully handled by plaintiff and all intermediate persons. Escola v. Coca Cola Bottling Co., supra. The evidence, however, need not go so far as to eliminate every remote possibility of injury by third persons. DeCorsey v. Purex Corp., 92 Cal.App.2d 669, 672, 207 P.2d 616. If such evidence is presented the question becomes one for the trier of fact. Escola v. Coca Cola Bottling Co., supra.

Defendant, being in business on a large scale, was, of course, skilled and experienced in preparing its merchandise for shipment, and familiar with the manner in which various transportation facilities handle their cargo. It naturally packed Purex with the care and used the quality of containers and cartons its experience indicated was necessary for it to reach its destination in good condition under usual handling practices of the transportation industry. The cartons in which the bottle of Purex was shipped in this case did not reveal any marks indicating they had been subjected to any unusual or rough handling. They appeared to Mr. Jarman to be "in good condition." He did not know of any abuse of the cartons in his store prior to their being unpacked, nor did he know of anything happening that could have damaged any of the bottles. It seems that if anything had happened to either the unpacked cartons or the bottles in the Jarman store he would likely have known of it for he had a small one-room store and no help other than his wife and a high school girl for three hours in the afternoon. Although some customers served themselves in this store the chances of their doing anything to damage the Purex bottles seems very remote. The product is standard; all the bottles are alike so there is no problem of choice by the customer and consequently no occasion for handling them for the purpose of making a decision as to which bottle to take. Only about a dozen bottles were ordinarily carried in stock on a shelf about four feet high. Purex was thus easily accessible, hence slight excuse for damage to a bottle in originally placing it on the shelf or in replacing it in the event a customer changed his mind about buying a bottle. Also, in such a location there would be virtually no reason on the part of self-service customers to move the Purex bottles around on the shelf. Further, it may be inferred that Purex bottles are of such quality that they may be subjected to normal handling in a store without the likelihood of serious damage to them. As to the handling of the bottle from the time sale was made until it burst, the evidence is clear that this was careful.

[2] A somewhat similar situation was presented in Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522. There the bot-

tle of beer that exploded in plaintiff's hand in Los Angeles had been produced in San Diego. The case containing this bottle had been loaded on a truck of a trucking company at defendant's San Diego plant and delivered to a warehouse in Los Angeles where it remained about three days. It was then loaded on another truck and delivered to plaintiff's place of business. The only showing of careful handling insofar as the transportation and storage of the beer was concerned was that the trucks had not been involved in an accident while transporting this beer and, so far as the manager of the warehouse knew, no accident had happened while the beer was in storage that affected it, although the manager admitted breakage from handling in the warehouse was a common occurrence. 33 Cal.2d at pages 525–526, 203 P.2d 522. In that case it was held there was a sufficiently satisfactory showing of probable negligence on the part of the defendant to warrant its determination by the jury, and that it was the jury's province to determine whether the plaintiff had sufficiently proved the absence of intervening harmful forces after the defendant shipped the bottle to entitle the plaintiff to rely on an inference inherent in the res ipsa loquitur doctrine that the defendant's lack of care was the proximate cause of his injury. In like fashion these questions were for the determination of the trier of fact in this case.

The circumstances attending the bursting of the bottle throw light upon the cause thereof. A hole about an inch in diameter was blown out of the shoulder of the bottle nearest the plaintiff with the result that she got the contents fully in the face. The gas pressure in the bottle was sufficient to propel fragments of glass upward into Mrs. Saporito's eyes, face and hair. One sliver three or four millimeters long was so imbedded in the inner side of her eyelid that it was not discovered, despite several examinations by eye specialists, until fifteen months after the accident. The appearance of the dress plaintiff was wearing, particularly the splashes around the neckline and shoulders, justifies the inference that the contents of the bottle sprayed rather than spilled on her. There was also evidence by plaintiffs' expert that a fragment of glass about an inch long was pushed outward by pressure from inside the bottle at the time it burst.

[3] Defendant did not wash its bottles before filling. Purex is a solution of sodium hypochlorite. It is chemically unstable when in contact with rust, hair, or other metallic or organic substances which may remain in unwashed bottles. When Purex decomposes it develops gas causing an increase of gas pressure within the bottle. The physical facts here justify an inference that there was considerable pressure inside this bottle when it burst, and lend support to the opinion of plaintiffs' expert that the bursting of the bottle was caused "in part by internal pressure * * *" It was a question of fact for the trial court as to whether the gas pressure was partially responsible for the bottle bursting and whether it resulted from any negligent act or omission on the part of defendant. DeCorsey v. Purex Corp., supra, 92 Cal.App.2d at page 674, 207 P.2d 616.

Plaintiffs' expert included as one of the causes of the bottle bursting the application of force by Mrs. Saporito in attempting to unscrew the cap. Defendant, however, insists she had not actually applied any force when the accident occurred. She testified, "I started to twist the cap." Other testimony of hers, however, creates some uncertainty as to whether or not she had actually applied any force to the cap. The court made no finding on this point. This question, however, is immaterial because there is no claim that Mrs. Saporito was guilty of any negligence in her attempt to open the bottle.

The trial court having resolved the issues of fact in favor of plaintiffs, we cannot say as a matter of law that the evidence is insufficient to support the findings and ensuing judgment.

The judgment is affirmed.

McCOMB, J., concurs.

MOORE, P. J., deeming himself disqualified, does not participate herein.

111 Cal.App.2d 69

ROBERTS v. DEL MONTE PROPERTIES CO., Inc.

Civ. 14869.

District Court of Appeal, First District, Division 2, California.

May 12, 1952.

Rehearing Denied June 11, 1952.

Hearing Denied July 10, 1952.

John Roberts, a minor, by Owen A. Roberts, his guardian ad litem, brought an action against Del Monte Properties Company, Inc., a corporation, for injuries resulting when plaintiff fell through unprotected open window in hall of hotel operated by defendant when plaintiff was playing on a pile of furniture and mattresses left near window. The Superior Court of the State of California in and for the City & County of San Francisco, Melvyn I. Cronin, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Nourse, P. J., held that action of plaintiff infant in playing on such pile of furniture and mattresses did not render plaintiff a trespasser or licensee to whom hotel operator owed no duty of care except to refrain from overt or intentional acts.

Affirmed.

1. Innkeepers ⚷10.1

Infant son of Navy officer who was residing in hotel and along with other officers was attending school conducted in hotel by Navy, did not, by playing on a pile of furniture and mattresses left in hall near unprotected open window through which infant fell, become a trespasser or licensee to whom hotel operator owed no duty of care except to refrain from overt or intentional acts.

2. Negligence ⚷32(2.8, 4)

A person in possession of premises must take such precautions for safety of business invitees as are reasonable under circumstances considering their relation, burden of interference with his own affairs, and danger to invitees to be anticipated, and special caution is required in behalf of invitees of immature age whose inability to appreciate and propensity to ignore certain dangers he ought to consider.

3. Innkeepers ⚷10.14

In action brought against operator of hotel for Navy for injuries sustained when son of Navy officer, who was residing in hotel and was attending school conducted in hotel by Navy, fell through unprotected open window while playing in hotel hall on pile of furniture and mattresses left in hall, negligence of defendant hotel operator in placing pile of furniture where accident occurred was for jury.

4. Innkeepers ⚷10.14

In action brought against operator of hotel for Navy for injuries sustained when son of Navy officer, who was residing in hotel and was attending school conducted in hotel by Navy, fell through unprotected open window while playing in hotel hall on pile of furniture and mattresses left in hall, existence of order of officers in charge of school forbidding officers attending school to allow their children to play in corridors did not prevent question of negligence of defendant hotel operator in placing furniture in hall from going to jury.

5. Negligence ⚷136(29)

Violation of statute by seven year old child does not constitute contributory negligence on part of child as a matter of law, and whether violation constitutes contributory negligence is for jury.

6. Trial ⚷139(1)

If evidence is clear, positive, uncontradicted and of such nature that it cannot rationally be disbelieved, court must instruct that a fact so proved has been established as a matter of law.

7. Negligence ⚷54

One who carries on an activity on land on behalf of owners in possession is subject to same liability and enjoys same immunity from liability for bodily harm caused thereby to others as though he were such owner.

8. Negligence ⚷136(9)

What constitutes reasonable care under circumstances is for jury in negligence action, if subject to reasonable doubt.

9. Innkeepers ⚷10.14

In action brought against operator of hotel for Navy for injuries sustained when son of Navy officer, who was residing in hotel and was attending school conducted in hotel by Navy, fell through unprotected open window while playing in hotel hall on a pile of furniture and mattresses left in hall, whether ordinary care required frequent inspection of halls for furniture placed in hall by student officers and their families was fact question for jury.

10. Appeal and Error 🔑930(2)

Jury would be presumed on appeal to have followed instructions given by court in action for injuries.

11. Trial 🔑330(5)

Where several issues are tried and submitted to jury general verdict must stand if evidence upon one issue alone is sufficient to sustain verdict.

Dana, Bledsoe & Smith, San Francisco, for appellant.

Joseph L. Alioto, Robert J. Drewes, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by the defendant in a negligence action held responsible for the injuries suffered by the minor plaintiff, who fell through a window when playing on a pile of furniture and mattresses left near it.

Defendant corporation had for many years been owner and operator of the Del Monte Hotel at Monterey, California, which hotel since the end of 1942 had been used by the United States Navy for some of its schools, the defendant remaining owner and operating and maintaining the properties for the Government. On June 15, 1948, the Government purchased the properties, but, pending the organization of a staff of its own, continued to use the services of defendant, as an independent contractor, for the operation and maintenance of said properties on the basis of a written contract. Defendant was so operating and maintaining the properties when on June 27, 1948, the accident happened. Plaintiff, John Roberts (hereinafter called John) then seven years old, was living in the west wing of the hotel building as a member of the family of his father, a Navy officer who was attending the school. The west wing was being used as quarters for officers with families. There were at least fifty children in the west wing divided over four floors. John's family lived on the second floor.

On June 27, 1948, a Sunday, John had played outside and then later in the afternoon rode up in the elevator together with his playmates Bobby Masonheimer and Danny Smith—also sons of officers living in the west wing—and Danny's father, Warrant Officer Smith. The Smith family was the only one that had quarters on the fifth floor and John often went there to play with Danny. They left the elevator at the fourth floor, the highest floor served by it, and there saw in the hall near the windows a pile of furniture and mattresses near which they had to pass to mount the stairway to the fifth floor. Danny and his father continued up but John and Bobby remained behind to play on the pile. John testified that one of the mattresses was lying on the furniture slanted in such a way that the boys could slide down in the direction of the stairs, one was on the floor on which they could jump and the top one slanted partly down in the direction of the window. When during the playing John was on the top mattress he accidentally tumbled backward towards the open window behind the pile, the screen in it gave way, and boy and screen fell down into a patio. John was seriously injured. There was evidence that the screen was in a weakened and defective condition, but on appeal no negligence is predicated on this condition independent from the fact that the pile of furniture and mattresses, attractive to children, was near the unprotected, open window.

Appellant contends in the first place that it could not be held liable on the theory that it placed in a hall where children invitees were known to pass a pile of furniture attractive to children in a location which would be dangerous if they played there, because there was no evidence that any of its employees or agents placed it in that manner. To the contrary, the janitor Marie, the only one who gave evidence concerning the furniture as it was prior to the time John saw it, testified that on the preceding Saturday afternoon on which he worked until 4:30 he found in the hall of the fourth floor two iron bedsteads taken apart with two springs and two mattresses. He put the bedsteads in the storeroom on that floor but, as there was no room for the mattresses and springs, he put them nearby leaning against the wall. He did not put anything else near the window. When he came there again on Wednesday (after the accident) there was more furniture and it was not placed in the same way. He often found furniture of the hotel in the halls because Navy families put it out of their rooms when they brought in furniture of their own. The storerooms were full. The pile remained in the hall until Wednesday when room for it was made in the storeroom. However it was shown that at a prior trial of the case the witness, over and above testimony to the same effect as that at the present trial, had also testified on cross-examination: "Q. Isn't it true, Mr. Marie, that on Saturday, the 26th of June, 1948, you were moving furniture from the officers' rooms to the storeroom, in room A? A. Yes.

"Q. Isn't it true you piled the furniture between the window and the storeroom as shown in Plaintiff's Exhibit 3-A. A. Yes." The witness contended at the trial that he had misunderstood the question and that the answers were not right. He was further impeached by testimony of Lieutenant Owen Roberts, father of plaintiff, to the effect that when in his presence the attorney of his son discussed the circumstances of the accident with Marie in July, 1948, Marie stated that he had placed the furniture between the storeroom and the window on the day preceding the accident without making any qualification and further that he frequently put furniture, there until he could put it in the storeroom. Under those circumstances the jury could disbelieve Marie's main testimony and taking into consideration that the moving of furniture belonged to Marie's task as a janitor, that the furniture was piled up near the storeroom where such furniture was normally stored by defendant, and that Marie finally removed it after the accident, it could infer that Marie had placed it there.

Appellant further argues that a motion for a directed verdict made by it should have been granted because plaintiff when playing on the pile of furniture was using it for an unintended and unpermitted purpose and therefore became a trespasser or licensee to whom defendant owed no duty except to refrain from overt or intentional acts not here involved.

[1-3] This rule has expressly been held inapplicable to infant invitees attracted by dangerous objects in Crane v. Smith, 23 Cal.2d 288, 300, 144 P.2d 356, 363. In that case our Supreme Court affirmed the award of damages to a three year old child for injuries received when she placed her finger in a coffee grinder in a market where her mother was purchasing groceries. The court said: "The rule relied upon by the appellant, however, has no application to the facts of this case. At the time of the injury, the coffee mill was on an aisle in a portion of the store open to business visitors. To say that a three-year-old girl accompanying her mother was such a visitor as she stood in front of the machine but a trespasser when she followed a childish impulse to put her hand on or in the fascinating red contrivance which made such interesting sounds would be to extend the doctrine of the cases denying compensation to one who has exceeded the scope of his invitation beyond their logical scope. Moreover, such reasoning would nullify the land occupier's duty to keep his premises free of natural or artificial conditions which involve an unreasonable danger to his business visitors when he has reason to believe that they will not realize the risk involved in the condition. Certainly, evidence shown by the present record justifies a finding that the child's act was one which a reasonably prudent person should have anticipated and guarded against." And further 23 Cal.2d on page 301, 144 P.2d on page 364: "The childish propensity to intermeddle was the characteristic which the appellant should have taken reasonable precautions to guard against." To the same effect is Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 140 P.2d 467, in which case it was held that an action of a four year old

child, who accompanied his mother to a department store, for injuries received when he inserted his hand under the "combplate" of the store's escalator, should have gone to the jury. Appellant's contention that said two cases represent an exception to the general rule and are restricted in their application to situations involving dangerous machinery is without merit. Neither the language nor the rationale of said decisions presents any ground for such restriction. They are based on the general principle that the person in possession of premises must take such precautions for the safety of his business invitees as are reasonable under all the circumstances, considering their relation, the burden of the interference with his own affairs and the danger to the invitees to be anticipated, and that special caution is required in behalf of invitees of immature age whose inability to appreciate and propensity to ignore certain dangers he ought to consider. In this respect it can make no difference in principle whether the owner of a shop or hotel places within the reach of his infant invitees attractive but dangerous machinery or attractive fruit, decorative but poisonous. In each case the reasonableness of the conduct under all the circumstances is for the jury and accordingly it was also in this case correctly left to the jury. No contention is made that apart from the improper use of the furniture John was not a business invitee on the premises.

[4, 5] The existence of an order of the Navy officers in charge of the school forbidding officers with dependents to allow their children to play in corridors should not prevent the matter from going to the jury. Not only was the order not directed to the children but to their parents, but even the violation of a statute by a child of that age does not constitute contributory negligence as a matter of law but the question whether the violation constitutes contributory negligence remains for the jury. Galbraith v. Thompson, 108 Cal.App.2d 617, 239 P.2d 468. As could be expected there was evidence that children did play in halls and corridors. Neither was John's testimony that he knew that falling might hurt decisive against him. The essential inquiry was not that, but whether John was reasonably required to anticipate that if he played on the pile he might fall and be hurt and therefore to abstain from so playing.

Next appellant assigns as error that the court in instructions expounding the issues to be decided stated in effect that plaintiff was entitled to a verdict if he was not negligent and had not assumed the risk whereas defendant's negligence was the proximate cause of the injury without including the proviso that the jury must first find that plaintiff was still an invitee while playing on the furniture. Under our holding that appellant's theory that plaintiff lost his status of invitee by improper use of the pile of furniture was not applicable to a situation as presented in this case such proviso evidently was not required. As to appellant's duties with respect to an infant invitee the jury was correctly instructed.

[6, 7] Appellant contends that instructions to the effect that defendant corporation was the operating manager and its agent in charge of the properties involved in the accident and that it was subject to the same liability, and enjoyed the same immunity from liability for bodily harm caused thereby as though it were the owner of the land invaded the province of the jury by stating contested issues as established facts. However if the evidence is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved the court must instruct that a fact so proved has been established as a matter of law. Compare Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868. In this case plaintiff introduced into evidence the contract in force between defendant and the Government at the time of the accident. This contract, dated June 15, 1948, recited in part that up to June, 1948, appellant, in the contract called the "Contractor", had been owner and operator of the Del Monte Hotel which it "*had operated and maintained for the Government as a Naval Pre-Flight School*" according to a prior contract, that the Government had purchased the properties for the purpose of establishing a Naval Post Graduate School

and that "pending the recruiting and organization of a staff *for the operation and maintenance* of said properties, the Government is desirous of continuing to utilize the services of Contractor for such purposes." It is then agreed that for a sum of $30,000 a month "the Contractor will perform all janitorial services, operate the powerhouse, make current repairs, and *perform all other services necessary to the operation and maintenance* of the Del Monte properties and grounds." (Emphasis ours.) Apart from possible other evidence which might cause a conflict this contract proves that at the time of the accident defendant was still operating and maintaining the premises for the Government as a school in the same manner as it had done for several years up to June, 1948, when it was still owner. Defendant did not introduce any evidence that the Navy took over or controlled the janitorial service or management of the halls and corridors here involved. There was evidence that Navy officers regulated and controlled the use of rooms by the student officers and their families; they assigned quarters, gave keys; their permission was required for officers to move furniture or switch it from one room to another. If permission was given the handling was the task of defendant's janitorial service. Sometimes a room on the fifth floor was allotted by the Navy to a family as a private storeroom. The evidence of defendant's witnesses showed that the janitorial service in halls and corridors and the general storing was handled by defendant's employees and agent; although those most directly concerned testified as witnesses for defendant, there was no evidence whatever of any control of the Navy over these activities. The fact that the Navy among many other orders regulating conduct of student officers and their families made the one concerning letting children play in corridors, mentioned before, does not cause any conflict with regard to defendant's physical control of said corridors. Neither does the existence of a security patrol of civilian officers hired by the Navy have this effect as there was no evidence whatever that it was in any way concerned with physical conditions on the premises. Appellant points out that its employees were not present on Sundays. There is, however, no evidence that they were not allowed to work or inspect on Sundays. (We have held moreover that the jury could conclude from the evidence that an employee of defendant placed the pile in the hall on Saturday.) It may be that the statement in the instruction that the properties were in charge of an agent of defendant was somewhat general as the Navy which conducted a school on the premises must in that respect have had some control. However, as the uncontradicted evidence shows that all halls and furniture involved in the accident and all management and activity concerning them was in charge of defendant's agents, any possible error as to the extent of appellant's management cannot have been prejudicial. It is not contested that one who carries on an activity on land on behalf of the owners in possession is subject to the same liability and enjoys the same immunity from liability, for bodily harm caused thereby to others as though he were said owner. (Restatement, Torts § 383.)

[8–11] Appellant also attacks an instruction reading: "The contract operator of a dwelling owes a duty to keep his buildings and premises reasonably safe for his guests, and to exercise reasonable care to protect his guests from injury through his negligence. He has the duty of making careful and frequent inspections in an endeavor to discover any defective conditions that would cause injury to a guest." It is said that it is a qeustion of fact for the jury whether ordinary care required inspection, and whether the duty of inspection if any rested on defendant or on the Navy. We have already decided this point partly against appellant in holding that appellant was responsible for the physical condition of the premises in so far as involved in this accident. However the instruction requiring frequent inspections is erroneous. What constitutes reasonable care under all the circumstances of a case is for the jury, if subject to reasonable doubt, Polk v. City of Los Angeles, 26 Cal.2d 519, 530, 159 P.2d 931 and whether ordinary care requires frequent inspections of the halls of the living quarters of a school for furniture placed there by student officers and their families is subject to such doubt. Good instructions had been given as to the measure of care to which defendant was held in general and the specific instruction requested should have been refused as invading the province of the jury. However the error does not require reversal. Defendant could be held liable either on the theory that its janitor placed the pile of furniture there where the accident occurred in which case defendant was liable as his superior without any question of inspection being involved or on the theory that it was placed there by guests after the janitor left on Saturday afternoon, in which case the question of reasonable inspection might come up. However if the janitor's testimony is believed that the dangerous condition did not yet exist when he left late on Saturday afternoon, there is not the slightest evidence when between his leaving and the time that John started to play on the pile on Sunday afternoon guests might have constructed the pile, so that there could be no basis for holding that even frequent inspection, short of constant guarding, would have discovered the pile in time to prevent the accident. It could therefore not be held that the lack of frequent inspection proximately caused the accident. The jury was clearly instructed that if they might find the defendant negligent they had still to determine whether that negligence contributed in any degree as a proximate cause of the accident, and that if they found that it did not they had to find for defendant. Although the jury could be induced by the erroneous instruction to hold that the admitted fact that defendant had not inspected the halls the last twenty-four hours before the accident constituted negligence as a matter of law, they could not hold under the correct instructions given as to proximate cause that such negligence proximately contributed to the causation of the accident. It will be presumed that the jury followed the court's instructions. Snodgrass v. Hand, 220 Cal. 446, 448, 31 P.2d 198. It must therefore be presumed that the jury did not hold defendant liable on the ground of negligence in inspection but on the ground of its responsibility for the negligent placing of the furniture by its janitor. "Where several issues are tried and submitted to the jury, the general verdict must stand, if the evidence upon one issue alone is sufficient to sustain the verdict." In re Estate of Hellier, 169 Cal. 77, 83, 145 P. 1008, 1010. Compare also the following statements, not completely in point here but nevertheless adding support to our conclusion that no reversal is required: "[A]n instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify a reversal unless it has misled the jury to the prejudice of the appellant." Meholtin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855, 857. "Presumptively, however, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, has not prejudiced the defendant." Marston v. Pickwick Stages, Inc., 78 Cal.App. 526, 533, 248 P. 930, 933, quoting from Bosqui v. Sutro R. R. Co., 131 Cal. 390, 401, 63 P. 682. As the verdict could as a matter of fact correctly be based only on respondeat superior and could be based on lack of inspection in accordance with the incorrect instruction only if the jury overlooked the lack of evidence of proximate causation contrary to the other instruction given we do not feel constrained to hold that the jury was misled to defendant's prejudice.

Appellant also complains of instructions which allegedly do not sufficiently restrict its duties towards licensees. Under our holding that John as a matter of law did not become a licensee and that appellant's duties remained the duties towards invitees, more onerous than those stated in the instruction here attacked, appellant could not be prejudiced even if the instruction had been in itself incorrect, as to which contention we express no opinion. Finally appellant complains of the refusal of certain instructions proposed by it. As all of them were based on theories urged by appellant but rejected herein the refusal was correct.

Judgment affirmed.

GOODELL, J., and JONES, Justice pro tem., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

110 Cal.App.2d 764

GALLI v. BROWN et al.

Civ. 14827.

District Court of Appeal, First District, Division 1, California.

May 7, 1952.

Rehearing Denied June 6, 1952.

Hearing Denied June 26, 1952.

Iola Galli, as a taxpayer, brought actions against Edmund G. Brown, individually and as District Attorney of the City and County of San Francisco, the Controller and Treasurer thereof, and another, to recover on behalf of San Francisco, a consolidated city and county, amount of salaries paid to two city and county employees allegedly hired contrary to provisions of city and county charter. The Superior Court of the State of California in and for the City and County of San Francisco, Sylvain J. Lazarus, J., entered judgments against Brown and in favor of the city, and in favor of the controller and treasurer, and defendant Brown appealed from the judgments against him and from orders denying motions for new trial, and Galli cross-appealed. The District Court of Appeal, Peters, P. J., held that district attorney was not liable for appointing employee who did not have requisite residence requirement when district attorney was acting in good faith.

Appeals from orders dismissed, portions of judgments involved on appeals by Brown reversed, portions of judgment involved on appeals by Galli affirmed.

1. Appeal and Error ⟾110

Orders denying motions for new trial are "nonappealable".

See publication Words and Phrases, for other judicial constructions and definitions of "Nonappealable Order".

2. Counties ⟾61

Warrant and bond office is separate and distinct from district attorney's office under charter of San Francisco, a consolidated city and county. St.1931, pp. 2995, 2997, §§ 29, 30, 34.

3. District and Prosecuting Attorneys ⟾3(2)

Attorneys who lacked necessary qualification of two years admission to practice law for appointments as assistant district attorneys, and who were appointed by district attorney to warrant and bond office, under civil service classification junior attorney, criminal, were warrant and bond clerks and not assistant district attorneys, notwithstanding that during emergencies and to gain experience they performed some legal duties and functions normally performed by assistant district attorneys, and hence appointments could not be basis of taxpayer's action on behalf of consolidated city and county to recover from district attorney salaries paid to attorneys on ground that same were illegally hired as assistant district attorneys. St.1931, pp. 2994, 2995, 2997, 3030, 3060, §§ 27, 29, 30, 34, 86, 141.

4. Counties ⟾196(7)

In action by taxpayer on behalf of consolidated city and county against district attorney and controller and treasurer of city and county to recover salaries allegedly illegally paid to city and county employees who were allegedly hired contrary to provisions of city and county charter, evidence sustained finding that person appointed as warrant and bond clerk did not have the requisite resident requirement under the city and county charter. St.1931, p. 3030, § 86; St.1933, p. 2805, § 7.

5. Counties ⟾64

City and county charter requiring that all employees shall have been city residents for at least one year prior to appointment means that appointee must have had one year's residence immediately preceding appointment, and requirement would not be filled simply by having residence for one year at any time prior to appointment, and appointment of warrant and bond clerk by district attorney when clerk did not possess such qualification was illegal. St. 1931, p. 3030, § 86; St.1933, p. 2805, § 7.

6. Counties ⟾196(7)

In action by taxpayer on behalf of city and county against district attorney to recover salary of allegedly illegally appointed warrant and bond clerk on ground that such clerk did not have one year's residence requisite to appointment, evidence established that district attorney made appointment in good faith believing that clerk possessed requisite residence requirement. St.1931, p. 2995, § 30; St.1933, p. 2805, § 7.

7. District and Prosecuting Attorneys 🔑10

At common law, a district attorney who illegally but in good faith hired a warrant and bond clerk was not personally liable for salary paid to clerk.

8. Officers 🔑114

At common law, where public officer is empowered to and does exercise judgment but acts mistakenly or erroneously, he is not liable if he acts in good faith within general scope of authority without malice, corruption or sinister motives.

9. District and Prosecuting Attorneys 🔑10

If section of city and county charter providing that every officer who shall approve, allow or pay any demand on treasury not authorized by law shall be liable to city and county individually and on official bond for amount of demand, was intended to impose personal liability on public officials where they authorize or make such payments regardless of good or bad faith, then section is unconstitutional in so far as it attempts to impose liability on district attorney who in good faith and not knowing that appointee did not have requisite resident requirement, appointed him as warrant and bond clerk. St.1931, p. 2995, § 30; St. 1933, p. 2805, § 7.

10. District and Prosecuting Attorneys 🔑1

Even though San Francisco is a consolidated city and county, district attorney remains a county official. Government Code, § 24000(a).

11. Counties 🔑3

Charter provision relating to county officials is valid only if authorized by state constitution.

12. District and Prosecuting Attorneys 🔑10

The constitution of the state does not authorize San Francisco, a consolidated city and county, to fix liability of its county officers in general and of district attorney in particular. Const. art. 11, § 8½, subd. 4.

13. Statutes 🔑93(3)

If approval by legislature of section of charter of consolidated city and county of San Francisco imposing liability upon officer who allows or pays demand on treasury not authorized by law be looked upon as making such section general law of state, same would be special legislation and unconstitutional. St.1931, p. 3030, § 86; Const. art. 4, § 25, subd. 33.

14. Statutes 🔑93(3)

Legislature cannot by statute create or impose rights or liabilities on officers or employees of one county not imposed on officers and employees of all counties.

15. District and Prosecuting Attorneys 🔑10

In absence of liability in common law and general statute imposing such liability, section of charter of consolidated city and county imposing absolute liability on district attorney for erroneous discretionary acts performed in good faith within scope of his authority, without malice, corruption or sinister motives, is unconstitutional. St.1931, p. 3030, § 86.

16. Appeal and Error 🔑170(2)

Where taxpayer brought action on behalf of consolidated city and county against district attorney seeking to impose liability for salary allegedly paid to illegally appointed warrant and bond clerk, but complaint did not charge bad faith on part of district attorney, complaint was fatally defective and such point could be raised at any time, and district attorney did not waive constitutional point that without such allegation, section of city and county charter imposing absolute liability on district attorney for illegal appointments was unconstitutional, by not raising such constitutional point in trial court. St.1931, pp. 2995, 3030, §§ 30, 86; Const. art. 4, § 25, subd. 33; art. 11, § 8½, subd. 4.

17. District and Prosecuting Attorneys 🔑10

Regulation of liability of district attorney is not a municipal affair, and hence constitutional articles granting San Francisco, a consolidated city and county, home rule and complete control of its municipal affairs do not authorize regulation of liability of district attorney. Const. art. 11, §§ 6–8½.

18. Counties 🔑88, 90

Where district attorney for consolidated city and county appointed warrant and bond clerk not knowing that he did not have requisite residence necessary for such position, and controller of city and county allowed salary payments and treasurer paid same, though payments were illegal, controller and treasurer were not liable therefor, since city and county charter does not purport to make controller and treasurer guarantors of validity of appointment. St. 1931, pp. 2995, 3023, 3030, 3065, §§ 30, 73, 86, 150.

◆

Norman Elkington, Thomas B. Larkin, Hancock, Elkington, Rothert & Low, all of San Francisco, for appellant Edmund G. Brown.

Dion R. Holm, City Atty., Wm. F. Bourne, Deputy City Atty., San Francisco, for cross-respondents.

Delany, Jarvis, Fishgold & Werchick and Martin J. Jarvis, all of San Francisco, for respondent and cross-appellant.

PETERS, Presiding Justice.

After demand on, and refusal by, the proper authorities to sue, Iola Galli, as a taxpayer,[1] commenced these actions against the district attorney, the controller and treasurer of the City and County of San Francisco, to recover on behalf of the city the amount of salaries paid to two city and county employees, it being contended that the two employees were hired contrary to the provisions of the city and county charter.[2]

The controversy involves the appointment by Edmund Brown, then the district attorney of the City and County of San Francisco, of Roger Garety and William Mullins, it being contended by Galli that both were employed as assistant attorneys in the district attorney's office illegally in that neither possessed the necessary qualification of two years' admission to practice law, as required by section 34 of the charter.[3] As to Garety, it was also contended that, when appointed, he had not been a resident of San Francisco for at least one year immediately prior to his appointment as required by section 7 of the charter.[4]

The public officials involved defended on several grounds, one of the main defenses being that the two employees were not employed as assistant attorneys, but were lawfully employed as warrant and bond clerks pursuant to section 30[5] of the charter, it being contended that such employees do not have to be admitted to practice law for two years prior to their appointment.

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[1] Section 27 of the charter, St.1931, p. 2994, provides that in the event a taxpayer institutes such an action "if judgment be finally entered in his favor he shall be allowed his costs and also such reasonable compensation for attorney's fees as may be fixed by the court."

[2] Section 86 of the charter provides, in part: "Every officer who shall approve, allow or pay any demand on the treasury not authorized by law, ordinance or this charter, shall be liable to the city and county individually and on his official bond for the amount of the demand so illegally approved, allowed or paid."

[3] Section 34 provides, in part: "The elective officers of the city and county may appoint such assistants and employees as are authorized by the supervisors upon the recommendation of the mayor, in the annual budget and annual or supplemental appropriation ordinances, * * *. Each assistant attorney in the offices of * * * the district attorney * * * must, at the time of his appointment, be qualified to practice in all courts of the state and must have been so qualified for at least two years next preceding his appointment. The salaries * * * for assistants and employees in such elective offices, shall be fixed as provided by the salary standardization provisions of this charter."

[4] Section 7 provides, in part: "All employees of the City and County shall be citizens and shall have been residents thereof, for at least one year prior to the appointment, * * *. A 'resident' within the intent and purpose of this section, means one who actually lives within the City and County and maintains an abode therein, where such resident with his family, if any, customarily spends the night * * *." St.1933, p. 2805.

[5] Section 30 provides: "There shall be a warrant and bond office. The district attorney shall appoint an assistant to have charge of the warrant and bond office to be designated warrant and bond deputy, and such additional assistants and clerks as may be provided by the budget and appropriation ordinances. No person shall be appointed warrant and bond deputy who is not at the time of his appointment qualified to practice law in all the courts of this state." Then follows an enumeration of the duties of the deputy in the warrant and bond office. Ref-

It is an admitted fact that neither Garety nor Mullins had been admitted to practice for two years prior to March 1, 1949 (the date of their appointments), each having been admitted to practice just a few months prior to his employment.

[1] The trial court found that the employments were illegal, and entered its judgments against Brown and in favor of the City in the total sum of $6,460, the amounts admittedly received by Garety and Mullins as salary, and also awarded Galli, as against Brown, $2,500 attorney fees. So far as the controller and treasurer are concerned, the court found that they had allowed and paid the salary claims of Garety and Mullins in accordance with the charter provisions, and were not legally responsible for the illegal payments. Judgments were entered in their favor. Brown appeals from the judgments against him and from the orders denying his motions for a new trial. The last mentioned orders are non-appealable, and the appeals therefrom should be dismissed. Galli appeals from the judgments in favor of the controller and treasurer.

The Facts.

Early in 1949, Garety and Mullins, recently admitted to the bar, applied for positions in the district attorney's office. They were both told by Brown that, because of their lack of two years' experience, they could not be appointed assistant attorneys, but it was suggested that they might be appointed warrant and bond clerks. Each agreed to take such a position. Brown telephoned to Henderson, personnel director of the city and county and secretary of the civil service commission, told him that the two applicants had not been admitted for two years, and asked him if he, Brown, could appoint them bond and warrant clerks under the classification of "K52 Junior Attorney, Criminal." Henderson replied that the two applicants could be so appointed. Brown thereupon submitted to the civil service commission, on proper forms, proposed appointments of the two applicants, giving the class number and title of the positions as "K52 Junior Attorney, Criminal (Bond and Warrant Clerk)." The words in parenthesis are not found in the salary standardization ordinance or in the civil service classification, but were added by Brown to indicate that the two proposed employees were being hired as clerks in the warrant and bond office and not as assistant attorneys in the district attorney's office. Henderson, for the civil service commission, Ross, as controller, and the mayor's office approved the applications. The two appointees started to work on March 1, 1949. These actions were filed in November of 1949.

Between March and November the two employees worked in the warrant and bond office. Both accepted bail pursuant to a schedule prepared by the judges; they released prisoners who produced bail; they heard complaints and determined whether citations should issue; they conducted citation hearings and warrant hearings, consulting superiors in all but the clearest cases; and they processed complaints and warrants. Both occasionally advised city, county and state officials as to the proper charges to be filed. On a few occasions, fifteen as to Garety, eighteen as to Mullins, on the instructions of the deputy in charge of the warrant and bond office, each appeared at afternoon sessions of the traffic court as the representative of the district attorney's office, calling the calendar, occasionally questioning witnesses and informing defendants of their legal rights. Twice Garety appeared in the Superior Court to sit, observe, and assist the regular deputy district attorney assigned to that court. Apparently, the traffic court appearances were caused by shortage of personnel in the district attorney's office during vacation periods.

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erence will hereafter be made to these duties. The section concludes: "In the matter of fixing bail and ordering the release of prisoners the warrant and bond deputy shall be subject to the judges of the municipal court and the judges of any court in the city and county empowered by law to act as magistrates."

In addition to signing the appointment applications, Brown, as appointing officer, certified that the persons to be appointed were citizens and residents as required by section 7 of the charter. It is admitted that Mullins possessed these qualifications, but it is contended, and the trial court found, that Garety did not possess the residence requirement in that he had not been a resident of San Francisco for one year immediately prior to his appointment.

The facts in reference to Garety's residence are not in serious dispute. He was born in San Francisco and resided here, except for a few months, until he entered the army during the last war. His father was a city employee, and had so worked for many years. Garety was discharged from the army in 1946. He was then married and had one child. He was unable to find, within his means, a place to rent in San Francisco. His parents, who live in San Francisco, purchased a crib for the baby and a bed for Garety and his wife, and the young Garetys moved in with the elder Garetys. The parents of the wife of young Garety live in Oakland, and they too offered the young couple and their child emergency accommodations. Young Garety was attending a night law school in San Francisco, and got a day job in Oakland as a playground director.

Garety testified that during the one-year period prior to March 1, 1949, he and his family used both the San Francisco home of his parents and the Oakland home of his wife's parents as their residence, and that they spent about half of their time in each place. Week ends, starting Friday nights, holidays, and a few weeknights were spent in San Francisco, while the balance of the time was spent in Oakland.

Garety secured a job as a playground director in Oakland, and registered to vote and did vote in Alameda County. In January of 1949, after passing the bar examination, he found a place to live in San Francisco, rented it, moved here with his family, changed his voting registration to San Francisco, and has lived here ever since. When he was interviewed by Brown in February, 1949, he was in fact and in law a resident of San Francisco. Brown asked Garety where he lived, and was told San Francisco. Brown also made inquiry of the two persons who had recommended Garety for the appointment and was told that Garety had lived in San Francisco all of his life, and that Garety's father was an employee of the city.

Pertinent Charter Provisions, Ordinances, etc.

In addition to the portions of the charter already set forth, there are other provisions that should be mentioned. Section 25 through section 34 deals with the "Powers and Duties of Elective Officers." Each office is treated separately. Section 25 deals with the mayor; section 26 with the city attorney; section 27, already quoted, with taxpayer's suits; section 28 with the assessor; section 29 with the district attorney; section 30, quoted above, with the warrant and bond office; section 31 with the treasurer; section 32 with the sheriff; section 33 with the public defender; and section 34, above quoted, with assistants and employees in elective offices.

There is no doubt that the charter makes a distinction between the district attorney's office as such, and the warrant and bond office. Section 29 fixes the salary and qualifications of the district attorney and then provides "He shall appoint, and at his pleasure may remove, all assistants and employees in his office." That means assistants and employees in the district attorney's office appointed under section 29. Section 29 also provides: "The district attorney, either in person or by his assistants, shall prosecute all criminal cases in the municipal and superior courts, draw all complaints, and issue warrants for the arrest of persons charged with crime who are to be prosecuted in such courts."

Section 30, a portion of which has already been quoted, refers to the warrant and bond office. After providing that there shall be such an office presided over by a deputy appointed by the district attorney, and that such deputy must be admitted to practice law (but for no time period) the section continues:

> "The warrant and bond deputy shall keep his office open continuously night

and day for the transaction of business; he shall draw and approve with his signature all complaints and warrants in criminal actions to be prosecuted in the municipal courts and any inferior court established by law in this city and county and possessing criminal jurisdiction; he shall have custody of all bail bonds and appeal bonds taken in such courts.

> "The warrant and bond deputy may issue bail bonds and appeal bonds and order the discharge from custody of the persons for whom such bonds are approved by a magistrate. He may fix cash bail in misdemeanor cases where arrests are made without warrants and may take cash bail in all cases arising in the municipal court * * * and may order the discharge from custody of the persons for whom cash bail is deposited with him."

The section then provides that in fixing bail and releasing prisoners the deputy is subject to the control of the judges.

Reference should also be made to section 141. It confers certain powers on the civil service commission as to non-civil service employees subject to salary standardization. It reads, in part, as follows:

> "The civil service commission shall be the employment and personnel department of the city and county and shall determine appointments on the basis of merit and fitness, as shown by appropriate tests. * * * The commission shall likewise classify all other positions or other places of employments in the city and county service specifically exempted from the civil service provisions of this charter, but which, by the provisions of section 151, thereof, are made subject to classification for salary standardization purposes on the basis of duties and responsibilities of the employment, and training and experience required. The civil service commission shall be the judge of such classification.
>
> "The commission shall also, in accordance with duties and responsibilities, allocate, and from time may re-allocate, the positions to the various classes of the classification. The allocation or re-allocation of a position shall not adversely affect the civil service rights of an occupant regularly holding such position. No person shall hold a position outside of the classification to which he has been appointed, provided that every employee of any department or office shall discharge any of the duties pertaining to such department or office to which his chief may temporarily assign him.
>
> "The class titles and class numbers assigned to positions by the commission shall be used in all records, reports, statements and communications, including the compensation schedule, annual budget and salary ordinance, payrolls, and appropriation ordinances.
>
> "The commission shall adopt rules to carry out the civil service provisions of this charter * * *."

Section 151, St. 1943, p. 3128, requires the board of supervisors, by ordinance, to fix salaries for all officers and employees of the city, after first receiving from the civil service commission a schedule of compensations for all positions covered by the section.

The salary standardization ordinance and the classification of duties of positions prepared by the civil service commission has no specific reference to a warrant and bond clerk. Prior to 1942 there was a classification of "B154 Criminal Law Clerk" which, among other things, included the duties of a clerk in the warrant and bond office. In 1942 the then district attorney requested the civil service commission to reallocate the position so as to describe more accurately the duties. The commission's minutes for May 20, 1942, indicate that the request was made because the duties of the bond and warrant clerks required legal background, and were not clerical in nature. Under these circumstances, the commission amended the classification of "B154 Criminal Law Clerk" by deleting therefrom the reference to the district attorney's office. At the same time, it also created a new classification of "K52 Junior Attorney, Criminal," and fixed the duties of that office. This classification was amended in 1943 to become effective July 1, 1944, and was in effect in March of 1949 when Garety and Mullins were appointed, and at the time of trial in February, 1950. This classification and duty statement reads as follows: "K52 Junior Attorney, Criminal—Under general supervision: hears and determines complaints in the warrant and bond office of the district attorney's office; issues citations; prepares complaints and warrants for issuance by magistrates; advises police officers, municipal and state inspectors and investigators as to proper criminal charges; subject to judicial approval, fixes bail in misdemeanor cases where arrest is without warrant; accepts bail and issues receipt therefor; acts as relief attorney in prosecuting matters before the municipal court; and performs related duties as required."

The deputy in charge of the warrant and bond office is classified as "K58 Principal Attorney, Criminal."

Were Garety and Mullins Appointed as Warrant and Bond Clerks or as Assistant Attorneys?

This is the pivotal question in the case. The trial court has found that they were appointed as assistant attorneys within the meaning of section 34 of the charter, and that their appointments were illegal inasmuch as they had not been admitted to practice for two years. We are of the opinion that the trial court decided this question of law incorrectly. It is our view that both men were lawfully employed as warrant and bond clerks under section 30 of the charter.

[2] As already pointed out, the warrant and bond office, under section 30, is separate and distinct from the district attorney's office, and is so treated in the charter. Section 30 creates the office, and then provides that a deputy appointed by the district attorney shall have "charge" of the office. The duties of the office are set forth, and it is then provided that the deputy shall keep "his" office open day and night, and it further provided what he shall do in the operation of the office—not what shall be done in the name of the district attorney. The section closes with the provision that as to certain of his functions the deputy shall be subject to the control of the judges. The section clearly provides that the deputy in charge acts for himself as such deputy as to most of his duties, not as the representative of the district attorney. This is of some significance. See discussion 21 Cal.Jur. p. 1007, § 168.

Brown was required to appoint the deputy in charge of the warrant and bond office, and also "such additional assistants and clerks as may be provided by the budget and appropriation ordinances." So far as the deputy in charge is concerned, section 30 of the charter requires that he be admitted to the bar, but not that he have two years' experience. The provision of section 34 requiring assistant attorneys in the district attorney's office to have two years' experience has no application to the deputy in charge of the warrant and bond office. It is equally clear that, so far as any charter requirement is concerned, "assistants and clerks" do not have to be attorneys at all, and certainly do not have to have two years' experience. Section 34 has no application to such assistants and clerks. If it did, then the logically ridiculous situation would be presented where the assistants and clerks have to have higher qualifications than the deputy in charge. This difference in treatment by the charter between assistant attorneys in the district attorney's office and clerks in the bond and warrant office is based on important differences of function. Assistants in the district attorney's office are primarily trial attorneys and need experience if the people are to be properly represented. But the assistants and clerks in the warrant and bond office perform primarily clerical and administrative work.

Brown was required to appoint necessary assistants and clerks in the warrant and bond office. In making such appointments he was required, by the charter, to respect and to follow the civil service commission's classifications. The only classification that embraces the duties of the warrant and bond clerk is "K52 Junior Attorney, Criminal." This title indicates that the appointee is an attorney—but, as already pointed out, that is not a requirement of the charter. Under the old classification of "B154 Criminal Law Clerk" under which clerks were formerly appointed in the warrant and bond office, it is perfectly clear that such clerks did not have to be attorneys. But the minutes of the civil service commission disclose that in 1942 the then district attorney had decided to appoint only attorneys to these jobs because the clerks were required to perform legal duties. Thus, when the commission, at the then district attorney's request changed the classification to "K52 Junior Attorney, Criminal" it obviously intended to thus designate the position of clerk in the bond and warrant office, and by the title gave practical recognition to the fact that the appointing power—the district attorney—had determined that such clerks should be lawyers. But this was merely a determination by the district attorney without charter compulsion. The charter does not require that such clerks be lawyers at all. By deciding to appoint a lawyer to such a position certainly the district attorney was not attempting to change the position from that of clerk in the warrant and bond office to assistant attorney in his office. The district attorney not only does not possess the power to thus change the charter, but Brown definitely stated in making the appointment that he had no such intent. He ascertained from Henderson that the K52 classification was intended by the commission to describe the duties of the clerks in the warrant and bond office. Then, in making the appointments, he described the jobs as "K52 Junior Attorney, Criminal (Bond and Warrant Clerk.)"

[3] The respondent argues that after the appointments were made Garety and Mullins performed some legal duties, and even appeared occasionally in traffic court as representatives of the district attorney. There is no doubt that on occasion these two men performed some of the functions normally performed by an assistant attorney in the district attorney's office, but these were not regular assignments but were done in emergencies and to gain experience. Such temporary assignments were probably valid under section 141 of the charter permitting temporary assignments. But whether these temporary assignments were valid or not need not be here decided. Obviously, the validity of the appointments must be determined as of the date they were made, regardless of what the appointees may have done later. These appointments being valid when made would not be adversely affected by the fact that the appointees performed some duties that they were not qualified to perform. In our opinion, the two years' service requirement was not applicable to either Mullins or Garety.

Residence of Garety and its Effect on the Liability of Brown.

[4] The determination that these two men were appointed legally as warrant and bond clerks disposes of the case so far as Mullins is concerned, but it does not dispose of the case involving Garety. As to him, the trial court found that his appointment was illegal for the additional reason that he did not possess the residence requirements demanded by section 7 of the charter. In our opinion, that finding is supported by the evidence.

Section 7 requires that all city employees shall have been city residents "for at least one year prior to the appointment," and then defines what is meant by residence. Brown does not argue that the evidence shows residence for the one year immediately prior to the appointment, but argues that the charter simply requires residence for any one year at any time prior to the appointment. In this connection Brown refers to other portions of section 7 that contain more precise language. Thus, it is required that candidates for elective office must have been electors of the city "for at least one year immediately prior to the time of his taking office". The section also requires that members of the police and fire departments must have been residents "for at least five years next preceding appointment". It is argued that by being so precise as to these city officers and employees, the framers of the charter intended a different rule to apply when they simply used the word "prior," and intended it to mean any time prior.

[5] The argument is unsound. The plain meaning of the portions of section 7 here involved is that the one year's residence must immediately precede the appointment. Garety did not possess this qualification, so that he was not qualified for the position when appointed. His appointment was therefore illegal.

[6] This determination, however, is not decisive of the case as against Brown. This is not a suit against the unlawfully employed Garety to compel him to repay the sums illegally paid to him, but against Brown as the appointing power. There is no pleading or finding that Brown, in appointing Garety, acted in bad faith, or even negligently. There is no evidence that would have supported such findings had they been made. The record shows that Brown did not know of Garety's residence in Oakland. He was told by Garety that he was a resident of San Francisco, which was then the fact. Inquiry developed the fact that Garety had been born in San Francisco, and that his father was a city employee residing in San Francisco. It was natural to assume that the residence of Garety in the city had not been broken. The only finding that could have been made on this issue would have been that Brown made the appointment in the good faith belief that Garety possessed the requisite residence requirements. No serious contention is made to the contrary.

[7, 8] Is the district attorney who illegally but in good faith hires a warrant and bond clerk personally liable for all salary paid such clerk? At common law there would be no liability. It is well established at common law that where a public officer is empowered to and does exercise judgment, but acts mistakenly or erroneously, he is not liable when he acts in good faith within the general scope of his authority, without malice, corruption or sinister motives. Holman v. County of Santa Cruz, 91 Cal.App.2d 502, 205 P.2d 767; People v. Standard Accident Ins. Co., 42 Cal.App.2d 409, 108 P.2d 923; Jones v. Richardson, 9 Cal.App.2d 657, 50 P.2d 810; see cases collected 21 Cal.Jur. p. 911, § 90; 43 Am.Jur. p. 86, § 274; 2 Shearman and Redfield on Negligence, p. 799, § 325.

In the instant case, however, we are not controlled by the common law, but by section 86 of the charter. It provides: "Every officer who shall approve, allow or pay any demand on the treasury not authorized by law, * * * shall be liable to the city and county individually and on his official bond for the amount of the demand so illegally approved, allowed or paid." Good or bad faith is not mentioned, nor is any distinction made between ministerial or discretionary duties.

[9] If section 86 intended to impose personal liability on public officials where they authorize or make such payments regardless of their good or bad faith, then the section is unconstitutional insofar as it attempts to impose such liability on the district attorney.

[10] The district attorney is a county officer. Section 24000(a) of the Government Code so provides. For some purposes he is a state officer. Singh v. Superior Court, 44 Cal.App. 64, 185 P. 985. Even though San Francisco is a consolidated city and county, the district attorney remains a county official. Kahn v. Sutro, 114 Cal. 316, 46 P. 87, 33 L.R.A. 620, Dineen v. City and County of San Francisco, 38 Cal.App.2d 486, 101 P.2d 736.

[11] It is elementary law that a charter provision relating to county officials is valid only if authorized by the state Constitution. In this respect, the authority as to consolidated cities and counties must be found if it exists in Article XI of the Constitution, and particularly in section 8½. There are many cases holding that San Francisco cannot regulate county officers unless authority is found in section 8½. Thus, in Nicholl v. Koster, 157 Cal. 416, 108 P.2d 302, San Francisco attempted to fix the compensation of assistant county probation officers. At that time section 8½ conferred no such authority. It was held that the city did not possess this authority. Subsequently section 8½ was amended to confer such authority.

Similarly, in Crowley v. Freud, 132 Cal. 440, 64 P. 696, San Francisco attempted to fix the qualifications of deputies in certain county offices. At that time section 8½ did not expressly confer that power. It was held that San Francisco possessed no such power. This, too, resulted in an express amendment to section 8½ conferring the power to fix such qualifications.

In Kahn v. Sutro, 114 Cal. 316, 46 P. 87, 33 L.R.A. 620, San Francisco attempted to regulate the election of its district attorney and some other county officers contrary to the general state law. Since no such power was then contained in the Constitution, it was held that San Francisco had no such power. A subsequent amendment now confers that power.

Section 8½ of Article XI in no way authorizes a consolidated city and county to fix the *liability* of its county officers. The pertinent provision is subdivision 4 of section 8½. So far as here pertinent, it provides: "It shall be competent in any charter framed in accordance with the provisions of this section, or Section 8 of this article, for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employees whose compensation is paid by such city or city and county, excepting judges of the superior court, shall be elected or appointed, and for their recall and removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

[12] There is nothing in this section or in any other provision of the Constitution authorizing a consolidated city and county to prescribe the liabilities of county officers in general and of the district attorney in particular.

[13, 14] If the approval of section 86 of the charter by the Legislature be looked upon as making the section a general law of the state, such would be special legislation and violative of Article IV, section 25, subsection 33, of the Constitution. It is well settled that the Legislature cannot, by statute, create or impose rights or liabilities on the officers or employees of one county not imposed on the officers and employees of all counties. Welsh v. Bramlet, 98 Cal. 219, 33 P. 66; Payne v. Murphy, 18 Cal.App. 446, 123 P. 350; Pratt v. Browne, 135 Cal. 649, 67 P. 1082; City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604; Chitwood v. Hicks, 219 Cal. 175, 25 P.2d 406; Hollman v. Warren, 32 Cal.2d 351, 196 P.2d 562.

[15] Thus it is quite clear that section 86 is invalid insofar as it attempts (if it does attempt) to impose absolute liability on the district attorney for erroneous discretionary acts performed in good faith within the scope of his authority, without malice, corruption or sinister motives. As already pointed out, there is no such liability at common law, and there is no general statute imposing such liability. The general law authorizes boards of supervisors to supervise the conduct of all county officers and to direct prosecutions for delinquencies. Gov.Code, § 25303. The district attorney is authorized to bring suit against persons unlawfully receiving money to recover the money paid, plus a penalty. Gov. Code, § 26525. This action lies against the person receiving the money, not the person allowing it. County of Santa Barbara v. Janssens, 177 Cal. 114, 169 P. 1025, L.R.A.1918C, 558; Merriam v. Board of Supervisors of Yuba Co., 72 Cal. 517, 14 P. 137. There may be other sections dealing with the same subject matter, but we have found no general law, and have been referred to none, imposing liability on a county officer who in good faith erroneously allows a claim where money is available to pay it.

[16] Galli argues that Brown has waived this constitutional point because he did not raise it in the trial court. The point is without merit. The complaint here involved does not charge bad faith on the part of Brown, and without such an

allegation the complaint is fatally defective —a point that can be raised at any time.

[17] Galli also contends that by virtue of sections, 6, 7, 8 and 8½ of Article XI of the Constitution, San Francisco has been granted home rule and has complete control of its municipal affairs. That is undoubtedly true, but, as already pointed out, the regulation of the liability of the district attorney is not a municipal affair. While section 86 of the charter may be paramount to state law as to municipal affairs, it is not paramount as to matters of state concern. Brown, in appointing Garety, was acting as a county officer, and the verification of the payrolls was the performance of an act as a county officer. There is nothing in Rand v. Collins, 214 Cal. 168, 4 P.2d 529, so strongly relied upon by Galli, to the contrary. The Supreme Court in that case simply held that the Constitution, §§ 7½ and 8½ of Article XI, authorized San Francisco to provide by charter that certain offices should be appointive—it did not decide that without such authority San Francisco would possess such power.

Liability of the Controller and Treasurer.

The determination that Garety and Mullins were properly appointed under section 30 of the charter necessarily determines, so far as Mullins is concerned, that the payments made to him were lawful. The payments to Garety, because of his lack of residence, were not lawful. Nevertheless, the trial court found that while the approval by Brown of these salary payments was illegal, the "allowance" of such claims by the controller and their "payment" by the treasurer were authorized by law and not such as to impose liability on the controller and treasurer. Thus, the trial court found that, although the payments were illegal, the controller and treasurer were not liable therefor. Galli appeals.

[18] The determination of this question by the trial court was undoubtedly correct. Liability is sought to be imposed under section 86 of the charter, above quoted. It is Galli's theory that Brown "approved," the controller "allowed" and the treasurer "paid" the salary demands and all are therefore liable. This theory is not sound. The charter does not purport to make the controller and treasurer guarantors of the validity of the appointment of every employee. It simply requires them to warrant that the steps required by the charter have been followed. So far as the controller and treasurer are concerned, these salary claims were paid in precise conformity with the charter.

Section 150 of the charter provides:

> "All personal services shall be paid by warrants on the basis of a claim, bill, timeroll or payroll approved by the head of the department or office employing such service. The * * * payrolls * * * for each department or office * * * shall be transmitted to the civil service commission before presentation to the controller.
>
> "The secretary of the commission shall examine and approve such payroll for all persons legally appointed to or employed in positions legally established under this charter. The payrolls thus approved, with notation of any item thereof disapproved, shall be then certified by the secretary of the commission and transmitted by him to the controller. The controller shall not approve and the treasurer shall not pay any claim for personal services, * * * unless the same shall have been approved by the said secretary."

The secretary of the civil service commission is not a party to these proceedings.

Section 73 of the charter requires the enumeration of all positions in the city and county employ in an annual appropriation ordinance and then provides: "The said ordinance shall constitute the legal basis for check by the civil service commission or the controller as to the legality of the creation of any position in the city and county service and the rate of compensation fixed therefor."

These sections must be read with section 86. So read, it is too apparent to require extended discussion that the controller and treasurer are not required to hold hearings and pass upon the legality of each appointment, but are simply required to see to it that payments are not made unless they comply with the procedure set up in the charter. The duty is placed on the head of the department to approve the payroll. He certifies by such approval to the legality of the appointment. The secretary of the commission then certifies that the person is legally appointed to a legally established position. The controller is not required to go beyond these certifications. He must check the annual salary ordinance to see if the position described is included, and must ascertain whether the rates of pay are as there set forth, but, having done that, he is authorized to issue and the treasurer to pay the warrant.

In the instant cases all payrolls were approved by the duly authorized agent of Brown, and were certified by the secretary of the civil service commission. The controller admittedly checked each payroll against the salary ordinance and ascertained that such position was set forth in the ordinance, and that the rates of pay were within the limits there described. Warrants were issued and paid. The controller and treasurer did everything required of them by the charter. So far as they are concerned, every payment was in precise conformity with the charter. They were legally entitled to rely upon the allowance by Brown and the certification by the secretary of the civil service commission. Under no theory are they liable.

The appeals by Brown from the orders denying his motions for new trials are dismissed; the portions of the judgments involved on the appeals by Brown are reversed; the portions of the judgments involved on the appeals by Galli are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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39 Cal.2d 48

LAZZAREVICH v. LAZZAREVICH et al.

L. A. 21990.

Supreme Court of California, in Bank.

May 20, 1952.

Action to set aside conveyance of a one-half interest in realty or, as an alternative, to have the property partitioned. The Superior Court, Los Angeles County, Thurmond Clarke, J., denied relief and plaintiff appealed. The Supreme Court, Gibson, C. J., held that the evidence sustained finding that plaintiff's cause of action to set aside the assignment on the ground of mistake was barred by the statute of limitations, but that the existence of an unpaid judgment held by a defendant against plaintiff did not bar plaintiff's action for partition of the property.

Judgment affirmed as to first cause of action and reversed as to second cause of action.

Schauer, J., dissented in part.

Prior opinion, Cal.App., 238 P.2d 614.

1. Limitation of Actions ⇨197(2)

Evidence was sufficient to show that former husband acquired knowledge between 1933 and 1945 that decree divorcing him and former wife had become final prior to his execution of deed conveying undivided one-half interest in realty to former wife, barring former husband's action in 1949 to set aside the deed on ground of lack of consideration, within statute requiring that an action for relief on ground of mistake must be brought within three years after discovery by aggrieved party of facts constituting the mistake. Code Civ.Proc. § 338, subd. 4.

2. Attorney and Client ⇨104

Generally, a person is held to know what his attorney knows and should communicate to him. Civ.Code, § 2332.

3. Attorney and Client ⇨104

Former husband, who brought action to set aside a deed conveying an undivided one-half interest in realty to former wife on ground that assignment was made under mistaken belief that parties were legally married, was charged with knowledge of his attorney who procured entry of divorce decree in 1933, as respects running of statute providing that an action for relief on ground of mistake shall be brought within three years after discovery by aggrieved party of facts constituting the mistake. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 2332.

4. Partition ⇨26

Fact that joint tenant owed judgment debt to other joint tenant did not bar judgment debtor from maintaining action for partition of property held in joint tenancy.

5. Partition ⇨14

In absence of a waiver, a joint tenant is entitled as a matter of right to have his interest severed from that of his cotenant.

◆

Eugene L. Wolver, Los Angeles, for appellant.

Henshey & Beeman and Howard B. Henshey, all of Hollywood, for respondents.

GIBSON, Chief Justice.

John Lazzarevich brought this action against Catherine Lazzarevich, his former wife, to set aside an assignment of a joint tenancy interest in real property. In a second count, as an alternative, he sought to have the property partitioned. Judgment was given against him on both counts, and he has appealed.

John was given an interlocutory decree of divorce from Catherine in 1932, and in

1933 his attorney obtained entry of a final decree. The parties became reconciled in 1935, and they cohabited without remarriage until 1945. In 1938, while the parties were living together, John entered into a contract with the Veterans Welfare Board to purchase the real property here involved, and in 1941 he assigned the contract to himself and Catherine as joint tenants. In August of 1945 Catherine discovered that a final decree of divorce had been entered in 1933. She notified John of that fact and then brought an action to recover the value of services rendered and advances made during the putative marriage. The trial court gave her judgment for $2,350 which, on appeal in 1948, was increased to $10,277.50. Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 200 P.2d 49. A few months later, in 1949, John commenced the present action.

[1–3] John's first cause of action is based on his claim that he made the assignment under the mistaken belief that the parties were legally married and that he would not have made it if he had known that they were not lawfully married. He complains that the trial court erred in determining that his first cause of action was barred by section 338, subdivision 4, of the Code of Civil Procedure, which provides that an action for relief on the ground of mistake shall be brought within three years after discovery, by the aggrieved party, of the facts constituting the mistake. The trial court in effect found and concluded that John had knowledge of the entry of the final decree in 1933, that he knew that he was not lawfully married to Catherine when they became reconciled in 1935, and that Catherine learned in 1945 that the decree had been entered in 1933 and immediately notified John of that fact. These findings are sufficiently supported by the evidence. Ordinarily a person is held to know what his attorney knows and should communicate to him, and John is chargeable with the knowledge of his attorney who procured entry of the final decree. See Civ.Code, § 2332; Rauer v. Hertweck, 175 Cal. 278, 281, 165 P. 946. In addition, there was testimony that Catherine informed John in 1945 that the decree had been previously entered, and that John stated that he knew, prior to the reconciliation in 1935, that they were not married. Also, John testified that he knew in August, 1945, that the final decree had been previously entered. Accordingly, it was proper to deny recovery on the first cause of action.

[4, 5] As to the second cause of action, the trial court concluded that John should be barred from obtaining partition of the property because he had not paid the money judgment which Catherine held against him. This conclusion is erroneous. It is well settled that in the absence of a waiver a joint tenant is entitled as a matter of right to have his interest severed from that of his cotenant. Bacon v. Wahrhaftig, 97 Cal.App.2d 599, 603, 218 P.2d 144; Rowland v. Clark, 91 Cal.App.2d 880, 882, 206 P.2d 59; Miranda v. Miranda, 81 Cal.App.2d 61, 65, 183 P.2d 61; De Roulet v. Mitchel, 70 Cal.App.2d 120, 123–124, 160 P.2d 574; Priddel v. Shankie, 69 Cal.App.2d 319, 324–325, 159 P.2d 438; see also Roberts v. Jones, 307 Mass. 504, 30 N.E.2d 392, 132 A.L.R. 663, 666; Freeman on Cotenancy and Partition, (2d ed.) § 442; 4 Thompson on Real Property, (Perm.ed.) §§ 1981, 1982; Tiffany on Real Property, (3rd ed.) § 474. Catherine relies on Ventre v. Tiscornia, 23 Cal.App. 598, 604–605, 138 P. 954, in support of her contention that her unsatisfied money judgment against John can be used as a bar to partition, but that case cannot aid her here. It merely holds that a partition proceeding is equitable in nature, and that where one cotenant has, in good faith, expended money in making permanent improvements necessary to the preservation of the common property, partition should not be decreed without making a suitable allowance for such expenditures. The case does not hold that the fact that the expenditures were made constituted a bar to the action.

It is not clear whether Catherine's judgment is a lien on John's interest in the property, but in any event the existence of the unpaid judgment cannot prevent partition. See Struzinski v. Struzinsky, 1947, 133 Conn. 424, 52 A.2d 2, 5, 171 A.L.R. 929. If the judgment is not a lien on John's interest, it is no different from any other extraneous claim. On the other hand, if it is a lien, Catherine's interest may be protected in settling and determining the rights of the parties in the property. See Code Civ.Proc. §§ 759, 769, 771–774.

The judgment is affirmed as to the first cause of action and reversed as to the second cause of action.

SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I would reverse as to both causes of action.

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39 Cal.2d 52

PANZICH et ux. v. GAYLORD.

L. A. 22111.

Supreme Court of California, in Bank.
May 20, 1952.

Action by John Panzich and another against Henry C. Gaylord for damages for alleged fraud in connection with sale by defendant to plaintiff of house and lot, together with garage which had been remodeled for use as a small dwelling. The Superior Court, Los Angeles County, Elmer D. Doyle, J., found for defendant, and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that evidence sustained findings that defendant had not misrepresented or concealed any fact, that plaintiff did not rely upon any representations made by defendant, and that plaintiffs had made their own investigation after having been advised that they should check to see whether they could rent remodeled garage to third persons as dwelling unit.

Judgment affirmed.

Prior opinion 234 P.2d 47.

1. Fraud 🔑58(2)

In action to recover damages for alleged fraud in connection with sale by defendants to plaintiffs of house and lot together with garage which had been remodeled for use as small dwelling, evidence sustained finding that defendant had not falsely represented that remodeled garage could be rented for residential purposes, but established that inference, from statement that garage was being rented, that it might continue to be rented, was qualified by warnings to plaintiff concerning right to rent same.

2. Fraud 🔑58(2)

In action to recover damages for alleged fraud in connection with sale by defendants to plaintiffs of house and lot, together with garage which had been remodeled for uses as small dwelling, evidence was not such as to require finding that defendants had concealed that no permit had been obtained for erection of screen porch when remodeling garage.

3. Fraud 🔑58(4)

In action to recover damages for alleged fraud in connection with sale by defendants to plaintiffs of house and lot, together with garage which had been remodeled for use as a small dwelling, evidence sustained finding that plaintiffs had not been induced to purchase property in reliance on any misrepresentations allegedly made by defendants, or because of alleged concealments, but that purchase had been result of plaintiff's own investigation and determination that they had right to rent small house to third party as dwelling.

Sinclair & Baker and J. M. Sinclair, Los Angeles, for appellants.

Fleming, Robbins & Tinsman, Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiffs brought this action to recover damages for defendant's alleged fraud in connection with the sale to them of a house and lot together with a garage which had been remodeled for use as a small dwelling. It was alleged that defendant falsely represented to plaintiffs that the small house could be rented for residential purposes, that he concealed the fact that no building permit had been obtained for its construction, that plaintiffs purchased the property in reliance on defendant's representations, and that they were damaged as a result of the "fraudulent representations and concealments." The trial court, sitting without a jury, found for defendant, and the sole question to be determined on this appeal is whether the evidence supports the judgment.

In 1947, defendant obtained building permits to construct a house and garage, and both buildings were approved by the city inspector of Arcadia, where the property is located. At the time it was built the garage was wired for electricity and contained a bathroom, and later, in order to provide a dwelling for his sister and brother-in-law who could find no other place to live, defendant made certain alterations in the building. A partition was erected which divided it into two rooms in addition to the bathroom, one of the doors was sealed shut, and a screen porch was added. A sink was also installed, but the record is not clear whether this was done when the garage was built or when the alterations were made. No permit was obtained for the erection of the screen porch, and the record is silent as to whether one was secured for the other alterations.

Defendant listed the property for sale with a real estate agent who took plaintiffs to see the premises on October 21, 1948. The small house was then being occupied by defendant's sister and brother-in-law who were renting it for $35 a month. The agent told plaintiffs that the small house was rented and was producing an income of $35 a month. Plaintiffs orally agreed to buy the property on October 21, an escrow was opened on October 25, and the transaction was completed on November 16.

Defendant's mother, Mrs. Gaylord, had conversations about the property with Mr. Panzich on two occasions. During the course of the first conversation, which occurred on the premises, she talked to Mr. Panzich about the relatives who lived in the small house and asked him "if it would be permissible for them to stay there until such time as they could locate a house they could afford," and she testified that "we told Mr. Panzich at the time the arrangements for Henry [defendant] to live in the garage when it was being built was —he was given permission to live there while the house was being built." Defendant testified that his mother told Mr. Panzich in his presence "that he had better check the legality of renting that garage to anyone except one of his own family," and that Panzich had replied, "The ordinance has been changed. It is all right." The date of the conversation was not fixed with certainty, but there was evidence that Mr. Panzich was on the premises and discussed renting the small house with Mrs. Gaylord and other members of defendant's family on Sunday, October 24, and the trial court could infer from the evidence that all of the conversation detailed above took place on that day.

Mrs. Gaylord had the second conversation with Mr. Panzich about one week later. Defendant's sister and brother-in-law had vacated the small house, and Mr. Panzich told Mrs. Gaylord that he had another couple who wanted to rent the place. Mrs. Gaylord said, "You can't do that, Mr. Panzich. You know you can't. We told you that when you were here a week ago that you could not do that * * * The only reason that Henry [defendant] could rent that place was because it was his sister and it was just a war emergency. None of us really had the right to rent the place, particularly, but it was just because the kids did not have any place to live and he rented it to them * * *." Panzich replied, "Oh yes we can. The ordinance has been changed."

The only evidence in the record with regard to what plaintiffs knew about defendant's failure to obtain a permit for the erection of the screen porch was plaintiffs' testimony that they did not "suspect" or "find out" that alterations had been made without a permit until January, 1949, when a city inspector told them that they could not rent the small house. The inspector testified that he informed plaintiffs at that time that renting the building as a residence would be a violation of "the zoning code" and the Health and Safety Code. The witness did not specify in what respect renting the place would violate the Health and Safety Code, and there was no evidence before the trial court which would require a finding that the premises were unsafe or unfit for human habitation. There was evidence that the city inspector erred in stating that renting the small house as a residence would violate zoning restrictions. Relying upon the information obtained from the inspector, plaintiffs applied to the city planning commission for permission to rent the small house and requested that it approve the allowance of an exception from restrictions established by the zoning ordinance. After making an investigation, the commission reported on March 17, 1949, "that there is no violation of zoning * * *." Thereafter, on March 31, 1949, plaintiffs filed this action.

The trial court found that the defendant did not misrepresent or conceal any fact, that plaintiffs did not rely upon any representations made by defendant, and that they made their own investigation after having been advised that they should check to see whether they could rent the building to third persons as a dwelling unit. These findings are supported by the evidence.

The statement by the agent that the small house was rented for $35 was true. Any implication that the place would continue to produce an income was qualified by the warnings given plaintiffs on two separate occasions that there was some question about the right to rent the place as a dwelling and that they should "check" to see whether it could be rented to anyone other than a member of their family. There was evidence from which the court could find that the first of these warnings was given before the escrow was opened. Further, even if we assume that defendant was under a duty to disclose that no permit had been obtained for the erection of the screen porch, and that this was a material fact, we cannot say as a matter of law that the trial court was compelled to find that defendant concealed it. Plaintiffs' allegation of concealment was denied by defendant in his answer, and the trial court was not bound to accept plaintiffs' testimony that they did not learn until after the sale was completed that a permit had not been secured. Finally, there was ample evidence that plaintiffs were not induced to purchase the property in reliance on any of the alleged representations made by defendant or because of the alleged concealments. They made their own investigation and satisfied themselves that they had a right to rent the small house as a dwelling.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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111 Cal.App.2d 231

LOHR v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY.

Civ. 18904.

District Court of Appeal, Second District, Division 3, California.
May 20, 1952.

Proceeding in mandamus by E. B. Lohr to compel the Superior Court, Los Angeles County, to discharge a writ of attachment. The District Court of Appeal, Parker Wood, J., held that mandamus was not the proper remedy to secure the dissolution of a writ of attachment after motion to discharge the attachment had been denied.

Alternative writ of mandate discharged, petition for peremptory writ of mandate denied.

1. Mandamus 🔑168(2)

Burden is on petitioner for a writ of mandate to show that he does not have a plain, speedy or adequate remedy by appeal. Code Civ.Proc. § 963, subd. 2.

2. Mandamus 🔑154(2)

Allegation by petitioner for a writ of mandate that he has no plain, speedy or adequate remedy by appeal, without reference to any facts, was insufficient to sustain petitioner's burden of showing that remedy of appeal was inadequate. Code Civ.Proc. § 963, subd. 2.

3. Mandamus ⚷4(1)

Showing that an appeal would take time and cost money was insufficient to justify issuance of writ of mandate. Code Civ.Proc. § 963, subd. 2.

4. Mandamus ⚷4(3)

Where motion to discharge attachment had been denied after hearing upon the motion, the aggrieved party had a plain, speedy and adequate remedy by appeal and no uncertainty existed as to the appealability of order refusing to dissolve the attachment, mandamus was not the proper remedy. Code Civ.Proc. § 963, subd. 2.

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Reynolds, Painter & Cherniss, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Guthrie, Darling & Shattuck, Los Angeles, for real party in interest.

PARKER WOOD, Justice.

Petition for writ of mandate directing the superior court to discharge a writ of attachment. That court denied defendant's motion to discharge the writ of attachment.

On October 11, 1951, Clyde Victor Voss filed an action in the superior court against E. B. Lohr, Lohr, Inc., a corporation, and Angelo Mion. In the first cause of action therein, it was alleged as follows: About February 1, 1950, plaintiff and defendants E. B. Lohr and Mion entered into an oral agreement which provided: that plaintiff and defendant Mion agreed to transfer their business, known as Benson Tile, to a corporation to be known as Lohr, Inc., in consideration of the transfer by defendant E. B. Lohr of his business, known as E. B. Lohr Marble & Tile, to the corporation; the three said persons would give their exclusive time to the affairs of Lohr, Inc.; upon receiving a permit from the corporation commissioner, each of the three persons would purchase an equal number of shares in the corporation; pending the organization of the corporation and securing a permit for issuance of shares, the said three persons would transfer to the corporation the assets of their businesses and would advance to the corporation funds as required upon a share and share alike basis; defendant Lohr would act as president of the corporation and would have control of all contracts, income and expenditures of the business; plaintiff and Mion would work on jobs transferred to the corporation, and would be paid the regular pay scale for their work; each of said three persons would have an equal interest in the business, an equal voice in its management, and an equal share in its profits. Defendant Mion, who did not desire to be a party plaintiff, is named a defendant because he is a necessary party, but plaintiff seeks no judgment against him. Pursuant to said agreement plaintiff and Mion transferred their said assets to Lohr, Inc., and, upon request of E. B. Lohr, they paid the sum of $3,400 to the corporation, and they gave their full time to the affairs of the corporation. On February 7, 1950, pursuant to the agreement, the said three persons incorporated Lohr, Inc., under the laws of California. The board of directors of said corporation, which was elected at the only meeting of the incorporators, consisted of plaintiff, Mion, E. B. Lohr, and E. B. Lohr, Jr. On March 29, 1950, the corporation commissioner issued a permit for the sale of shares to said three persons and E. B. Lohr, Jr. Since the issuance of the permit defendant E. B. Lohr, as president and manager of the corporation, has refused to issue any of said shares to plaintiff or Mion or to himself (E. B. Lohr), and said defendant E. B. Lohr refuses to recognize the rights of plaintiff or Mion in or to any of the profits of the corporation or in or to any contracts entered into after February 1, 1950, and refuses to disclose to plaintiff whether such profits or contracts were made in the name of the corporation or defendant E. B. Lohr or otherwise. Plaintiff has requested defendant E. B. Lohr, as president of the corporation, to call a meeting of the directors for the purpose of securing a report as to the financial condition of the corporation, but said Lohr has declined to call such a meeting. Defendants E. B. Lohr and Lohr, Inc., have received funds belonging equally to plaintiff, Mion, and E. B. Lohr in the net amount of $25,500, one-third of which is due to plaintiff. Defendants E. B. Lohr and Lohr, Inc., have refused to pay any part of said $8,500 to plaintiff.

In the second cause of action therein, it was alleged that defendants E. B. Lohr and Lohr, Inc., became indebted to plaintiff on account of moneys received by said defendants belonging to plaintiff in the sum of $8,500, and that no part of said sum has been paid.

In the third cause of action therein, it was alleged that plaintiff repeats all the allegations of the first cause of action, except the allegation that defendants E. B. Lohr and Lohr Inc., had received funds belonging to said three persons in the sum of $25,500, one-third of which was due to plaintiff; that defendant E. B. Lohr has never rendered any statement of account to plaintiff; since February 1, 1950, defendant E. B. Lohr has collected, under his name and other names, sums of money the amounts of which plaintiff does not know and cannot ascertain, but plaintiff is entitled to receive one-third of said sums; said defendant E. B. Lohr has refused to render any accounting to plaintiff. Plaintiff prayed for judgment for $8,500 against defendants E. B. Lohr and Lohr, Inc., and that defendants E. B. Lohr and Lohr, Inc., be required to account to plaintiff for all funds received and expended in the name of Lohr, Inc., E. B. Lohr, or any other name used by E. B. Lohr in conducting business subsequent to February 1, 1950.

Upon the filing of said complaint and upon application of said plaintiff Voss, a writ of attachment was issued in said action. Three bank accounts, standing in the name of defendant E. B. Lohr (petitioner herein), were attached. The affidavit of plaintiff Voss, in support of his application for writ of attachment, stated that "defendants E. B. Lohr and Lohr, Inc. herein are indebted to me in the sum of $8,500.00 * * * upon an oral contract, for the direct payment of money, to-wit: For a joint venture the profits of which were to be divided equally between 3 parties, one of whom was the plaintiff * * *." Defendant E. B. Lohr filed a notice of motion to discharge the attachment, and in support of said motion he filed his affidavit in which he stated that he is not indebted to plaintiff Voss at all, and that Voss and defendant Mion are indebted to him in a sum in excess of $12,000. Thereafter, plaintiff Voss amended his affidavit for attachment so that as amended it stated that defendants E. B. Lohr and Lohr, Inc., are indebted to him the sum of $8,500 "upon an oral contract for the direct payment of money, to-wit: Contract for money due * * *." As above stated, the motion to discharge the attachment was denied.

[1-3] The order denying said motion was appealable. Code Civ.Proc., sec. 963, subd. 2. Petitioner herein has alleged that he has no plain, speedy or adequate remedy by appeal. "The burden, of course, is on the petitioner to show that he did not have such a remedy." Phelan v. Superior Court, 35 Cal.2d 363, 366, 217 P.2d 951, 953. A general allegation that petitioner has no plain, speedy or (and) adequate remedy, "without reference to any facts," is not sufficient to sustain the petitioner's "burden of showing that the remedy of appeal would be inadequate." See Phelan v. Superior Court, supra, 35 Cal.2d at page 370, 217 P.2d 951, 956. No fact with respect to the inadequacy of the remedy by appeal was recited in petitioner's affidavit. There was no showing by petitioner's affidavit or other part of the record that any particular fact or circumstance in the case rendered inadequate the remedy by appeal. In Phelan v. Superior Court, supra, it was said 35 Cal.2d at page 370, 217 P.2d at page 955, that the remedy by appeal "should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case." In his supplemental points and authorities, petitioner herein states in effect that the remedy of appeal is not as convenient or effective as mandamus because (1) the cost of preparation of the record on appeal and the cost of preparation of briefs are costs

which are not involved in the mandamus proceeding, and (2) the time required for an appeal is substantially longer than the time required in mandamus. In Mitchell v. Superior Court, 98 Cal.App.2d 304, at page 305, 219 P.2d 861, 862, which was a proceeding in mandamus and prohibition, it was said: "The most petitioner shows in this regard is that an appeal will take time and cost money. This is insufficient."

Petitioner asserts that mandamus is the proper remedy to secure the dissolution of a writ of attachment improperly issued where the trial court has improperly denied a motion for discharge, and he cites Weaver v. Superior Court, 93 Cal.App.2d 729, at page 732, 209 P.2d 830, 210 P.2d 246; wherein that statement is made. The opinion in that case does not refer to the question as to the adequacy of the remedy by appeal, but the case of McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019, is cited therein in support of said statement to the effect that mandamus is the proper remedy. In the McCall case the trial court had not ruled upon the matter of dissolving the attachment, but judgment upon the merits of the case had been rendered and an appeal from that judgment was pending when the mandamus proceeding was commenced in the District Court of Appeal. Since there was no order of the trial court in the McCall case (regarding the attachment) from which an appeal could be taken, and since the trial court had lost jurisdiction by reason of the appeal, it appears that under the special circumstances therein an application for dissolution of attachment would be made necessarily in the Appellate Court. The McCall case is authority for the rule that in proper cases mandamus is a remedy to secure the dissolution of an attachment. A proper case for such a remedy is one in which there is a sufficient showing that under special circumstances then existing the remedy by appeal is not adequate. " 'Mandamus may not be resorted to as a substitute for an adequate legal remedy by appeal or otherwise.' " Lincoln v. Superior Court, 22 Cal.2d 304, 311, 139 P.2d 13.17. In the present case, as above stated, the motion to discharge the attachment was denied after a hearing upon the motion.

[4] Petitioner also asserts that if the remedy by appeal precludes the issuance of a writ of mandate, the rule should not be applied against him. He argues that since it has been held in certain cases, including the Weaver and McCall cases, that mandamus is a proper remedy it would work an injustice against him to decide in this case that an appeal was an adequate remedy. He cites the cases of Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951, and Robinson v. Superior Court, 35 Cal.2d 379, 218 P.2d 10, wherein there are statements to the effect that in view of the uncertainty which has existed in the law with respect to the *appealability* of certain orders, it would be a hardship upon a litigant who has been misled by such uncertainty in the law if the court were to resolve the uncertainty and in the same proceeding deny his petition for a writ of mandate on the ground that the petitioner had an adequate remedy by appeal. In the Phelan case the question pertained to the appealability of an order reducing the amount of a judgment. In the Robinson case the question pertained to the appealability of an order denying a motion to confirm an award of the labor commissioner. With respect to the present case, it is to be noted that no uncertainty has existed as to the appealability of such an order as that involved herein—an order refusing to dissolve an attachment. The provision of section 963 of the Code of Civil Procedure that an appeal may be taken from an order refusing to dissolve an attachment has been in said code section for many years.

The alternative writ of mandate is discharged, and the petition for a peremptory writ of mandate is denied.

SHINN, P. J., and VALLÉE, J., concur.

111 Cal.App.2d 124

RACKSON v. BENIOFF.

Civ. 14580.

District Court of Appeal, First District,
Division 2, California.

May 16, 1952.

Action on a promissory note. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment on verdict for plaintiff, and the defendant appealed. The District Court of Appeal, Goodell, J., held that the giving of instructions which were contradictory in essential elements constituted prejudicial error.

Judgment reversed.

1. Appeal and Error ⚷1064(1)
Trial ⚷243

In suit to recover on promissory note which was given in part payment for shares of stock in corporation, instruction, which in effect advised jury that defendant could sue plaintiff for damages for any loss sustained by defendant caused by failure of plaintiff to include any liability of corporation in contract but it would not be possible for the defendant to sue the plaintiff on that contract for any damages caused by any misrepresentation, created a conflict with further instruction that defendant when sued on a promissory note or other obligation could set up fraud as a defense, and was prejudicial error.

2. Appeal and Error ⚷1064(1)

Instructions that are contradictory in essential elements may warrant reversal of a judgment on ground that it cannot be ascertained which instruction was followed by jury.

3. Appeal and Error ⚷1064(2)
Trial ⚷191(3)

In action on promissory note which was given in part payment for shares of stock in corporation sold by plaintiff to defendant, instruction which in effect advised jury that where stock of a corporation is issued for consideration consisting of property, and corporation and stockholders have agreed upon valuation of the property transferred, such valuation is conclusive in the absence of fraud, but that no evidence had been introduced in the trial tending to show that the valuation placed upon property by stockholders of such corporation was fraudulent was prejudicial error as improperly removing issue from jury, in view of evidence tending to prove fraud.

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Henry B. Nathan, San Francisco, Herbert Chamberlin, San Francisco, of counsel, for appellant.

Gladstein, Andersen & Leonard, San Francisco, for respondent.

GOODELL, Justice.

Respondent sued on a promissory note for $2,500 dated August 9, 1947, payable February 9, 1948.

The answer alleges that the note was obtained through misrepresentation and that the consideration therefor had failed. As a separate defense the answer pleads that the note was given in part payment for 50 shares of stock of Du Bain Furs, Inc., sold by respondent to appellant for $100 a share, and that at the same time appellant acquired 50 other shares in the same corporation from William E. Du Bain in exchange for stock in another corporation; that the 100 shares so purchased from both vendors represented all the outstanding stock of Du Bain Furs, Inc. It pleads also that prior to the purchase plaintiff and Du Bain represented in writing "that the shop and equipment, vaults, display showroom furniture, shop supplies, linings, etc." (in the quarters of Du Bain Furs, Inc., in Santa Barbara, which appellant was then acquiring by buying the 100 shares of stock) had an actual value of $8,000. Such representation was alleged to have been false, and made with the intent to deceive defendant and to induce him to purchase the 100 shares. It was alleged that the actual value of such equipment did not exceed $2,500. A further defense alleged a failure of consideration on the same grounds.

The jury returned a verdict for $2,768.40, and from the judgment entered thereon this appeal was taken after the denial of a new trial.

The transaction was a simple one, consummated at appellant's place of business in San Francisco on August 9, 1947. Respondent endorsed and delivered to appellant the certificates evidencing his ownership of the 50 shares and turned over to appellant the corporate papers, minutes, and seal, and the keys to the Santa Barbara store, and appellant delivered the notes. An agreement reading as follows was then and there signed by respondent and Du Bain:

> "We the undersigned, jointly and severally hereby certify that the attached papers showing liabilities of Du Bain Furs, Inc., as of August 9th, 1947, accounts receivable as of August 9th, 1947, inventory as of August 9th, 1947, and statements on the attached papers entitled 'Statement as of August 9th, 1947,' are true and correct in all particulars and we agree that we will jointly and severally pay any additional liabilities and hold Du Bain Furs, Inc., harmless from any liabilities other than those mentioned on the attached paper.
>
> "We further jointly and severally agree that we will pay all back taxes of any nature due as of August 9th, 1947, by Du Bain Furs, Inc., which are not mentioned on the attached papers and that if Du Bain Furs, Inc., is required by any Governmental Agencies, City, State or Federal, to pay taxes due as of August 9th, 1947, or penalties thereon not mentioned in the attached papers, we will immediately reimburse Du Bain Furs, Inc., for such payment.
>
> "This agreement is for valuable consideration. * * *"

Attached thereto is a statement as of August 9, 1947, initialed by Rackson and Du Bain reading:

"Inventory	$ 8,459.50
"Accounts Receivable	4,156.00
"Paid up Insurance	189.68
"Cash in the Bank	192.13
"*Shop and Equipment Vaults, Display Showroom Furniture Shop supplies, Linings, Etc.*	8,000.00
"Deposit at State Sales Tax	25.00
"Total Assets	$21,022.31
"Liabilities	7,766.60"

(Emphasis added.)

In addition to the $2,500 note in suit appellant delivered to respondent a note for $2,500 payable on December 9, 1947, the two notes representing the $5,000 purchase price for respondent's 50 shares. He also signed and delivered a third note, for $1,500, evidencing a debt owed by Du Bain to Rackson which (it was understood by appellant, respondent and Du Bain) was being paid by appellant for Du Bain's account and deducted from the amount which appellant owed Du Bain on the purchase of the latter's 50 shares.

The first note for $2,500 was paid off in September, three months before its maturity, for $2,000, Rackson allowing a $500 discount.

Du Bain's sale of his 50 shares to appellant was a separate transaction between themselves, and Du Bain is connected only collaterally with this case; he is not a party and was not a witness. Appellant gave Du Bain, in exchange for his 50 shares in Du Bain Furs, Inc., stock in Arnold Best Company, a corporation in which appellant was interested.

Appellant visited the Santa Barbara store for the first time in November, 1947, three months after the sale. According to his testimony he found it in very unsatisfactory condition, and he testified in detail as to the difference in values of the articles of equipment as he claims to have found them, as compared with the values as fixed by respondent and Du Bain. In short he testified that the articles listed under the $8,000 item were worth no more than $2,500.

The $1,500 note matured on January 9, 1948, and was paid off when due, notwithstanding appellant claims to have discovered the fraud two months before. Appellant explained this inconsistency by testifying that it was handled through his bank.

Respondent first learned of appellant's claim of fraudulent misrepresentation only about February 9, 1948 when the note in suit fell due, by a letter from appellant's attorney saying that the $8,000 value placed on the equipment and fixtures had been misrepresented. This action was then filed.

Appellant's counsel says that "The sole ground on appeal is that the jury was misdirected to the prejudice of appellant on the law applicable to the defenses of fraud and failure of consideration. On those issues the evidence was in sharp conflict. Its sufficiency to support the judgment for plaintiff is not questioned." Appellant at the same time contends that the evidence was also sufficient to support a judgment for defendant, and that would appear to be correct.

Before discussing the instructions it should be noted that a few days before the sale the Santa Barbara store was visited by one Abe Weinblatt who had been associated with appellant in different fur ventures and enterprises for over 35 years and was thoroughly familiar with the fur business. Weinblatt testified that on this visit he made but a casual inspection of the store, lasting about an hour, while respondent testified that it was a minute inspection lasting 2 or 3 hours. Weinblatt was present at the closing of the transaction and told appellant to go ahead and sign. From these circumstances, plus the fact that Weinblatt advised appellant "that the location [of the Santa Barbara store] was a desirable one * * * from the retail point of view," it would seem that the jury might well have concluded that Weinblatt represented appellant when he looked over the store and its equipment and that his inspection was therefore appellant's inspection; that the investigation was an independent one, made by an experienced and expert fur man, and hence that appellant, who has been in the fur business all his life, did not rely at all on the $8,000 figure.

[1] Of the $21,022.31 of listed assets the only item attacked is that of $8,000. The wide disparity of $5,500 between the $8,000 valuation and appellant's $2,500 valuation presented the principal issue in the case. For this reason the following instruction (numbered X), given at respondent's request, was of primary importance:

> "The agreement included in defendant's Exhibit 'B' is a contract * * * on which the defendant could sue the plaintiff and William E. Du Bain for damages for any losses sustained by the defendant caused by the failure of plaintiff and Du Bain to include in Exhibit 'B' any liabilities of the corporation * * * or by any taxes owed by the corporation as of August 9, 1947. *It would not be possible, however, to sue the plaintiff or Du Bain, on that contract, for any damages caused by any misrepresentation.*" (Emphasis added.)

The last sentence told the jury, in effect, that even if it found respondent's $8,000 valuation to be a misrepresentation—and that was the real basis of the defense—appellant would find himself without a remedy.

The error is accentuated by what precedes the last sentence, wherein the jurors were given the particular parts of the contract on which defendant "could sue", namely, the failure to include "any liabilities of the corporation * * * or * * taxes owed * * * as of August 9, 1947." The emphasis placed on those items contrasts sharply with the statement that "It would not be possible * * * to sue the plaintiff or Du Bain, on the contract, for any damages caused by any misrepresentation" since neither the failure to include outstanding liabilities nor unpaid taxes was in issue.

It goes without saying that if a defendant, when sued on a promissory note or other obligation, sets up fraud or failure of consideration (as was done here) he must plead a cause of action against the plaintiff and prove his case in the same manner as if he had elected to bring a separate action. Hence when the court told the jurors that *appellant could not sue*, it told them (although not in so many words) that *he could not plead a fraudulent representation defensively*.

A half dozen or more instructions tendered by appellant told the jury in one form or another that a defendant, when sued on a promissory note or other obligation, *could* set up fraud as a defense, thus creating a series of direct conflicts with instruction X.

[2] In Sebrell v. Los Angeles Railway Corp., 31 Cal.2d 813, 817, 192 P.2d 898, 900, the court said: "Instructions that are contradictory in essential elements may warrant the reversal of a judgment on the

ground that it cannot be ascertained which instruction was followed by the jury. Chidester v. Consolidated People's Ditch Co., 53 Cal. 56, 58; Starr v. Los Angeles Railway Co., 187 Cal. 270, 280, 201 P. 599; Soda v. Marriott, 118 Cal.App. 635, 643, 5 P.2d 675. In determining whether there is such a conflict the decisive question is whether the instructions read as a whole and in the light of the circumstances of the case in which they were given, are apt to confuse a person of ordinary intelligence."

In the Chidester case, just cited, it was said: "If it be claimed that the error in this instruction was cured by the first instruction given at the request of the defendant, the answer is that the two instructions are in this particular contradictory, and it is impossible to determine on which of them the jury acted [citations]". In Noce v. United Railroads of San Francisco, 53 Cal. App. 512, 519, 200 P. 819, 822 (followed in Soda v. Marriott, 118 Cal.App. 635, 643, 5 P.2d 675), the court said: "Where two instructions are contradictory in essential parts, the judgment must be reversed [citations]." See, also, 2 Cal.Jur., p. 1027.

[3] Respondent tendered instruction XIV, which the court gave, as follows: "Where the stock of a corporation is issued for a consideration consisting of property, and the corporation and the stockholder[s] have agreed upon a valuation for the property transferred, such valuation is conclusive in the absence of fraud. *There has been no evidence introduced in the trial of this case tending to show, or for the purpose of showing, that the valuation placed upon property by the stockholders of Du Bain Furs, Inc. was fraudulent in purpose or effect or at all.*" (Emphasis added.)

The whole question in this case was (to paraphrase) whether the "evidence introduced in the trial of this case" showed "that the valuation placed upon property by the stockholders of Du Bain Furs, Inc. was fraudulent in purpose or effect or at all." Appellant's testimony that the property had been overvalued by as much as $5,500 was certainly evidence tending to prove fraud, but the last sentence of the instruction removed it summarily from the case.

Respondent seeks to justify the instruction by arguing that when both sentences are read together it is clear "that this instruction referred to the valuation placed upon certain material by the stockholders when the corporation was formed, and is set forth in the minutes of the first meeting of the corporation" which were exhibits in the case. The answer to that argument is that the only issue before the jury was the correctness of the $8,000 figure which Rackson and Du Bain certified to appellant on August 9, 1947 as the true value. The jury was not concerned with some valuation which Rackson and Du Bain might have agreed on between themselves when the two-man corporation was organized some months earlier. If the instruction means what counsel suggests, it was misleading and confusing and injected a wholly foreign issue into the case, which in itself was error. Whatever the first sentence may mean, there can be no doubt that the jurors must have understood the words "the valuation placed upon property by the stockholders" to refer to the $8,000 certified in the writing of August 9, 1947, since that was the only issue before them.

Appellant points to other errors in the charge, but we see no reason to discuss them since it is to be presumed that on a new trial correct instructions will be given.

In our opinion it was prejudicial error to give instructions X and XIV.

The judgment is reversed.

NOURSE, P. J., and DOOLING, J., concur.

111 Cal.App.2d 110

TONE v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR COUNTY OF LOS ANGELES.

Civ. 18946.

District Court of Appeal, Second District, Division 3, California.

May 15, 1952.

Hearing Denied July 10, 1952.

Proceeding in mandamus by Franchot Tone against the Superior Court of the State of California, in and for the County of Los Angeles, for writ of mandate requiring said Superior Court to vacate its order which vacated and set aside order allowing Tone to examine witnesses for purposes of perpetuating testimony, and to reinstate said former order. The District Court of Appeal, Shinn, P. J., held that the filing in the Superior Court of a petition which complied with essential conditions specified in Code of Civil Procedure for allowing examinations to perpetuate testimony was sufficient to require that court to make the order applied for and that, in view of facts asserted as basis for vacating that order, court abused its discretion in making order vacating former order.

Writ of mandate issued with directions.

1. Depositions ⚷38

Where petitioner, under authority of statute, had obtained order for the taking of depositions in anticipation of a suit, statements in affidavits of prospective witnesses on their motion to vacate said order, that petitioner had filed petition in bad faith and not in anticipation of any expected litigation, were not sufficient to deprive petitioner of statutory right. Code Civ.Proc. §§ 2083 to 2089

2. Mandamus ⚷53

Where petition for order allowing petitioner to take depositions to perpetuate testimony in anticipation of suit had complied with Code of Civil Procedure requirements, mandate was the proper remedy to require Superior Court to vacate order which vacated original order which granted said petition. Code Civ.Proc. § 2084.

3. Depositions ⚷38

If witnesses, who were to be examined pursuant to order allowing taking of depositions for perpetuation of evidence, had valid reasons for refusing to answer questions anticipated, time and place for objection to questions would be at the taking of the depositions and not in a motion to vacate order allowing the taking of depositions. Code Civ.Proc. §§ 2083 to 2089.

4. Depositions ⚷32

Where petition for order allowing taking of depositions to perpetuate testimony stated that petitioner expected to be a party to an action and named the witnesses to be examined and set forth a general outline of the facts expected to be proved, it complied with the essential conditions specified for such petition in the Code of Civil Procedure and was sufficient to require court to make the order applied for. Code Civ.Proc. § 2084.

5. Depositions ⚷38

Where petition for order allowing taking of depositions to perpetuate testimony complied with essential conditions specified for such petition in the Code of Civil Procedure, the granting of subsequent motion by prospective witnesses to vacate order allowing taking of depositions was, in view of facts asserted as basis for motion, an abuse of discretion. Code Civ.Proc. § 2084.

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Herzbrun & Chantry, Beverly Hills, Stahlman & Cooper, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

Hahn, Ross & Saunders, Los Angeles, for Florabel Muir and Betty Voight, real parties in interest.

SHINN, Presiding Justice.

By his petition for writ of mandate, petitioner Tone represents that he heretofore filed in the superior court a petition for examination of witnesses pursuant to the provisions of sections 2083 to 2089, inclusive, of the Code of Civil Procedure. He sought an order for the examination by deposition of Florabel Muir, Betty Voight, Elizabeth Cosgriff and Richard Barron, for the purpose of perpetuating their testimony for use in an action which he expects to institute against said persons claiming damages for the invasion of his right of privacy. He accused said persons as conspirators who acted in concert in listening in and recording a series of telephone conversations, messages and communications by and between the petitioner Tone and a young woman then known as Barbara Payton. In the petition it appears that Barbara Payton had a party line telephone, upon which the said Elizabeth Cosgriff was a subscriber. It was alleged that during the month of September, 1951, the said prospective defendants and each of them listened in and recorded said telephone conversations between said Tone and Barbara Payton, and that in so doing they acted unlawfully, fraudulently, clandestinely, in an unauthorized manner and without the permission of the telephone company, using the telephone of said Elizabeth Cosgriff; all of this was without the knowledge or consent of Mr. Tone and Miss Payton. It was also alleged that said prospective defendants and each of them disclosed and published, and attempted to disclose and publish, the substance and purport of said telephone conversations, and that all of their acts were and are in violation of certain statutory enactments. Upon said petition it was duly ordered that said named persons submit to examination and depositions on a day and at a place named, on due service of a copy of said order and said petition.

Prior to the time set for the taking of the depositions, Florabel Muir, by her counsel, gave notice of motion to vacate the order for the examination of witnesses upon the ground that the petition was not filed in good faith, but solely for the purpose of harassing and annoying the said Florabel Muir. It is alleged in the petition filed herein that the court granted the motion and vacated and quashed the order for the examination of said witnesses. It is also alleged that the testimony of each of said witnesses is material and essential to establish the action petitioner expects to institute against them. Petitioner seeks mandate requiring the superior court to vacate its order which vacated and set aside the order for examination of said witnesses and to reinstate the said former order.

[1] The question before us is whether the court abused its discretion in making the order here in question, and this in turn depends upon the facts set forth in the affidavit of Florabel Muir which accompanied her notice of motion. It is a lengthy affidavit, carefully drawn. It consists largely of conclusions and in its denials makes prolific use of the negative pregnant. It contains a denial that the affiant *and* any of the other prospective defendants listened in *and* recorded any telephone conversations, and a denial that they were acting in concert *and* for profit, or violated the right of privacy of the petitioner, and a denial that they violated any law. It alleged that an altercation had taken place in a restaurant between said Tone and said Muir, as a result of which Tone was being prosecuted criminally, and that he had thereby become embittered toward the said Florabel Muir and was seeking to take her deposition merely to annoy and harass her. There was nothing whatever in this showing which justified the order vacating the order for the examination of said witnesses. It was not denied that some of the prospective defendants had listened in on said telephone conversations and had published, or caused to be published, the same. We have looked for any forthright assertion of a material fact in said affidavit and find none. Although it was alleged that the petition was filed in bad faith and not in anticipation of any expected litigation, that allegation is not sufficient to deprive one of a statutory right.

[2] Mandate is a proper remedy, and a writ will be issued to require procedure to perpetuate testimony where the petition for the order complies with section 2084 of the Code of Civil Procedure. Nothing more than this is required. Brown v. Superior Court, 34 Cal.2d 559, 212 P.2d 878; McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944; Strauss v. Superior Court, 36 Cal.2d 396, 224 P.2d

726; Irving v. Superior Court, 79 Cal.App. 361, 249 P. 236; Kutner-Goldstein Co. v. Superior Court, 212 Cal. 341, 298 P. 1001.

[3–5] The problem here is simplified by the nature of the objections urged to an issuance of the writ, and also by significant omissions of other grounds of objection. It is pointed out that the petition in the superior court contained allegations in the nature of conclusions, but with respect to the sufficiency of the facts alleged it is merely said: "It would seem that the balance of the Petition does not set forth sufficient facts that would warrant the court in ordering the depositions to be taken." It is also urged that by answering the questions which it is anticipated would be put to them the witnesses would tend to incriminate themselves, and it is said that Florabel Muir is a newspaper writer and that to require her to disclose the sources of information procured for publication would abuse her privilege to keep her sources of information a secret. We find nothing in the record which indicates that Florabel Muir is a newspaper woman, but if she is, and if she or any of the others would have a valid reason for refusing to answer questions, the time and the place for them to object will be in the taking of their depositions. None of the grounds urged in opposition to the granting of a writ is meritorious. The petition filed in the superior court stated, (1) the applicant expected to be a party to an action and it named the prospective defendants, (2) it named the witnesses to be examined and a general outline of the facts expected to be proved, and thus complied with the essential conditions specified in section 2084, Code of Civil Procedure. This was sufficient to require the court to make the order applied for.

Let a writ of mandate issue directed to the superior court, requiring it to vacate its order vacating the order for the taking of the depositions of said named witnesses, and to proceed further in accordance with the findings herein expressed.

PARKER WOOD and VALLÉE, JJ., concur.

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111 Cal.App.2d 193

ASSOCIATED TEL. CO., Limited, v. GREENMAN et al.

Civ. 18679.

District Court of Appeal, Second District, Division 1, California.

May 19, 1952.

Negligence action by Associated Telephone Company, Ltd., against Allen Greenman, and another, for damages to buried telephone cable which was in easement across property which Greenman cleared with bulldozer under contract for third party, and across property which co-defendant, as holder under purchase agreement, had hired Greenman to grade. The Superior Court, Los Angeles County, H. J. Borde, J., entered order and judgment of nonsuit in favor of Greenman and judgment on verdict in favor of his co-defendant, and telephone company appealed. The District Court of Appeal, Doran, J., held that in view of facts that, Greenman had not been told cable was buried in ground, that it was too close to surface for him to avoid hitting it, that he did not know he had hit it and that nobody else saw him do it, and that, co-defendant instructed him to bulldoze protrusion which was discovered to be cable, Greenman was not negligent, and that evidence sustained verdict for his co-defendant.

Judgment and order affirmed.

1. Pleading ⚷236(7)

In action by telephone company against bulldozer operator for damages to underground telephone conduit and cables, where plaintiff moved only few days before trial and without supporting affidavit to amend petition grounded on negligence to include cause of action for trespass on telephone company's easement, but facts of alleged trespass must have been known earlier to plaintiff, and change might well have prejudiced defendant, there was no abuse of discretion in denying motion.

2. Telegraphs, Telephones and Radio ⚷19

Where bulldozer operator was hired by developer of real estate tract to clear tract, and by owner of adjoining land to do grading and, in clearing tract, operator allegedly struck and broke underground telephone cable which was too close to surface to be avoided and about which he had been told nothing, and which he did not know he had hit and which no one had seen him hit, and, in grading adjoining land, operator cut cable when instructed by owner to remove a protrusion which appeared to be old foundation and which was discovered to be cable, bulldozer operator had not been negligent in his operation.

3. Telegraphs, Telephones and Radio ⚿19

In action by telephone company against bulldozer operator who, in clearing and grading land, twice struck buried conduit and cable of which he had no notice, burden rested on plaintiff to establish some act of negligence on part of defendant and if negligence was shown to be that of plaintiff rather than of defendant, no case was made out and nonsuit would be proper regardless of negligence on part of two landowners who hired bulldozer operator, one of whom was codefendant.

4. Telegraphs, Telephones and Radio ⚿19

In negligence action by telephone company against bulldozer operator and landowner who hired him for damage to buried telephone cable and conduit which was cut in course of bulldozer operator's grading operation, evidence supported verdict in favor of landowner.

5. Appeal and Error ⚿1046(5)

In negligence action by telephone company for damage to buried telephone conduit and cable which was struck by bulldozer operator hired to grade property through which easement for cable and conduit ran, reference by trial court to a defendant as owner of the property could not be deemed a prejudicial error, even though defendant's only claim to property was through an irrevocable purchase agreement on which he had paid $2,000 and a written reservation of the lots on a then unrecorded subdivision.

6. Appeal and Error ⚿1064(1)
Trial ⚿295(5)

In negligence action by telephone company for damages to buried telephone cable from bulldozer grading operation on defendant's property which was subject to easement for the cable, instructions in reference to easements and the duties of easement owners to keep property in repair were not prejudicial, and, when considered as an entirety, instructions given did not mislead jury.

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Hector P. Baida, Santa Monica, for appellant.

Chase, Rotchford, Downen & Drukker, Richard T. Drukker, and Otto M. Kaus, all of Los Angeles, for respondent Greenman.

Merrill L. Granger, Santa Monica, Donn B. Downen, Jr., Los Angeles, for respondent Pilgrim.

DORAN, Justice.

Two appeals are involved; one from an order and judgment of nonsuit in favor of respondent Greenman; the other from a judgment on a verdict in favor of respondent V. M. Pilgrim. The action herein seeks damages arising out of the operation of a bulldozer by Greenman which injured telephone conduit and cables buried in the earth and located on an easement in Uplifters Ranch Subdivision.

The case was tried before a jury upon a First Amended Complaint which in general terms alleges negligence causing damage in the amount of $4,250.12. On January 12, 1951, five days before the date of trial, plaintiff-appellant had noticed for hearing a motion seeking to add a new and additional cause of action on the theory of trespass. The trial court refused to permit the amendment; a nonsuit was granted as to respondent Greenman and the jury returned a verdict in favor of respondent Pilgrim.

Appellant Greenman's brief states: "For many years prior to February 11, 1948, (the alleged date of damage), appellant's conduits and cables were maintained in a generally easterly and westerly direction across said Lot 16 * * *. Before the completion of the subdivision the owners * * * executed and delivered a grant of an easement to the appellant over an area approximately five feet on either side of the center of the conduits for the length thereof. This grant of easement, recorded December 8, 1947, provided that appellant might construct, maintain and operate a telephone line, with * * * conduits, cables and appurtenances * * * in, over, under, along and across said easement".

In respondent Greenman's brief, attention is called to the fact that the above mentioned easement "specified neither the lateral nor vertical location of the area"; that the conduit had been laid 21 years before and was approaching the usual life of such conduits; that a bridle path crossed the easement wearing down the surface; that ground contours are known to change by reason of rain and other erosion; that the telephone company had apparently given no attention to the conduit during this long period; and that while Greenman "knew that poles and wires above the ground had been installed in the area of the telephone cable easement * * * he did not know that any underground cables had been installed".

The record discloses that prior to the incident in question, one George E. Read, agent for the owner of a portion of the property, entered into a contract with respondent Greenman for cleaning the surface of the tract. The work involved clearing off brush and debris and pushing such material into a depressed area. According to Greenman, Read "didn't give me any definite boundaries. He said to clean up the whole tract". Lot boundary lines were not marked at that time and the only parts of the subdivision then laid out were two roads. After Greenman had completed a portion of this work for Read, another contract was made between Greenman and respondent Pilgrim, the latter having agreed with Read to purchase Lot 16 and portions of Lots 5 and 6. Greenman was to use a bulldozer to "straighten up the bank * * to conform to the general contour of the bank".

Appellant claims that by reason of the bulldozer operation, two breaks were made in the telephone conduit and cables; Break No. 1 being about five feet north of Lot 5, and Break No. 2 being on Lot 16. As to the first break Greenman testified, "I did not know it at the time", but learned of it "sometime after I came back from Pilgrim's lot, later in the afternoon". Concerning Break No. 2 Greenman stated that just previous thereto, something was noticed that "Looked like a piece of foundation * * just barely visible". Pilgrim "said it was old foundations" and said to remove it. Several cuts "of a few inches" were then made which resulted in severing the conduit and cable, referred to as Break No. 2.

There is evidence by appellant's witnesses that the conduit was not "covered very deep", in places being buried only "a few inches from the surface". The deepest cut said to have been made by the bulldozer was from five to eight inches. There was also evidence that it was the custom to bury such conduit from 18 inches to three feet; also that on private property it was not customary to make inquiries as to the exact location of utilities. As hereinbefore indicated, 21 years had elapsed since installing the conduit and a telephone official stated that after installation no further investigation is made unless and until some trouble is reported, although it is known that ground contours change by reason of erosion.

[1] Appellant complains that there was an abuse of discretion in the denial of leave to add a second cause of action for trespass. The respondent's brief notes that this motion, filed only a few days before trial, was without a supporting affidavit, and that the only ground alleged was that the amendment was "necessary and a proper cause of action to be contained in plaintiff's First Amended Complaint". The original complaint had been amended once but without mention of any theory other than negligence, although the facts must have been as well known to plaintiff at that time as at the later date when the trespass amendment was offered.

The trial court in refusing to allow a change of theory a few days previous to trial doubtless considered these facts and the further fact that such a change might well prejudice defendants in the conduct of the trial. In any event the matter was within the discretion of that court, and under the circumstances shown by the record, no abuse of discretion has been made manifest.

[2] It is also contended that the trial court was in error in granting a nonsuit in favor of the respondent Greenman. As to Break No. 1, the trial judge said: "The record is clear to the court that at the time he made that first cut he was working for Read, under Read's instructions, and he wasn't informed by anybody that the conduit was there. It was so close to the ground that it was unavoidable for him to hit it. * * * He didn't know he hit it until he was informed some time later that day. * * * So far as that cut is concerned, there is no testimony that that break was made by his bulldozer. He said he didn't know and nobody else saw him do it". In respect to Break No. 2, the trial court said: "The conduit was exposed. It was set right on top of the ground at the point where the break actually occurred. There was no negligence on the part of Greenman. Nobody had shown him this conduit. Nobody told him about it."

[3] The trial court's observations as to the state of the evidence at the time the motion was made, are fully supported by the record. Moreover that court possessed the great advantage of having heard the witnesses in person, an opportunity denied to appellate tribunals. As in all such cases, a burden rested upon the plaintiff to establish some act of negligence on the part of the defendants. Obviously, if the negligence was shown to be that of the telephone company rather than that of the bulldozer operator, no case was made out. Whatever may have been the negligence of the defendant Pilgrim, or possibly of the seller Read who is not a party defendant herein, no error has been demonstrated in the granting of a nonsuit as to Greenman.

[4] The further question of negligence on the part of the respondent Pilgrim, who was purchasing the property, seems to have been properly submitted to the jury under appropriate instructions containing no prejudicial error. A verdict in favor of Pilgrim was returned by the jury, and such verdict and the judgment based thereon find substantial support in the evidence.

The proposition that the theory of trespass should have been submitted to the jury has been disposed of in reference to the trial court's refusal to allow such an amendment to the pleadings. As stated in respondent's brief, "The issue of trespass was not in the case. Negligence was the only issue litigated, and appellant's insistence that the negligence allegations should be considered mere surplusage and that trespass was the real issue, is without merit.

[5] Appellant also contends that "Pilgrim had neither a legal nor an equitable interest in the property at the time of the injuries", because of the fact that Pilgrim possessed merely a written reservation of lots on a then unrecorded subdivision, and did not obtain legal title until later. However, as noted in respondent's brief, Pilgrim had paid $2,000 on an irrevocable purchase agreement, had been shown the property on the ground and given the right of entry and possession. Under these circumstances it would appear that the contention may properly be regarded as specious rather than real. The trial court's reference to Pilgrim as the "owner", cannot be deemed of a prejudicial nature.

[6] Nor can the instructions in reference to easements and the duties of easement owners to keep the property in repair be considered prejudicial. Considered as an entirety, the jury could hardly have been misled by the instructions given. No merit is found in any of appellant's points for reversal.

The judgments and order appealed from are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

111 Cal.App.2d 198

KRUCKOW v. LESSER et al.

Civ. 18906.

District Court of Appeal, Second District, Division 1, California.

May 19, 1952.

Action by Arthur Kruckow against Lewis Lesser and another. From a judgment of the Superior Court of Los Angeles County, Orlando H. Rhodes, J., the defendants appealed. The District Court of Appeal, Hanson, J. pro tem., held that the record established that the appeal was taken for delay requiring the imposition of a penalty of $100 in addition to the cost of the appeal.

Judgment affirmed with penalty.

1. Appeal and Error ⚷989, 1011(1)

Findings of fact on conflicting evidence of a substantial character are conclusive, and an appellate court cannot examine a record to ascertain if the findings are supported by a preponderance of evidence.

2. Costs ⚷260(1)

A penalty must be exacted for the taking of an appeal for the purpose of delay. Code Civ.Proc. § 957.

3. Appeal and Error ⚷757(3), 907(2)

A reviewing court starts with presumption that record contains evidence to sustain every finding of fact so that if appellants contend, some particular issue of fact is not sustained, they are required to set forth in their brief all material evidence on the point and not merely their own evidence and unless such is done the error assigned is waived.

4. Costs ⚷263

Where record established that appeal was taken for delay judgment was affirmed and a penalty of $100 was imposed in addition to the cost of the appeal. Code Civ. Proc. § 957.

◆

Albert H. Allen, Michael J. Fasman, Beverly Hills, for appellant.

Marvin Osburn, Los Angeles, for respondent.

HANSON, Justice pro tem.

The defendants appeal from the judgment rendered against them upon the sole ground that it was excessive to the extent of at least $3,480. While appellants concede that there was a substantial conflict in the evidence upon the issues on which the judgment was predicated, nevertheless they contend that the trial court erred in weighing the evidence and hence we should modify the judgment or else order a new trial. In the language of appellants' brief: "It is the contention of the appellants that while there was a conflict in the evidence, the plaintiff failed to maintain the burden of proof: Firstly, as to the alleged authorized variations in the furniture manufacture from the sketches as shown; and secondly, as to the complaints registered by the appellants from time to time as to the furniture delivered. The weight of the evidence substantially supports the contention of the defendants, and in this respect respondents have not maintained the burden of proof.

> "Appellants contend that the court did not properly weigh the evidence, and that if the evidence were fairly judged, an allowance should have been made to the defendants in at least the sum of $3,480.00."

[1] There is nothing involved in this case beyond the application of principles which have never been deviated from in the jurisprudence of this state since the adoption of the Constitution in 1879. During that entire period it has been held that the findings of fact of a trial court on conflicting evidence of a substantial character are conclusive, and that an appellate court cannot examine the record to ascertain if the findings are supported by a preponderance of the evidence. Bauder v. Tyrrel, 59 Cal. 99; Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; 24 Cal.L.Rev. 733.

[2] In view of this unbroken line of authority we must assume that counsel for appellants were not unfamiliar with it and, accordingly, that the appeal was taken only for the purpose of delay. Such a purpose

not only imposes needless expense on the part of a respondent but also is a waste of the time of this court for which a penalty should and must be exacted. Code Civ. Proc. § 957; Sipe v. McKenna, 105 Cal. App.2d 373, 233 P.2d 615.

[3] It is here pertinent to add that appellants are not entitled to a review of the evidence for still another reason. In support of their contention that the evidence is insufficient to sustain the size of the judgment appellants point to the testimony of their witnesses, but ignore the testimony of the respondent. In that aspect the rule is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. Accordingly, if as appellants contend, some particular issue of fact is not sustained, they are required to set forth in their brief all the material evidence on the point and not merely their own evidence. Unless this is done the error assigned is deemed to be waived. Brovelli v. Bianchi, 1902, 136 Cal. 612, 613, 69 P. 416; People v. One Buick Sedan, 1940, 39 Cal.App.2d 42, 45, 102 P.2d 447; Kyle v. Craig, 1899, 125 Cal. 107, 116, 57 P. 791; Cooper v. Weatherholt, 1938, 28 Cal.App.2d 321, 325, 82 P.2d 524; Duncan v. Ramish, 1904, 142 Cal. 686, 689, 76 P. 661; Wieczorek v. Texas Co., 1941, 45 Cal.App.2d 450, 457, 114 P.2d 377; Glass v. City of Fresno, 1936, 17 Cal.App.2d 555, 62 P.2d 765; Thomas Haverty Co. v. Jones, 1921, 185 Cal. 285, 197 P. 105; Cook v. Rice, 1891, 91 Cal. 664, 27 P. 1081; People v. Central Pac. Railway Co., 1895, 105 Cal. 576, 38 P. 905; Chronister v. Brennan, 1938, 27 Cal.App.2d 509, 81 P.2d 479; In re Shay Estate, 1925, 196 Cal. 355, 237 P. 1079; Rutledge v. City of Eureka, 1925, 195 Cal. 404, 234 P. 82; Gluckstein v. Lipsett, 1949, 93 Cal.App. 2d 391, 209 P.2d 98; Smythe v. Schacht, 1949, 93 Cal.App.2d 315, 209 P.2d 114.

[4] The judgment is affirmed and damages are imposed upon defendants-appellants in the sum of $100 for having taken and prosecuted the appeal for the purposes of delay, and the trial court is instructed to enter judgment in favor of plaintiff and against defendants for said sum in addition to the costs of appeal.

DORAN, Acting P. J., and DRAPEAU, J., concur.

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111 Cal.App.2d 201

PEOPLE v. KING.

Cr. 4769.

District Court of Appeal, Second District,
Division 1, California.
May 19, 1952.

Rehearing Denied May 28, 1952.

Hearing Denied June 16, 1952.

The defendant was convicted in the Superior Court of Los Angeles County, Thurlow T. Taft, J., of bookmaking, and he appealed from an order denying a motion for a new trial. The District Court of Appeal, Doran, J., held that evidence was insufficient to sustain conviction.

Order reversed.

1. Criminal Law ⚷561(1)

The guilt of a defendant in a criminal action must be established to a moral certainty and beyond a reasonable doubt.

2. Gaming ⚷98(3)

Evidence was insufficient to sustain conviction for bookmaking. Pen.Code, § 337a, subds. 2, 3.

◆

Horace Appel, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from an order denying a motion for a new trial.

Defendant was charged in two counts by information with violating subdivisions 2 and 3 of section 337a of the Penal Code.

A jury was waived and the matter submitted, by stipulation, on the preliminary examination transcript. No witnesses appeared.

Following the so-called trial the matter was disposed of by the trial judge in the following words, "The court now finds the defendant innocent as to Count I and guilty as to Count II". Following a hearing on an application for probation, the following occurred: "The Court: Proceedings are suspended for five years during which time you are placed on probation on the following terms and conditions. * * * Finally, that you pay to the Probation Officer a fine in the sum of $300 in 30 monthly installments of $10.00, the first installment to be paid on or before the 15th day of October, 1951 and subsequent installments on or before the 15th day of each succeeding month."

The only so-called evidence in support of the court's conclusion was the testimony of two police officers in substance to the effect that defendant was in a building of a gasoline station where there was a table or desk. The officers, about 1:35 p. m. on the day in question, watched the building for about fifteen minutes during which time a couple of men were seen to enter the place. When a third man entered the officers went alongside the building and one of the officers overheard someone say, "Yes, that is right, one to win on Galloway". The officers then entered. There were some one dollar bills on the desk, about five. Defendant picked them up and put them in a "pants pocket". Defendant also had a small piece of paper on which were the names of three horses one of which was "Galloway". The officer who had been on the police force three months was an "expert" by stipulation and testified that the marks on the paper referred to "bets". There was also a "scratch sheet" on the desk. It was not proven who the third man was, who made the remark or who wrote the memorandum.

[1, 2] The foregoing constitutes the evidence which it is contended by respondent is sufficient to support a finding of guilty to a moral certainty and beyond a reasonable doubt. It may be sufficient to raise a suspicion which, it has been held, will support an order holding a defendant to answer but, guilt under the law must be established by something more than suspicion. The well known rule of law that the guilt of a defendant in a criminal action must be established to a moral certainty and beyond a reasonable doubt is still in effect. The evidence falls far short of supporting the above doctrine. If such were the law anyone talking about a horse race would be exposed to prosecution. See People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707.

The order is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

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111 Cal.App.2d 31

PACIFIC COAST ENGINEERING CO. v. STATE.

Civ. 7991.

District Court of Appeal, Third District, California.

May 9, 1952.

Hearing Denied July 3, 1952.

Action by Pacific Coast Engineering Company against the State of California, acting by and through the Board of State Harbor Commissioners for San Francisco Harbor, to recover amount of sales tax on price of scow constructed and delivered to defendant by plaintiff. The contract was silent as to whether price included sales tax, but was made subject to laws of State. The Superior Court, Sacramento County, J. L. Henry, J., sustained general demurrer to first amended complaint, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that city was not bound to pay tax.

Judgment affirmed.

1. Licenses 🔑32(2)

That part of Sales Tax Law which provides that tax imposed shall be collected by retailer from consumer insofar as it can be done permits retailer to pass tax on to consumer, but does not charge retailer with mandatory duty to collect tax, and rights of retailer are optional and may be waived. Revenue and Taxation Code, § 6052.

2. Licenses ⚷32(2)

The section of the Sales Tax Law which makes it unlawful for retailer to advertise that tax will be assumed by retailer, or not added to selling price, or refunded, does not require that retailer add sales tax as additional charge to the selling price, but section is intended to place retailers on equal basis and to prevent unfair competition by allowing strong retailers to absorb tax and build up trade at expense of weaker retailer who could not absorb tax. Revenue and Taxation Code, § 6053.

3. Licenses ⚷32(2)

Whether buyer-consumer is to reimburse retailer for sales tax rests upon contractual arrangements of parties. Revenue and Taxation Code, §§ 6001–7176.

4. States ⚷104

Where contractor agreed to construct and deliver scow to state for stated price, and contract was silent as to whether such price included sales tax, state was not bound to pay amount of sales tax in addition to stated price, although contract was expressly made subject to laws of state. Revenue and Taxation Code, §§ 6001–7176.

5. Licenses ⚷32(2)

Under Sales Tax Law section which defines sales price as meaning total amount for which tangible personal property is sold, "sales price" is not cost to buyer-consumer exclusive of sales tax. Revenue and Taxation Code, §§ 6011, 6012.

6. States ⚷104

For purpose of determining whether state was obligated to pay sales tax on scow built for it by contractor for a stated price, contract would be interpreted not only in accordance with literal wording of the Sales Tax Law, but also in accordance with judicial construction thereof. Revenue and Taxation Code, §§ 6001–7176.

David D. Oliphant, Jr., Oakland, for appellant.

Ernest P. Goodman, James E. Sabine, Deputy Attys. Gen., for respondent.

VAN DYKE, Justice.

The plaintiff has appealed from the judgment entered upon the sustaining of a general demurrer to plaintiff's first amended complaint. The controversy involves the rights of a seller of personal property to collect sales tax from the buyer.

Appellant is engaged in the manufacture and sale of barges, scows and similar equipment. The State of California, acting through the Board of State Harbor Commissioners for San Francisco Harbor, advertised for bids for the construction of two steel dump scows according to plans and specifications adopted by the board. The specifications provided: "Each bidder *shall state a price* for which he will furnish all materials, labor and equipment and construct and deliver to the Board two 300 cubic Yard Capacity Welded Steel Dump Scows, in accordance with the Plans and Specifications". (Italics ours.) Appellant was the successful bidder. The bid submitted on a bid form provided by the board stated: "The undersigned hereby proposes and agrees to contruct the work described in annexed advertisement, according to the plans and specifications on file in your office, * * * and will accept in consideration thereof, *and as full compensation therefor*, the sum of Sixty Four Thousand Eight Hundred and Fifty Dollars for each dump scow." (Italics ours.) The parties entered into a formal contract based upon the call for bids and the bid submitted. This contract provided, among other things: "This contract and all work and labor done and performed thereunder and payments made thereunder and transactions of whatsoever kind and nature done under and pursuant thereto or arising therefrom, are subject to the laws of the State of California, in such case made and provided and applicable thereto."

Appellant completed the two scows in accordance with the contract and performed extra work in the sum of $7,150. In the final bill submitted to the respondent appellant entered a 2½% sales tax item amounting to $3,421.25. Respondent refused to pay this item and the present action was instituted after appellant's claim for the amount in question was refused in the course of administrative proceedings duly taken. The complaint alleged that the published call for bids, the bids submitted an the contract entered into between the parties after acceptance of appellant's bid were all silent on the subject of sales tax.

The question is thus presented whether the buyer is liable to the seller for the amount of sales tax, although no provisions for the tax were made in the contract of sale. It is appellant's contention that such liability exists under the provisions of the Sales and Use Tax Law. Secs. 6001–7176, Rev. & Tax. Code. It is argued that under Section 6011 providing that "'Sales price' means the total amount for which tangible personal property is sold," the words "sales price" exclude the sales tax and therefore a quoted contract price actually means the price exclusive of sales tax, and that the contract should be construed as binding the buyer to pay the tax to the seller in addition to the stated price. Appellant also relies on Sections 6052 and 6053 of the act. Section 6052 provides: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done." Section 6053 provides: "It is unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold or that if added it or any part thereof will be refunded. Any person violating any provision of this section is guilty of a misdemeanor."

Appellant contends that by the correct construction of the Sales and Use Tax Law the amount of the tax is not included in the sales price and that when the board asked bidders to "state a price" for which the subject property would be delivered it meant the price exclusive of the sales tax.

[1, 2] We do not agree with appellant's contentions. It is well established—indeed, appellant concedes—that the tax is imposed on the retailer and not the consumer. It is true that under Section 6052 the retailer is permitted to "pass on" the tax to the consumer, but this section does not charge the retailer with a mandatory duty to collect the amount of the tax. The rights of the retailer under this section are optional and may be waived. In Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 736, 57 P.2d 1022, 1029, the section was interpreted as follows: "The act is not unconstitutional because section 8½ thereof [now Sec. 6052] authorizes the retailer to collect the tax 'from the consumer *in so far as the same can be done.*' This act does not impose the tax on the consumer. The last-mentioned section merely authorizes the retail merchant to reimburse himself from the consumer in so far as it may be consistently done. He is not required to do so. He may waive that right. Section 8 of the act merely declares that it shall be unlawful for the retailer to *advertise* that he will assume and pay the tax or that he will not add it to the price of his merchandise upon sale thereof. In considering the entire act we are impelled to hold it is merely optional with the retail merchant as to whether he will reimburse himself from his customers for the tax he is compelled to pay." See, also, Ainsworth v. Bryant, 34 Cal.2d 465, 474, 211 P.2d 564. Section 6053 does not require, as appellant suggests, that a retailer add the sales tax as an additional charge to the selling price. Roth Drug, Inc., v. Johnson, supra. The purpose of this section is to place retailers on an equal basis since it is deemed "unfair competition for the strong to absorb the tax and build up his trade at the expense of the weaker dealer who could not absorb it." De Aryan v. Akers, 12 Cal.2d 781, 787, 87 P.2d 695, 698.

[3, 4] The remaining question is when the retailer must exercise his right of re-

imbursement. Since the tax is levied upon the retailer and his right of reimbursement is optional and may be waived by him, it follows, we think, that reimbursement of the amount of the tax rests upon the contractual arrangements of the parties. The buyer-consumer has no obligation in reference to the tax. As to him the "selling price" is the amount he must pay to obtain the goods whether or not the sales tax forms a part of the selling price. If the retailer is to "pass on" the tax to the buyer-consumer the tax must form a part of the total price which the buyer pays or agrees to pay. When, therefore, the parties have contracted as to the price, the buyer is bound to pay that price and no more. And even though the contract is silent as to whether that price includes or excludes a sales tax, the law will not by implication add to the burden of the buyer the amount of the tax as to which, the contract being silent, he is not bound.

[5] The provisions of the act are not in conflict with the foregoing construction Section 6011 does not provide, as is contended, that the sales price is exclusive of the sales tax. And although Section 6012, defining gross receipts, provides that *"For purposes of the sales tax,* if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed" (italics ours), yet such language was designed to prevent taxing the amount collected from the consumer for tax payments and does not define sales price as between retailers and buyers.

Our conclusion that the right of the retailer to "pass on" or reimburse himself for the amount of the tax is based upon the terms of the contract of sale is sustained by other cases which have considered this aspect of the act. In National Ice, etc., Co. v. Pacific Fruit Express Co., 11 Cal.2d 283, 292, 79 P.2d 380, the court indicated the tax could be "passed on" to the purchaser with his consent either expressly or impliedly given. In De Aryan v. Akers, supra, the court states, 12 Cal.2d at page 786, 87 P.2d at page 697: "It must be conceded that the purchase price ultimately is necessarily the source from which payment of the tax must be made. The consumer still has the right to purchase or not at the asked price which includes the tax. Any quibbling between the parties, in an attempt to differentiate between the purchase price and the tax by reason of the separate statement of the amount intended as tax reimbursement, will not alter the fact that within the purview of the legislative enactment the aggregate of the list price and the amount of tax reimbursement constitutes the actual purchase price of the commodity." See, also, Clary v. Basalt Rock Co., 99 Cal.App.2d 458, 222 P.2d 24.

Appellant argues that the provisions of the sales tax law were a part of the contract between the parties, both by reason of legal rules and also by the express terms of the contract. Herein they note the provisions of the act as hereinbefore set out and the provisions of the contract that it and all work and labor done under it and all transactions done pursuant to it are subject to the laws of the state. Appellant says: "The contract between the parties will be read and construed in every respect as if it recited the language of applicable statutes. Therefore, the contract between the seller and the buyer should be read as if at some place it stated in substance the following: It is understood between the parties that the retailer is required to pay a sales tax of 2½ per cent upon the sales price of the scows hereinabove referred to. It is further understood that said sales tax shall be collected by the retailer from the consumer. It is further understood that the retailer must not directly or indirectly advertise or hold out or state to the Board that said sales tax or any part thereof will be assumed by the retailer, or absorbed by the retailer, or that it will not be added to the selling price of the property sold. Putting it another way, it is the same as if the contract said in so many words: The sales tax will be added to the contract price."

[6] The conclusions we have stated herein are based not only upon the literal wording of the statute, but also upon the constructions placed thereon by the courts in decisions which have become a part of the law. Consequently, the contract made between the parties to this action must be interpreted not only in accordance with the literal wording of the statute law, but in accordance also with the judicial construction of that statute law, and as so interpreted we think that the complaint herein did not state a cause of action.

The judgment appealed from is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.

111 Cal.App.2d 53

BEATTY et al. v. OAKLAND SHEET METAL SUPPLY CO.

Civ. 14864.

District Court of Appeal, First District, Division 2, California.

May 12, 1952.

As Amended on Denial of Rehearing June 11, 1952.

Hearing Denied July 10, 1952.

Helen K. Beatty and others sued Oakland Sheet Metal Supply Company for loss of profits on account of alleged breach of contract. The Superior Court, Alameda County, Thomas J. Ledwich, J., rendered judgment in favor of plaintiffs, and defendant appealed. The District Court of Appeals, Jones, J. pro tem., held that the evidence sustained the trial court's findings.

Affirmed.

1. Pleading 🔑200

Allegation in answer that complaint failed to state cause of action constituted, in effect, general demurrer.

2. Sales 🔑411

Amended complaint, alleging sale of steel to plaintiffs on contract, resale by them at higher price, repudiation by defendant of its contract, impossibility of procuring other steel to supplant that contracted for, and resulting damage, stated good cause of action for loss of profits on account of breach of contract.

3. Contracts 🔑16, 22(1), 23

Where counter proposal is accepted by original offeror, a binding contract is concluded, but acceptance must be unequivocal assent to offer, though it is not essential that identical language be repeated and any form of expression showing clearly an intention to accept on terms proposed, that is a consent to same subject matter in same sense, is sufficient, if not coupled with some new condition, and in fact conduct of offeree may, under proper circumstances, constitute acceptance.

4. Sales 🔑52(5)

In buyers' action to recover for loss of profits on account of seller's alleged breach of contract, evidence established that contract had in fact come into existence.

5. Principal and Agent 🔑23(1)

In action for loss of profits on account of alleged breach of contract, evidence sustained trial court's conclusion that parties were acting for themselves and not as agents for others.

6. Appeal and Error 🔑1010(1)

Appellate court was without power to substitute any other finding or interpretation when conclusion of trial court was supported by substantial evidence.

7. Sales 🔑19

Where seller promised to deliver steel to buyers and buyers promised to pay $175 per ton for it, there was no lack of consideration. Civ. Code, § 1605.

8. Appeal and Error 🔑882(8)

Appellant could not question relevancy of evidence offered by itself at trial.

9. Appeal and Error 🔑1011(1)

It is not function of reviewing court to reconcile conflicts in evidence.

10. Sales 🔑172

If party desires to be free from his obligation to deliver commodity in event of nonproduction by particular concern, it is incumbent upon him to make clear provision to that effect in his contract.

11. Sales 🔑417

In action for loss of profits on account of alleged breach of contract, evidence sustained trial court's finding that parties had not intended that steel which was subject of contract was to be produced by any particular concern.

12. Sales 🔑418(9)

In action for loss of profits on account of alleged breach of contract, evidence established that defendant had had knowledge of resale effected by plaintiffs and had been cognizant of price at which steel, which was subject of contract, was being resold; and therefore rule against recovery of special damages based on resale where seller has not been informed of resale was not applicable.

13. Appeal and Error 🔑1011(1)

Appellate court may not disturb findings upon ground of conflict in evidence alone.

14. Appeal and Error 🔑1010(1)

In order to secure reversal of judgment on ground that findings are not sustained by the evidence, appellant must show that there is no substantial conflict in evidence upon which findings are based and that facts as found, as well as all reasonable inferences deducible therefrom, are contrary to proven facts.

Morris M. Grupp, San Francisco, for appellant.

Brown, Smith & Ferguson and Jacqueline Taber, all of Oakland, for respondents.

JONES, Justice pro tem.

This appeal is from a judgment awarding damages in the sum of $145,600 for loss of profits on account of an alleged breach of contract. The action has arisen out of a transaction in which plaintiffs, who are brokers in commodities, claim that they bought 20,800 tons of sheet steel from the defendant, Oakland Sheet Metal Supply Company, on a contract, and had the steel resold at an advance, or overage, of $7 per ton when the defendant repudiated its contract. The trial court found for the plaintiffs and rendered judgment for the amount of the overage. It is from this judgment that the defendant has appealed.

Appellant has challenged the evidentiary value of the written instruments and most of the oral testimony upon which the findings of the trial court are based, and we deem it advisable for an ample statement of the facts to set out the writings and some verbatim excerpts from the testimony.

On February 20, 1948, after previous negotiations, Helen K. Beatty, one of the partners in the brokerage firm, presented to Isadore Schechtman, vice president of the defendant corporation, a purchase order in the following form:

"Cattle-Rice
Grain-Fruit Licensed Broker
General Merchandise TWinoaks 9833
Beatty Company
Importer-Exporter
3503 Lakeshore Ave.
Oakland 12, Calif.
20 February 1948

Oakland Sheet Metal Supply Co.,
2100 Poplar Street,
Oakland, California
Gentlemen:
Att: Isadore Schechtman

Please consider this as our purchase order No. 09302, covering the following merchandise:

20,800 tons Cold Rolled SAE 1010 Deep Drawn Prime Steel Sheets, gauges and standard mill sizes—buyer's choice (sizes to be stipulated upon receipt of mill commitment). Mill must ship minimum of 400 tons of steel per week for 52 consecutive weeks commencing June 1, 1948. Price of steel is $175.00 per net ton, FOB mill, Pennsylvania area. Mill commitment and delivery guarantee to be in our office this date, otherwise this Purchase Order is null and void. Subject to the terms and conditions as above stated, this may be considered a non-cancellable purchase order.

Yours very truly,
Beatty Company
Helen K. Beatty"

HKB/nbb

On the same date Schechtman handed Mrs. Beatty a writing in language as follows:

"Oakland Sheet Metal Supply Co.
J. Leson
Oakland 7, California
February 20, 1948
21st & Poplar Streets,
P. O. Box 86
Telephone HIgate 2075–6–7
Beatty Company
3503 Lakeshore
Oakland, California.
Attention: Mrs. Helen K. Beatty
Gentlemen:

This is acknowledgment of your Purchase Order #09302 for 20,800 tons Cold Rolled SAE 10–10 Deep Drawn Prime Steel, gauges between 10 and 26, maximum width 48″, maximum length 120″, F.O.B. Tidewater, Pennsylvania, price $175.00 per net ton. Shipment of this steel will commence during the month of June for a twelve-month period, final shipment to be made approximately May 31, 1949. Our principals, the Atlantic Seaboard Steel Corporation, will deliver approximately 400 tons of steel per week for fifty-two consecutive weeks, subject to normal steel allowances of 15% up or down. This commitment is subject to riots, strikes, Acts of God, war, government rules, laws and regulations, either federal, state or municipal, and any other conditions beyond the control of the mill. The purchaser has the option to accept or reject any steel undelivered because of the aforementioned causes.

Your principals will establish a 90 day Letter of Credit, non-cancellable, irrevocable and divisible with permission for us to pass on to the mill the right to purchase raw materials which, when so bought, will remain in your customers name and the full price of such materials will be deducted from the price of steel when delivered. The steel mill has agreed to guarantee such payments by depositing with Mr. Granville Carroll, Vice-President, National City Bank, 55 Wall Street, New York, New York, all of the capital stock of the company, with the exception of the number of qualifying shares necessary to be held by the officers and directors and a complete equity of the company in its real estate and building, as well as all its machinery and chattels whose value far exceeds any possible advance. The purchaser has the option to cancel any order if delivery does not commence in June and will be repaid by the Atlantic Seaboard Steel Corporation advance in full, plus six (6%) per cent interest.

We trust this meets with your approval.

Very truly yours,
Oakland Sheet Metal Supply Co., Inc.
Isadore Schechtman"
IS/ds

This document was handed to Mrs. Beatty in Schechtman's office, and the record discloses that she then said:

"Q. Was there anything said then, by either you or Mr. Schechtman? A. Yes, I said it was entirely satisfactory. I had shown a similar one, as I mentioned, the day before, to my customer; and it was entirely satisfactory.

"Q. Was anything said by Mr. Schechtman? A. Nothing more at that time, that I can think of.

"Q. What did you do then? A. I left the office."

When she called on Schechtman Mrs. Beatty called to his attention the following purchase order from Salvatore Persico to her:

"Order No. 05776—Date Feb. 20th, 1948
M. Beatty Company
Address 3503 Lakeshore Avenue,
Oakland, California
Ship to—Instructions to follow
At
How Ship When
Terms Per agreement
Salesman
Buyer Salvatore Persico Waterbury, New & Used Contractor's Equipment Co. 20,800 Tons of SAE 10–10 cold rolled Steel sheets deep drawn prime

Steel—gauges and standard mill sizes buyers choice. Sizes to be stipulated upon receipt of mill commitment. Minimum shipment 400 tons per week for 52 consecutive weeks commencing June 1st, 1948 @ $182.00 per net ton f. o. b. mill Pittsburgh, Pennsylvania area. Mill commitment guaranteed to be in this office this date. This is subject to terms and conditions above stated and is to be considered non-cancellable.

Reference: Waterbury National
Bank Waterbury, Connecticut
Louis F. Brandley (Mention Steel)
Salvatore Persico
Waterbury New & Used Contractor's
Equipment Co.
47 Wilson Street
Waterbury, Connecticut."

Shortly after leaving Schechtman's office Mrs. Beatty wrote Persico as follows:

"Beatty Company
3503 Lakeshore
Oakland, California
February 20, 1948

Mr. Salvatore Persico
Waterbury New and Used Contractors
Equipment
47 Wilson Street,
Waterbury, Conn.
Gentlemen:

This is acknowledgment of your Purchase Order #09302 for 20,800 tons Cold Rolled SAE 10–10 Deep-Drawn Prime Steel, gauges between 10 and 26, maximum width 48″, maximum length 120″, F.O.B. Tidewater, Pennsylvania, price $182.00 per net ton. Shipment of this steel will commence during the month of June for a twelve month period, final shipment to be made approximately May 31, 1949. Our principals, the Atlantic Seaboard Steel Corporation, and the Oakland Sheet Metal Supply Co., 21st & Poplar Streets, P. O. Box 86, Oakland 7, California, will deliver approximately 400 tons of steel per week for fifty-two consecutive weeks, subject to normal steel allowances of 15% up or down. This commitment is subject to riots, strikes, Acts of God, war, government rules, laws and regulations, either federal, state or municipal, and any other conditions beyond the control of the mill. The purchaser has the option to accept or reject any steel undelivered because of the aforementioned causes.

Your principals will establish a 90 day Letter of Credit, non-cancellable, irrevocable and divisible with permission for us to pass on to the mill the right to purchase raw materials which, when so bought, will remain in your customers name and the full price of such materials will be deducted from the price of steel when delivered. The steel mill has agreed to guarantee such payments by depositing with Mr. Granville Carroll, Vice-President, National City Bank, 55 Wall Street, New York, New York, all of the capital stock of the company, with the exception of the number of qualifying shares necessary to be held by the officers and directors and a complete equity of the company in its real estate and buildings, as well as all its machinery and chattels whose value far exceeds any possible advance. The purchaser has the option to cancel any order if delivery does not commence in June and will be repaid by the Atlantic Seaboard Steel Corporation advance in full, plus six (6%) per cent interest.

We trust this meets with your approval.

Very truly yours,
Beatty Company
Helen K. Beatty"

HKB/ed

One of the contentions of appellant is that there is no evidence to show this offer of the steel by the Beatty Company to Persico was ever accepted by him. However, the defendant read into evidence the deposition of Benedetti, one of the partners of the Beatty Company, from which it appears:

"Q. You and Mr. Persico waited at the hotel? A. Yes.

"Q. Mrs. Beatty came there? A. That's right.

"Q. At the Leamington Hotel, to a public stenographer, there was dictated the commitment to Persico, is that correct? A. That's right.

"Q. And then Mr. Persico signed it right then and there? A. He did not have to sign it.

"Q. I mean, you signed it or Mrs. Beatty signed it? A. Mrs. Beatty did.

"Q. And delivered it to Mr. Persico? A. That's right.

"Q. And he left, is that correct? A. He left that evening. * * *

"Q. Now, when did you next hear from Mr. Persico? A. When I received a wire from him, or a call from him, either the next day or the day after that, wanting to know if it was through, and everything was all right, and if this was actually the true commitment, or if it was a real firm offering. He wanted to know about the Oakland Sheet Metal, and if we had checked on it, and we told him we had checked on the Oakland Sheet Metal and found out they were a reliable firm on a firm offering of sheet steel. So then several days later, I received another wire, telling me it was sold.

"Q. You say 'another wire'. The first was a telephone conversation? A. Yes.

"Q. Then you received a wire? A. Yes.

"Q. And it told you what? A. That it had been sold.

"Q. That the steel had been sold? A. Yes.

"Q. And when was this? A. On or about the 28th.

"Q. Of what? A. February."

The following letter was sent to the Beatty Company by Schechtman on March 3, 1948:

"Oakland Sheet Metal Supply Co.
J. Leson
Oakland 7, California
21st & Poplar Streets,
P. O. Box 86
Telephones HI 2075-6-7
Beatty Company
3505 Lakeshore Ave.
Oakland, California.
Attention: Mr. Helen K. Beatty
Subject: Your Order No. 09031, 09302, 09303

Gentlemen:

Pursuant to subject orders and our letters of February 19 and 20th, pertaining to same, please be advised effective immediately, we are withdrawing any tentative commitments we have made regarding same.

We have not received any firm commitments from the Atlantic Seaboard Steel Company pertaining to the steel you desire to purchase. We have been offered the opportunity of purchasing cold rolled sheets originating from the Atlantic Seaboard Steel Company from other brokers. On tracing the originating commitments we find they have originated from the tentative commitments given to you.

Due to the above we have no other alternative than to withdraw all tentative commitments made to you. Upon receipt of firm commitments from the Atlantic Seaboard Steel Company we shall resume negotiations with you for purchasing of steel.

We trust this meets with your approval.

Yours very truly,
Oakland Sheet Metal Supply Co., Inc.
Isadore Schechtman"

IS:cr.

The Atlantic Seaboard Steel Corporation has no mill and was not producing steel at the time the above quoted correspondence was written. A group, including Schechtman of the Oakland Sheet Metal Supply Company, were promoting a rolling mill to be operated by the corporation. Steel ingots and bars were to be purchased in the market and rolled into sheets and plates. The promoters planned that the purchase would be financed by letters of credit to be established by purchasers of the rolled steel. The projected mill failed to materialize and the Atlantic Seaboard Corporation never produced any steel.

The grounds urged for reversal by appellant are identical to defenses made by its answer which were not abandoned. In addition to a denial of the allegations of the amended complaint the answer sets up several different special defenses. Of these special defenses the one which challenges the legal capacity of the plaintiffs to sue was abandoned at the trial. As to all other defenses, generally and specially made, the trial court found against the defendant upon substantial evidence.

These special defenses include the pleas that the action is barred by the statute of limitations, a point not urged on appeal; the non-existence of a contract; that the defendant was acting as an agent for a disclosed principal; a variance between the purchase offer of the plaintiffs and the counter offer of the defendant; failure of defendant to comply with the purchase order allegedly rejected by its own counter offer; non-acceptance of its counter offer; and lack and failure of consideration.

[1, 2] The answer also pleads that the amended complaint does not state facts sufficient to constitute a cause of action. As is stated in Smith v. Tristam, 130 Cal.App. 750, 754, 20 P.2d 770, 771, "This (is) was in effect a general demurrer", and goes to appellant's point that the demurrer was improperly overruled. The amended complaint alleges the sale of the steel to the plaintiffs on contract; the resale by them of the steel at a higher price; the repudiation by the defendant of its contract; the impossibility of procuring other steel to supplant that contracted for; and the resulting damage. This, we think, states a good cause of action.

The contract does not, as hereinafter pointed out, state on its face that defendant was acting for a disclosed principal and not for itself in the transaction.

[3, 4] Appellant contends in the first place, as it has specially pleaded in its answer, that a contract for the sale of the steel never came into existence. It argues with much vigor that there was never an acceptance of its counter offer by the plaintiffs. It is also contended that as to the resale there is no evidence to show that Persico accepted plaintiffs' counter offer.

It is, of course, the rule that if a counter proposal is accepted by the original offeror, a binding contract is concluded. 6 Cal.Jur. p. 63. The acceptance, however, must be an unequivocal assent to the offer, although it is not essential that the identical language be repeated. As is said in Ennis Brown Co. v. W. S. Hurst & Co., 1 Cal.App. 752, 761, 82 P. 1056, 1059: "Any form of expression showing clearly an intention to accept on the terms proposed—i. e., a consent to the same subject-matter in the same sense—would be sufficient, if not coupled with some new condition * * *." Grimes v. Nicholson, 71 Cal.App.2d 538, 162 P.2d 934; Grant v. Long, 33 Cal.App.2d 725, 92 P.2d 940. And in Grant v. Long, 33 Cal.App.2d 725, 736, 92 P.2d 940, 947, it is said that: "While an express contract is one, the terms of which are stated in words (Treadwell v. Nickel, 194 Cal. 243 228 P. 25), one party may use the words and the other may accept, either in words or by his actions or conduct. Lane v. Superior Court, 104 Cal.App. 340, 285 P. 860." In Grimes v. Nicholson, 71 Cal.App.2d 538, 541, 162 P.2d 934, 935, the court said that, "Respondent's statement of the terms upon which he would perform the work, followed by appellant's answer 'O. K.' and 'O. K. we will go to work,' constituted a valid and binding contract between the parties whereby appellant agreed to the conditions as stated by respondent." Conduct of the offeree may, under proper circumstances, constitute acceptance. In Fidelity etc. Co. v. Fresno Flume etc. Co., 161 Cal. 466, 473, 119 P. 646, 648, 37 L.R.A.,N.S., 322, the court said: "The receipt and acceptance by one party of a paper signed by the other, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper. 9 Cyc. 260, 391; Civ.Code, § 1589; Watkins v. Rymill, L.R. 10 Q.B.D. 178, 188." Also in Dallman Supply Co. v. Smith-Blair Inc., 103 Cal.App.2d 129, 132, 228 P.2d 886; this court followed the rule so enunciated, setting out the language above quoted and citing in support thereof Frankfort etc. Co. v. California Artistic Metal & Wire Co., 28 Cal.App. 74, 82, 151 P. 176; Remsberg v. Hackney Manufacturing Co., 174 Cal. 799, 802, 164 P. 792; Barlow v. Frink, 171 Cal. 165, 170, 152 P. 290; Fidelity etc. Co. v. Fresno Flume etc. Co., 161 Cal. 466, 473, 119 P. 646, 37 L.R.A., N.S., 322; Bloom v. Hazzard, 104 Cal. 310, 37 P. 1037; California Jewelry Co. v. Provident Loan Ass'n, 6 Cal.App.2d 506, 510-511, 45 P.2d 271.

When Schechtman handed to Mrs. Beatty the written terms of his offer to sell, she said to him that the offer "was entirely satisfactory". She took the writing with her, and based her written offer to Persico on the terms which it contained. Schechtman knew as is hereinafter more fully set forth that Mrs. Beatty intended to sell the steel to Persico. She told him that his offer was satisfactory, she took the writing with her, and she acted on it as she had told him she was going to act. It is difficult to perceive how a clearer case of acceptance would be established.

The written offer by Mrs. Beatty to Persico was personally accepted by him, he verified it both by telephone and telegraph, and reported the steel sold, all before the letter of repudiation by the Oakland Sheet Metal Supply Company was written on March 3, 1948. As with the original offer, a clear case of acceptance of the Beatty counter offer is made out.

[5, 6] It is argued by appellant that the sale was made not for itself but for a disclosed principal, the Atlantic Seaboard Steel Corporation, and that the Beatty Company was likewise acting for Persico, a disclosed principal, and that neither agent is bound. In this connection it is urged that Schechtman's letter of February 20th by its own terms establishes the agency of the Oakland Sheet Metal Supply Company. A situation similar in many respects was presented in the case of Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 161 P. 25. It was there said: "The single question presented * * * is whether the contract * * * was one whereby the plaintiff agreed to sell and the defendants agreed to purchase * * *, or, to put the proposition in another form * * * whether the parties to the contract intended it to operate only to create between them the relation of principal and agents or that of creditor and debtor * * *." It was held in that case that the contract was ambiguous in the respect stated, and the court said: "So, if there were no other evidence in this record but the instrument itself which throws or tends to throw any light on the relation which the parties by the contract intended to establish between themselves, * * * it would be our duty—to uphold the construction given the contract by the trial court, as evidenced by its findings." The court there as in the case at bar had not only the writing itself before it, but there was much oral evidence of the facts and circumstances surrounding its execution permitted in evidence in aid of its interpretation. In this case the trial court permitted an exceptionally full and complete showing of the facts and circumstances leading up to and surrounding the execution of the writing. In Nuland v. Pruyn, 99 Cal.App.2d 603, 609, 222 P.2d 261, 265, wherein the case of Slama Tire Protector Co. v. Ritchie is cited with approval, it is said: "'* * * Whether a contract is in any of its terms ambiguous or uncertain is a matter of determination in the first instance by the trial court. If it is found so to be, it is primarily the duty of such court to construe it, after a full opportunity afforded the parties to produce evidence of the facts, circumstances and conditions surrounding its execution, and the conduct of the parties relative thereto. * * * And where a writing is so unceratin that either of the two constructions urged might be sustained, it is not within the functions of a court of review to declare that the interpretation given by the trial court should be supplanted by the other construction of which the instrument is susceptible.' 6 Cal.Jur. 327, sec. 192." See Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34, 37, where it is said that if "The construction given the instrument by the trial court appears to be consistent with the true intent of the parties * * * the appellate court will not substitute another interpretation, *though it seem equally tenable.*" (Italics added.) Since the record discloses much substantial evidence to support the conclusion of the trial court that the parties were acting for themselves and not as agents for others, this court is without power to substitute any other findings or interpretation.

[7, 8] Appellant's addititonal contention that there is such a lack of consideration that there is no basis for a contract is equally without merit. Civil Code Section 1605 defines consideration as "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

Section 75 of the Restatement of Contracts states the "Consideration for a promise" to be "a return promise, bargained for and given in exchange for the promise." The court in this case in effect found that the seller promised to deliver 20,800 tons of steel to the buyer, and that the buyer promised to pay $175 per ton for it. These promises were the considerations moving each of the respective parties.

Much emphasis is laid on the fact that letters of credit had not been established up to March 3, 1948, the date of the repudiation. The trial court found that the time intervening, less than two weeks, was not a reasonable time in which to establish a credit for the price of the steel which totals $3,640,000. The record discloses that a credit sufficient to finance the purchase by Persico had been established in a New York bank and that a designation by the Oakland Sheet Metal Supply Company of the bank in which to establish the letter of credit was being awaited by the purchasers. As heretofore stated appellant read into evidence the deposition of Nicholas Benedetti, from which deposition it appears, "Q. What did he (Persico) say about the money? A. That the money was in bank, waiting to be—I don't know whether it was waiting to be transferred or what, but he had received his funds from the group in New York." And "* * * I was informed that the money was up and ready to finance the buying of the steel." As stated, this evidence was offered by the appellant and it cannot now question its relevancy. In connection with the other evidence in the case it at least affords a basis for the inference that the contract of sale was revoked before respondents had a reasonable time to establish the required letter of credit.

[9–11] Appellant argues that even though an effective contract did result from its negotiations with respondents, nevertheless its offer was of steel from a specific source, and this source never materialized and it became excused from performance. It is contended that there was an implied condition precedent in the offer, known and understood by all parties to the transaction that the offered steel was to be manufactured by the Atlantic Seaboard Steel Corporation, and that since no mill was set up and no steel rolled, appellant was not bound to make delivery from any other source. The trial court found "that said contract was not conditioned upon the coming into existence of any steel mill nor upon any other condition not expressly set forth in the written offer." The question which appellant presents is again one of fact, and, if there is any substantial evidence to support the recited finding this court under a legion of authorities is without power to set it aside.

In the counter offer of appellant the particular steel to be delivered is not specified. There is a statement that the delivery will be by the Atlantic Seaboard Corporation, but not that it is to be produced by them. The language of the counter offer is: "Our principals, the Atlantic Seaboard Steel Corporation *will deliver* approximately 400 tons of steel per week for fifty-two consecutive weeks, subject to normal steel allowances of 15% up or down." (Italics added.) This is the only language contained in the counter offer with respect to delivery and it is barren as to the source of the steel. The only person bound to effect the delivery is appellant whose signature is affixed to the writing.

The record discloses that the oral testimony is in sharp conflict on the issue of implied conditions. Mrs. Beatty testified that she had no knowledge of any mill to be built by the Atlantic Seaboard Corporation, and that she was dealing with the Oakland Sheet Metal Supply Company expecting it to procure the steel from whatever source it might select. In her testimony she flatly denies the statements of Schechtman that he had explained to her that the steel sold was to be produced by the Atlantic Seaboard Steel Corporation. On the other hand his testimony on this material issue that such statements and explanations were so made is positive. The trial court was confronted with the problem of believing or disbelieving one or the other of the witnesses. It is not the function of the reviewing court to reconcile such a conflict.

There is no provision in the counter offer against nonproduction by the Atlantic Seaboard Steel Corporation. As is said in S. L. Jones & Co. v. Bond, 191 Cal. 551, 555, 217 P. 725, 727, "If a party desires to be free from his obligation to deliver a commodity in the event of nonproduction by a particular concern, it is incumbent upon him to make a clear provision to that effect in his contract. Law v. San Francisco Gas etc. Co., 168 Cal. 112, 142 P. 52, Ann.Cas.1915D, 842." From the failure of appellant to incorporate such a provision in the written offer of its own preparation the trial court may well have inferred that none was intended. Such an inference is, of course, sufficient to sustain the finding that the parties did not intend that the steel was to be produced by any particular concern.

[12] The right of respondents to damages for loss of profits is also challenged by appellant. This challenge is made on the ground that no knowledge was had by appellant of the resale to Persico. Authorities are cited in support of the rule that special damages based on a resale of the subject matter of the sale, such as loss of profits which would have accrued to a buyer had be been able to carry out the resale contract, cannot be recovered by him for a breach of the sale contract by the seller, where the latter was not informed of the resale and was not chargeable with notice thereof. The facts in this case decisively establish that the defendant did have knowledge of the resale and was cognizant of the price at which the steel was being resold. The verbatim testimony of Mrs. Beatty is:

> "Q. I show you here, Mrs. Beatty, a paper dated February 20, 1948, showing an order No. 05776, signed by Salvatore Persico at the bottom, and ask you if you recognize that? A. Yes, that is an order from my customer.
>
> "Q. Did you present that to Mr. Schechtman? A. I presented that to Mr. Schechtman together with a purchase order of my own, which I handed to him.
>
> "Q. You did present this to Mr. Schechtman? A. I presented both of them to him at the time.
>
> "Q. On what day? A. The 20th of February, 1948.
>
> "Q. How did you present this to Mr. Schechtman? A. In person.
>
> "Q. You handed it to him? A. Yes.
>
> "Q. Where? A. In his office.
>
> "Q. On the 20th of February, 1948? A. On the 20th of February, 1948, yes."

The testimony of Schechtman is:

> "Q. Did you read the orders from Mr. Persico? A. Yes.
>
> "Q. And you knew she was selling this steel to Mr. Persico? A. That is right.
>
> "Q. And the order said that her sale to him was at the rate of $182.00 per ton? A. That is right.
>
> "Q. And you learned that any time prior to the 20th of February? A. No sir.

"Q. But you did know it on the 20th of February when you read this letter? A. That is right, when I read the purchase order that was made to her, Persico's purchase order.

"Q. That is right, Persico's purchase order to her and that was handed to you at that time? A. She showed it to me and—

"Q. You did read it? A. Yes sir."

The undisputed facts of the case rule out the doctrine relied on by appellant, and the authorities cited are not in point.

That it is not unusual for brokers to buy on their own account and to sell at an advance in lieu of a commission is demonstrated by the case of Laurence v. Pacific Oil etc. Works, 27 Cal.App. 69, 148 P. 964. The mark up is termed overage. In that case the broker bought oil on his own account from a vendee under an original contract of sale and sold it to his own customers at an advanced price. The vendor under the original contract delivered the oil to the broker's customers at his direction and collected at the broker's price. It then refused to pay him his overage. The trial court gave judgment for the overage, which judgment was sustained.

The case of Morello v. Growers Grape Prod. Ass'n, 82 Cal.App.2d 365, 375, 186 P.2d 463, 469, quoting from Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 249, 41 P. 1020, states that, "Loss of profits which, like those claimed in the case at bar, are the direct and natural results of a contract, and which the law implies from such breach, *are recoverable without special allegations.*" (Italics added.) To the same effect is Patty v. Berryman, 95 Cal.App.2d 159, 212 P.2d 937.

[13, 14] Every ground urged by appellant for reversal presents a question of fact, upon which the trial court has made a finding based on substantial evidence. This evidence is in some particulars conflicting, but this court may not disturb the findings upon the ground of conflict alone. Taylor v. J. B. Hill Co., 31 Cal.2d 373, 378, 189 P.2d 258. In Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, our Supreme Court has made the statement, which many courts have adopted, that, "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court", citing Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483. The same rule applies of course when the court sitting without a jury is the trier of the facts. And in Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593, 596, the court said: "* * * as to the sufficiency of evidence to support findings, it is the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible." To the same effect are Powell v. Pacific Electric Railway Co., 35 Cal.2d 40, 42, 216 P.2d 448; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689 and Moran v. Board of Medical Examiners, 32 Cal.2d 301, 309, 196 P.2d 20. In order to secure the reversal of a judgment on the grounds that the findings are not sustained by the evidence an appellant must show that there is no substantial conflict in the evidence upon which the findings are based, and that the facts as found as well as all reasonable inferences deducible therefrom are contrary to the proven facts. In the present case this not been done.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

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PEOPLE v. PEARSON.

Cr. 4749.

District Court of Appeal, Second District,
Division 2, California.
May 9, 1952.

Rehearing Denied May 20, 1952.

Prosecution for removing certain papers on file in a sheriff's office while defendant was a deputy sheriff. From an order of the Superior Court, Los Angeles County, Arthur Crum, J., denying defendant's motion for a new trial after conviction, he appealed. The District Court of Appeal, Moore, P. J., held that the evidence was sufficient to sustain the conviction.

Order affirmed.

1. Records 🔑21, 22

Question of intent is not involved under statute prohibiting removal or destruction of records, as mere doing of act forbidden by statute is sum total of judgment against defendant. Government Code, § 6200.

2. Records 🔑21

Evidence was sufficient to sustain conviction of violating statute by removing certain papers on file in sheriff's office while defendant was a deputy sheriff. Government Code, § 6200.

3. Records 🔑21

A deputy sheriff was an "officer" within statute declaring officer removing or permitting another to remove any paper in officer's custody, filed or deposited in any public office, punishable by imprisonment in state prison. Government Code, §§ 6200, 24000, 24100.

See publication Words and Phrases, for other judicial constructions and definitions of "Officer".

4. Criminal Law 🔑1159(2)

Where defendant's guilt of crime charged was established by honest inferences from and indisputable facts in evidence, reviewing court is powerless to interfere with judgment of conviction.

5. Records 🔑21

A sheriff's vice squad's former captain, ordering squad sergeant to remove certain confidential records, valuable to law-enforcing agencies, from sheriff's office, and advising, encouraging and abetting sergeant to accomplish such removal, became principal in crime of removing records, though he did not personally remove them and was absent from office at time of their removal. Government Code, § 6200; Pen.Code, § 971.

6. Records 🔑21

A sheriff's vice squad's sergeant, following former squad captain's orders to remove confidential papers, valuable to law-enforcing agencies, from sheriff's office, became such former captain's partner in crime of removal thereof by voluntarily uniting with him in violating statute, regardless of fact that sergeant was only person present who knew combination of safe containing papers when ordered to remove them. Government Code, § 6200; Pen. Code, § 971.

7. Records 🔑21

Papers prepared by sheriff's vice squad's captain to show grand jury work done by squad in apprehending criminals, sheriff's letters to such captain concerning reported crimes, his replies thereto, communications from citizens giving evidence of criminal activities, and captain's memoranda used by him in testifying before grand jury, were confidential public records entitled, because of public policy, to protection of statute prescribing punishment of officers removing records filed or deposited in public office. Government Code, § 6200.

8. Records 🔑1

A paper written by public official in performing his duties or recording efforts of himself and those under his command or written plan of future work by him is "public record" properly in keeping of his office.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Record".

9. Records 🔑21

Intent not being made affirmative element of statutory crime of officer's removal of papers in his custody from public office in which filed or deposited, statute imputed criminal intent in very enactment thereof, so as to render allegation or proof of such intent unnecessary in prosecution for violating statute. Government Code, § 6200.

10. Records 🔑21

In prosecution of former deputy sheriff for removing confidential papers from sheriff's office in violation of statute, evidence was sufficient to take to jury question of defendant's criminal intent, regardless of presumption, inherent in statute, of such intent. Government Code, § 6200.

11. Criminal Law 🔑706

In prosecution of former captain of sheriff's vice squad for removing certain papers from sheriff's office, question asked defendant as witness by deputy district attorney as to whether papers would not be accessible or available to "a hoodlum lawyer" like attorney to whom defendant showed them was improper as evidencing perfervid zeal to impress jury that defendant had forsworn his duty to maintain honorable associates or shown records of his office to an ally of the underworld. Government Code, § 6200.

12. Criminal Law 🔑730(3)

In prosecution of former captain of sheriff's vice squad for removing certain papers from sheriff's office, improper question, asked defendant as witness by deputy district attorney, as to whether papers would not be accessible or available to "a hoodlum lawyer" like attorney to whom defendant showed them, was not prejudicial to defendant, where prosecutor promptly apologized and explained that he meant a lawyer for hoodlums, trial court expressed disapproval of question and ordered counsel to leave such attorney out of trial, and prosecutor's true purpose was promptly disclosed by his inquiry as to whether such attorney was entitled to see vice squad records. Government Code, § 6200.

13. Criminal Law 🔑1144(15)

The jury is presumed to have complied with trial court's instruction to disregard any sinister intimation arising from questions asked defendant as witness and to disregard matter stricken from record.

14. Criminal Law 🔑706

In prosecution of former captain of sheriff's vice squad for removing papers from sheriff's office, objection to question asked squad's former sergeant, who actually removed papers, on his direct examination by deputy district attorney, as to whether certain lawyer, to whom defendant had returned gambling paraphernalia after lawyer's client pleaded guilty of gambling offense, signed receipt therefor, was properly overruled, where purpose of question was to show that such receipt, which was among papers removed, was official document, not defendant's personal property, same inquiries were substantially made by defendant's counsel, and there was no showing of deputy district attorney's bad faith. Government Code, § 6200.

15. Criminal Law 🔑706

In prosecution of sheriff's vice squad's former captain for removing papers from sheriff's office, question asked defendant as witness by deputy district attorney as to whether finance company which defendant had testified that his office had investigated, was bookmaking syndicate operating on certain street, was not improper, where defendant was questioned by his own counsel in detail about such company and grand jury's investigation thereof was chief cause of defendant's visit to underworld character's attorney, to whom defendant exhibited papers. Government Code, § 6200.

16. Criminal Law 🔑1171(1)

In prosecution of sheriff's vice squad's former captain and sergeant for removing papers from sheriff's office question asked sergeant as witness by deputy district attorney as to whether defendant's attorney appeared for sergeant when attorney called on district attorney to ask for dismissal of prosecution as to sergeant, was not prejudicial to defendant, where question came in logically during prosecution's cross-examination of sergeant respecting conversation, heard by him, between defendant and underworld character's attorney, to whom defendant showed papers, and trial judge reminded parties that motion to dismiss as to sergeant was presented to court. Government Code, § 6200.

17. Criminal Law ⚷730(3)

In prosecution of former captain of sheriff's vice squad for removing papers from sheriff's office, deputy district attorney's question, on cross-examination of defendant, as to whether he told grand jury that he requested squad sergeant, who actually removed papers, to see that they were filed in proper place when he returned them to vice squad, was not misconduct, prejudicial to defendant, as implying that he concocted new story since testifying before grand jury, where question was propounded during attempt to impeach defendant, who had testified that he told sergeant that papers would be returned to files, and court instructed jury to disregard statements and implications in questions by attorneys. Government Code, §§ 6200.

18. Criminal Law ⚷919(2)

The trial court has broad discretion in determining whether questions to witnesses by, or other conduct of, counsel caused prejudice to defendant on consideration of his motion for new trial after conviction.

19. Criminal Law ⚷1173(2)

The trial court's rejection of defendant's proposed instruction that court, deeming evidence insufficient to warrant conviction of crime charged, advised jury to acquit defendant, but that jury was not bound to accept such advice, was not prejudicial error, in view of verdict of conviction, order denying defendant's motion for new trial, and healthful record disclosed by review of evidence.

20. Criminal Law ⚷814(6)

Defendant's proposed instruction to jury that act committed or omission made under ignorance or mistake of fact, which disproves any criminal intent, is not a crime, was properly rejected, in absence of evidence of any mistake of fact on defendant's part.

21. Criminal Law ⚷814(1)

In prosecution of former deputy sheriff for removing records from sheriff's office in violation of statute, defendant's proposed instructions to jury, defining "public record" and stating that mere fact that document is necessarily deposited or filed in public office or is in public officer's custody does not make it public record and that papers or memoranda not required by law to be kept as official records and public officers' memoranda made for their own convenience are not public records, were properly rejected as out of place and not bordering on law relating to statute, which was read to jury. Government Code, § 6200.

22. Criminal Law ⚷814(1)

In prosecution of former deputy sheriff for removing papers from sheriff's office, defendant's proposed instruction to jury that every citizen has right to inspect and take copy of any public writing, except as otherwise expressly provided by statute, was properly rejected as immaterial. Government Code, § 6200.

23. Criminal Law ⚷814(1)

In prosecution of former deputy sheriff for removing papers from sheriff's office, defendant's proposed instruction to jury that public record is record made by public officer in pursuance of duty for immediate purpose of disseminating information to public or serving as memorial of official transactions for public reference was properly rejected as deflecting jury's attention from issue of officer's removal and secretion of papers deposited in public office. Government Code, § 6200.

24. Criminal Law ⚷814(1)

In prosecution of former captain of sheriff's vice squad for removing papers from sheriff's office, defendant's proposed instruction to jury that mere fact that document is in public office or custody of public officer does not make it a public record was properly rejected as meaningless, as public records were not necessarily involved, especially where defendant testified that vice squad's papers were not open to public inspection. Government Code, § 6200.

25. Records ⚷13

Public policy requires that documents in sheriff's office relating to law enforcement be treated as confidential. Code Civ. Proc. § 1881, subd. 5.

26. Records ⚷21

In prosecution of former captain of sheriff's vice squad for removing papers from sheriff's office, defendant's proposed instruction to jury that mere fact that documents were taken from sheriff's office was not violation of statute, if they remained in custody of deputy sheriff entitled to custody thereof, was properly rejected as directly contrary to statutory inhibition and in view of defendant's testimony that he caused vice squad sergeant to remove papers from squad office, possessed them in an attorney's office without superior officer's consent, and removed from county file certain papers which did not appear until trial. Government Code, § 6200.

27. Criminal Law ⚷829(3)

In prosecution of former deputy sheriff for removing papers from sheriff's office in violation of statute, defendant's proposed instruction to jury that word "remove," as used in such statute, meant more than mere physical moving from a place, position or room, was properly rejected as adding nothing to court's general charge. Government Code, § 6200.

28. Criminal Law ⚷1173(1)

Refusal to instruct jury on mere commonplace is not prejudicial error.

29. Criminal Law ⚷814(17)

Where prosecution relied on direct evidence, defendant's proposed instructions pertaining to circumstantial evidence were properly rejected as not required.

30. Criminal Law ⚷814(17)

Where evidence is not entirely or even substantially circumstantial, rejection of defendant's proposed instructions adapted to purely circumstantial evidence is not error.

31. Criminal Law ⚷829(1)

Rejection of defendant's proposed instructions, covered by court's instruction to jury, was not error.

32. Criminal Law ⚷829(10)

The trial court, having stated law as applicable to all issues by reading to jury conventional, well-seasoned instructions with reference to accomplices, was not obliged to repeat any of such instructions proposed by defendant.

33. Criminal Law ⚷829(20)

Defendant's offered instruction to jury that one who does not actively commit offense, but aids, promotes or encourages its commission by act, counsel or both, is not deemed guilty thereof, unless he acted knowingly and with criminal intent, and that to abet another in commission of crime implies consciousness of guilt in instigating, encouraging, promoting or aiding commission thereof, was properly rejected as covered by trial court's instructions on intent, fraudulent purpose not required, and by Penal Code section. Pen.Code, § 20.

34. Criminal Law ⚷822(1)

In prosecution of former deputy sheriff for removing papers from sheriff's office, where trial court's instructions, taken as whole, fairly and fully covered every issue, defined Government Code section alleged to have been violated, words "officer", "intent required", "secret" and "accomplice," factors essential to corroboration, presumption of innocence, reasonable doubt and witnesses' credibility, jury was not misled and defendant suffered no material prejudice. Government Code, § 6200.

35. Indictment and Information ⚷10

Testimony before grand jury by former captain of sheriff's vice squad was sufficient to support his indictment for removing certain papers on file in sheriff's office. Government Code, § 6200.

36. Criminal Law ⚷364(4)
Records ⚷21

In prosecution of former captain of sheriff's vice squad for removing papers on file in sheriff's office, testimony of squad's former sergeant as to conversation, heard by him, between defendant and attorney for underworld characters before defendant opened package containing papers in such attorney's presence at his office, was admissible as res gestae and disclosing defendant's knowledge of purpose and nature of attorney's inspection of papers. Government Code, § 6200.

37. Criminal Law 🔑349

In prosecution of former captain of sheriff's vice squad for removing papers from sheriff's office, testimony of squad's former sergeant, who removed papers and delivered them to defendant, whom he then accompanied to office of attorney for underworld characters, as to what was said between defendant and such attorney concerning various documents and what took place after package containing papers was opened and folders exposed in such attorney's presence was admissible. Government Code, § 6200.

38. Criminal Law 🔑448(1)

In prosecution of sheriff's vice squad's former captain for removing papers from sheriff's office, trial judge acted within scope of his discretion in overruling objection that question asked squad's former sergeant as witness as to whether oft-mentioned "Guarantee Finance" referred to bookmaking syndicate on certain street called for conclusion. Government Code, § 6200.

39. Criminal Law 🔑349

In prosecution of sheriff's vice squad's former captain for removing from sheriff's office papers which he exhibited to attorney for underworld characters in squad sergeant's presence at attorney's office, sergeant's testimony as to telephonic conversation, in which defendant advised witness to leave with defendant matter of reporting their visit to attorney's office, was admissible as relevant. Government Code, § 6200.

40. Criminal Law 🔑404(4), 419(12)

In prosecution of former captain of sheriff's vice squad for removing from sheriff's office papers taken by squad sergeant from squad's files to defendant at office of attorney for underworld characters, such papers were admissible in evidence as essential to full presentation of state's case and not hearsay, where ample foundation therefor was laid by sergeant's testimony. Government Code, § 6200.

41. Records 🔑21

In prosecution of sheriff's vice squad's former captain for removing from sheriff's office papers carried by squad sergeant to defendant, question asked sergeant as witness concerning receipt, which should have been among such papers, for gambling equipment returned by defendant to person convicted of gambling offense was proper, as question whether documents involved were removed or secreted was paramount issue. Government Code, § 6200.

42. Records 🔑21

In prosecution of former captain and sergeant of sheriff's vice squad for removing from sheriff's office papers and records which captain exhibited to attorney for underworld characters in sergeant's presence at attorney's office, question asked sergeant as witness as to whether he obtained permission from any person to remove papers and records to such office was proper, defendants' good faith being factor calculated to shed light on extent or degree of their guilt. Government Code, § 6200.

43. Records 🔑21

In prosecution of former captain and sergeant of sheriff's vice squad for removing from sheriff's office papers exhibited by captain to attorney for underworld characters in sergeant's presence at attorney's office, questions asked sergeant as witness as to whether captain's attorney represented sergeant in seeking dismissal of case as to him and questions to captain's successor as to whether he granted sergeant permission to take records from squad's office to office of attorney for underworld characters were proper. Government Code, § 6200.

44. Criminal Law 🔑412(1)

Reading to trial jury of accused's testimony before grand jury which indicted him was not error, where corpus delicti had been established.

45. Criminal Law 🔑26

The offender's identity is not part of corpus delicti of crime charged.

46. Criminal Law 🔑535(2)

In prosecution of former captain of sheriff's vice squad for removing papers from sheriff's office, corroboration of testimony of squad's former sergeant, who removed papers from squad's files and delivered them to defendant, was not essential to establishment of corpus delicti, in view of defendant's confessions and inferences from detailed circumstances of removal of papers. Government Code, § 6200.

47. Criminal Law 🔑1178

Assignments of error, in support of which no authority is cited, are deemed abandoned.

48. Criminal Law 🔑412(1)

In prosecution of former captain of sheriff's vice squad for removing from sheriff's office papers taken from squad's files and delivered to defendant by squad sergeant, testimony of defendant's successor as squad captain that he permitted papers to remain in squad office safe after defendant's transfer to communications division and never removed them and deputy sheriff's testimony that he was on duty alone when sergeant called at office, entered room containing safe and emerged with package containing papers, established corpus delicti for admission in evidence of defendant's statements before grand jury which indicted him. Government Code, § 6200.

49. Criminal Law 🔑695(2)

In prosecution of former deputy sheriff for removing papers from sheriff's office, overruling of general objections to questions asked defendant as witness was not error, where no specific vice in any of such questions was suggested and answers disclosed their propriety and advantage, contributed to fuller understanding of defendant's purpose, revealed his reactions after crime became known to his superiors, and indicated his consciousness of guilt. Government Code, § 6200.

50. Witnesses 🔑277(5)

In prosecution of former captain and sergeant of sheriff's vice squad for removing papers containing confidential information from sheriff's office, question asked sergeant on cross-examination as to whether public had access to such papers was improper as irrelevant and not proper cross-examination. Government Code, § 6200.

51. Criminal Law 🔑448(1)

In prosecution of sheriff's vice squad's former captain for removing papers from sheriff's office, question asked former squad sergeant by deputy district attorney as to whether defendant's successor as squad captain would have permitted defendant to take his personal notes and papers from office was improper as calling for conclusion based on mere conjecture. Government Code, § 6200.

52. Criminal Law 🔑448(1)

In prosecution of former captain of sheriff's vice squad for removing papers from sheriff's office, question asked deputy sheriff under defendant by deputy district attorney as to witness' reason for not returning any papers to squad files was improper as immaterial and calling for mere conclusion or speculation. Government Code, § 6200.

53. Criminal Law 🔑449(1)

The function of witness to occurrences is to tell what was done, and inquiry as to what went on in his mind is improper as immaterial to any issue.

54. Criminal Law 🔑675

In prosecution of former deputy sheriff for removing papers from sheriff's office, question asked defendant as witness by his counsel as to status of his application, which he had testified was pending, for reinstatement after his discharge, in connection with outcome of case, was improper. Government Code, § 6200.

55. Indictment and Information 🔑110(3)

An indictment charging crime in language of statute defining it and in such words as to give notice of offense is sufficient.

56. Indictment and Information 🔑55

Greater liberality is now indulged in adjudging sufficiency of indictment.

57. Criminal Law 🔑1134(8)

An attack on indictment cannot be considered on appeal from order denying motion for new trial.

58. Records 🔑21

A record made by captain of sheriff's vice squad for regulation and control of squad's operations is a "public record" within statute authorizing imprisonment of officer removing or permitting another to remove record, map, book or paper in officer's custody from public office in which filed or deposited. Government Code, § 6200.

59. Records 🔑1

The filing of document in public office imports that it is placed in a public official's custody to be preserved by him for public use, and it becomes no less a "public record" because its value is best conserved by maintaining its confidential character by excluding public gaze thereat.

60. Records 🔑1

A "public record" embraces any document or record which may properly be kept by an officer in connection with discharge of his official duties.

61. Criminal Law 🔑1134(8)

Since unconstitutionality of statute is not ground for new trial, question whether statute providing that officer having custody of record, map, book or paper, filed or deposited in public office or placed in his hands for any purpose is punishable by imprisonment for removing it, will not be considered on appeal from order denying motion for new trial after conviction of violating such statute. Government Code, § 6200; Pen.Code, § 1181.

◆

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Ralph F. Bagley, Deputy Dist. Atty., Los Angeles, for respondent.

Murray M. Chotiner, Beverly Hills, for appellant.

MOORE, Presiding Justice.

Having been convicted of violating section 6200 of the Government Code[1] appellant made his motion for a new trial. This having been denied (as well as his motion in arrest of judgment) the proceedings were suspended and he was placed on probation for three years. His appeal is from the order denying the motion. He grounds his demand for reversal on the insufficiency of the evidence, technical errors in rulings at the trial and the unconstitutionality of the statute.

Pearson had been in the Sheriff's service for 26 years and Captain of the Vice Squad for three years. As such official he had intruded into countless criminal activities, investigated numerous personalities of the underworld, offended the overlords of vice and directed the manifold operations of his division of the Sheriff's office with intelligence and success. As captain it was his function to make investigations of such suspected persons or organizations as were designated by the sheriff or undersheriff and, at times, by other officers, to make reports in writing to the sheriff of his performances. Such labors required him to preserve in orderly fashion all communications to himself and carbon copies of his own letters to his superiors and to the world outside. In his files reposed also certain memoranda in his own writing destined to be a conspicuous exhibit at the trial. Such files were kept by appellant during his incumbency in due course. They contained much confidential information that ordinarily was never seen by eyes not in the county service.

When Pearson was relieved of his command of the vice squad and transferred to the communications division on August 7, 1950, he had accumulated quite a volume of such reports, correspondence and other writings, which during his three years there had been locked in steel cabinets. At the time of preparing to depart for his new assignment, the combination on the safe was changed. He then called upon his successor, Captain Frank O. Smith, to witness that he had a file of papers that belonged to him personally that did not concern anyone else. He requested leave to store them in the safe in Smith's office. At the same time Lawrence Schaffer, a deputy sheriff, sergeant of the vice squad and long time associate of Pearson, heard the conversation and remembered the repository of the papers which filled the only folders left by the departing captain. The change of the combination on the safe, made as per custom, left no one with knowledge of the new figures except Captain Smith and Sergeant Schaffer. The contents remained undisturbed until December 10, 1950. Prior to that date Captain Smith had not given anyone permission to remove the treasured documents.

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[1] Tit. 1, Div. 7, Ch. 3, sec. 6200, Government Code, reads:

"Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by imprisonment in the State prison not less than one nor more than 14 years."

On the afternoon of that December day, Pearson attempted to reach Captain Smith by telephone to gain release of the papers. Being unsuccessful he contacted Schaffer who agreed to take them from the safe and bring them to Pearson at 8th and Olive streets.[2] He wrapped them in a newspaper and set forth on his fateful mission. At the designated rendezvous they were near the office of attorney Rummel who at that time was attorney for Saul Davis and others suspected of gambling violations and represented underworld characters connected with the activities which Pearson as head of the vice squad had investigated and against whom he and his minions had produced evidence of crimes. Pearson requested Schaffer to accompany him to Rummel's office. When the captain met the attorney in the latter's sanctum, the sergeant retired to a chair on the opposite side, waited and witnessed. Pearson removed several sheets, had Rummel scan them, and Schaffer heard the attorney's commendation of Pearson's work in investigating 1747½ East Florence Avenue, address of the Guarantee Finance Company whose chief operators had been indicted in November, 1949. See People v. Kobey, 105 Cal.App.2d 548, 234 P.2d 251. Pearson extracted several sheets from the file, put them in his pocket and kept them. Pearson told Rummel he had prepared and accumulated the contents of the file ever since he had appeard before the grand jury prior to March, 1950. Rummel said, "You look in good shape. Everything is o. k." From such conversation, it is a fair inference that Pearson was seeking the opinion of the attorney to the effect that Pearson had diligently pursued the gamblers and bookmakers operating in unincorporated areas of Los Angeles County.[3] Schaffer returned the files to their place in Captain Smith's office at 8:05 on the following morning. Immediately thereafter he telephoned Pearson at his office and inquired to whom he should report the fact of his having been in Rummel's office. Pearson promised to make the report and requested the Sergeant to leave it in his hands.

The Evidence is Sufficient

[1] The crime charged to Captain Pearson is not that he aided a guilty party to escape, or disclosed evidence he had against those mentioned in his reports or otherwise gave comfort to vice elements under investigation. He was convicted of having, while a deputy sheriff, in violation of section 6200, supra, removed certain papers on file in the office of the sheriff of Los Angeles county, a public office. The question of his intent is not involved. The mere doing of an act forbidden by the statute is the sum total of the judgment against him.

[2–4] The papers were not the property of the individual, Carl H. Pearson. Some had been prepared by him for the grand jury to show the work that had been done by the Vice Squad in running down criminal elements. Some were letters from the sheriff upon reported crimes; some were Pearson's replies to his superior; some were communications from citizens giving evidence of criminal activities; others were in Pearson's own writing he had used while testifying before the grand jury in the spring of 1950. He testified that many of the papers he had shown to Rummel were official records notwithstanding his statement to Captain Smith that they were his own private papers. No one had inspected or seen the papers after August 7, 1950, until Schaffer took them to Pearson and to Rummel's office. Knowing what "records" Pearson wished to have out of his former quarters it was not difficult for Schaffer to go directly to the safe and remove them. He wrapped them in a newspaper for delivery. Pearson admitted having removed from the package the recapitulation of Vice Detail activities and the sheet showing the locations suspected of having been used by the Guarantee Finance. He told the Grand Jury that he took to defense counsel *a great many official records* along with his "pencil notes in this package." Another sheet taken to Rummel was a record of arrests theretofore made in the Hollywood Strip area in 1948 and 1949.

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[2] Schaffer was at first included in the indictment as a codefendant. It was dismissed as to him on motion.

[3] Pearson's official conduct had been criticised by the California Crime Commission.

Such proof leaves no room for doubt that Pearson violated the statute. Conceding Schaffer to have been an accomplice which he without doubt had been, he was generously corroborated by appellant's own testimony. Pearson was an officer within the contemplation of section 6200. Gov't Code, secs. 24000, 24100; People v. Purcell, 22 Cal.App.2d 126, 133, 70 P.2d 706; People v. Otto, 77 Cal. 45, 47, 18 P. 869. He testified that he caused another to take from a public office papers of a confidential character, of value to law-enforcing agencies; that he secreted some of them and others he exhibited to an agent of the enemies of the State. Therefore, since upon honest inferences and indisputable facts the guilt of appellant is established, the reviewing court is powerless to interfere with the judgment. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Tompkins, 109 Cal.App.2d 215, 240 P.2d 356; People v. Schoeller, 96 Cal.App.2d 55, 60, 214 P.2d 572.

[5, 6] His guilt is neither erased nor minimized because his own hand did not lift the records and remove them from the sheriff's office. Since he was interested in the removal, People v. Delgado, 28 Cal.App.2d 665, 669, 83 P.2d 512, and as a superior officer ordered the removal by the sergeant, his long-time associate, he was properly convicted as a principal. People v. Coffey, 161 Cal. 433, 439, 119 P. 901, 39 L.R.A.,N.S., 704. Although absent from the office, by advising, encouraging and abetting the sergeant to accomplish the removal, Pearson became a principal. People v. Young, 132 Cal.App. 770, 771, 23 P.2d 524. All persons concerned in the commission of a felony are principals. (Penal Code, sec. 971.) Pearson called upon Schaffer to remove the papers because the latter was the only available person who had access to the safe. But without regard to his being the only person present who knew the combination he followed the orders of his former captain, became his partner in crime by voluntarily uniting with Pearson in violating the statute. People v. Lima, 25 Cal.2d 573, 578, 154 P.2d 698. His entire narrative of the events is corroborated by appellant's testimony.

[7, 8] The contention that the papers removed were not public records is a mere quibble. They were kept by the Sheriff's office as evidence of what had been done, of what was to be done and proof of activities of those elements against whom the law-enforcing agencies should be on the alert. They were convenient to an expeditious discharge of the duties of the sheriff's office and they were necessary to the enlightenment of the Sheriff as to past failures and achievements and to current endeavors. They were not open to public inspection. The sheriff's office would be handicapped in enforcing the laws if at every sunset vicious elements might read all the Sheriff's reports of vice activities during the preceding day and all plans for defeating crime in the ensuing night. Such documents are confidential public records and because of public policy are entitled to the protection of the statute. Runyon v. Board of Prison Terms & Paroles, 26 Cal.App.2d 183, 184, 79 P.2d 101; City and County of San Francisco v. Superior Court, 38 Cal.2d 156, 238 P.2d 581. A paper written by a public official in the performance of his duties or in recording the efforts of himself and those under his command or written plans of future work is a public record and is properly in the keeping of the office. Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 396, 121 P.2d 829; People v. Tomalty, 14 Cal.App. 224, 232, 111 P. 513.

[9, 10] Inasmuch as intent is not made an affirmative element of the crime de-

nounced, the law imputed criminal intent in the very enactment of the statute, rendering it unnecessary to allege or prove the intent. People v. Gonzales, 72 Cal.App. 626, 630, 237 P. 812. But it was not necessary for the jury to rely upon the presumption inherent in the statute itself. A criminal intent to remove the papers was reasonably inferable from the evidence. Despite his brilliant career in the public service, appellant was suspect in December, 1950. Whether there was substantial basis for the suspicion is not germane to the instant issue. In any event while the public mind was disturbed if not inflamed at the reputed, flagrant criminal activities of the bookie and gambling elements, Pearson, in the dead of night, causes a volume of confidential papers to be removed from a locked, steel repository to which he did not himself have access. Pursuant to appointment he appears in the office of attorney Rummel who has represented some of those accused as participants in organized vice. He opens the files in the secrecy of the attorney's office and acquaints the latter with the historic efforts of the Vice Squad.

For such conduct no rational excuse has been suggested. With a friendly colaborer as head of the department, no good reason is conceivable why appellant did not have Rummel meet him in the Sheriff's office and request Captain Smith to exhibit the documents. Or, better still, why not go directly to the District Attorney and inquire whether the papers in the steel safe would show him to a disadvantage before the grand jury which he at that time feared was about to commence an inquisition to call upon him to explain? The evidence justified the verdict.

No Prejudice in Rulings

[11–13] Appellant assigns as prejudicial a question propounded to himself by the deputy district attorney with reference to the papers removed and to the fact that they were not accessible to the public. "Q. And then obviously they wouldn't be accessible or available to a hoodlum lawyer like Sam Rummel was?"

Such a question should not have been asked. It evidenced a perfervid zeal to impress the jury that appellant had forsworn his duty to maintain honorable associates, or had shown the records of his office to an ally of the underworld. But prejudice does not necessarily result from every mistake of enthusiastic counsel. People v. Johnson, 105 Cal.App.2d 478, 488, 234 P.2d 116. Jurors are selected on their qualifications and are presumed to have reason. The prosecutor promptly apologized, explained that he meant lawyer for hoodlums and the court expressed disapproval, ordered counsel to leave Rummel out of the trial and stated that "we are trying this defendant on a specific charge * * * limited by the language of the indictment." The prosecutor's true purpose was promptly disclosed by inquiring whether Rummel, a defense lawyer, not connected with any law-enforcement agency, was entitled to see vice-squad records. In other words, the State was entitled to show that in removing the documents and by exhibiting them to Rummel appellant's act was done with a full knowledge of its significance. Surely, removing the papers to exhibit them to the district attorney would never have been questioned. But Rummel was not the district attorney. Rummel was well known to Pearson as a defense lawyer. On one occasion in the past appellant had returned to Rummel, after his client had pleaded guilty, a large amount of cash and checks, a roulette table and other gambling devices taken in a raid. The jury having been instructed to disregard any sinister intimation arising from questions and to disregard matter stricken they are presumed to have complied. People v. Young, 25 Cal.App.2d 148, 156, 77 P.2d 271.

[14] After the court had sustained an objection to the prosecutor's question whether appellant had handled the return of the gambling paraphernalia to Rummel the deputy inquired of Schaffer on direct whether Rummel had signed the receipt for the property. The purpose of the question was obviously to show that the paper was an official document and not the personal belonging of appellant. The objection was properly overruled. The same inquiries were substantially made by appellant's counsel. There is an utter lack of a show-

ing of bad faith on the part of the deputy. See People v. Raleigh, 83 Cal.App.2d 435, 443, 189 P.2d 70; People v. Horowitz, 70 Cal.App.2d 675, 693–4, 694, 161 P.2d 833.

[15] Assignment is made of the prosecutor's question whether the "Guarantee Finance" refers to "the bookmaking syndicate operating on East Florence." The inquiry was not improper. Not only was it made after Pearson had testified that his office had done much work on the Guarantee Finance, but appellant was questioned by his own counsel in detail about that institution. The investigation of that concern by the Grand Jury was the chief cause of appellant's visit to Rummel who pretended to know that the immediate inquisition would involve Guarantee Finance.

[16] Complaint is made of the question to Schaffer by the prosecutor, to wit, whether Chotiner, Pearson's counsel, appeared for the sergeant when the attorney called upon the district attorney to ask for a dismissal as to Schaffer. The question came in logically while the prosecution was attempting to cross-examine Schaffer with respect to the conversation between Pearson and Rummel. No prejudice resulted. The trial judge reminded the parties that the motion to dismiss the action as to Schaffer was presented to the Superior Court and "that is all there is to it."

[17, 18] In the course of his cross-examination appellant was asked, "Did you tell that body [the grand jury] that you requested Mr. Schaffer when he took the documents back to the vice squad to see that they were filed in their proper place?" Appellant asserts that such question was misconduct, that it implied that appellant "concocted a new story since testifying before the grand jury." No prejudice could have resulted from the question. It was propounded in the course of an attempt to impeach appellant who had testified that he told Schaffer the designated papers would be returned to the files. The court's instructions to disregard statements as well as implications in questions by the attorneys served as a panacea for the ills suffered from improper though nonprejudicial questions. People v. Young, supra. Also, it is assumed that the trial court considered such contention at the time of denying the motion for a new trial. It has a broad discretion in determining whether questions or other conduct of counsel caused prejudice. People v. Mayes, 113 Cal. 618, 622, 45 P. 860. Contrary to appellant's contention, the prosecutor did not try to prejudice the defense by asking whether he had told certain facts to the grand jury. The repeated inquiry about appellant's activities with respect to Guarantee Finance and Saul Davis was prompted by the fact that appellant fell into his tragical error by virtue of the zealous interest in such matters on the part of Rummel or appellant.

Refusal of Proposed Instructions not Prejudicial

[19–28] Appellant assigns as prejudicially erroneous the court's rejection of 18 proposed instructions.[4] Most of them were

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[4] *Defendant's Proposed Instructions Rejected*

No. 1. "The Court deeming the evidence in this case insufficient to warrant a conviction of the defendant, advises the jury to acquit him. This advice the jury is not bound to accept."

No. 3. "An act committed or an omission made under an ignorance or mistake of fact which disproves any criminal intent is not a crime."

No. 4. "An essential element of the crime of which the defendant is accused in the indictment is intent, the law requiring that to constitute such a crime there must exist a union or joint operation of criminal conduct and criminal intent. The law requires that to be guilty of crime one must intend the conduct that fits the description of the crime and must engage in that conduct knowingly and wilfully."

No. 6. "A public record is one required by law to be kept or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office.

"The elements essential to constitute a public record are, namely: that it be a written memorial, that it be made by a included in the court's instructions. No. 1 would have been error. Not only do the verdict and the order denying the motion for a new trial prove its freedom from prejudicial error but a review of the evidence discloses a healthful record. No. 3 would have been error. There was no evidence of a mistake of fact on the part of defendant. No. 4 was substantially given by the court. Nos. 6 and 7 would have been out of place. See People v. Shaw, 17 Cal.2d 778, 112 P.2d 241; People v. Tomal-

> public officer, and that the officer be authorized by law to make it."
>
> No. 7. "The mere fact that a document is deposited or filed in a public office or with a public officer, even though necessarily so deposited or is in custody of a public officer, does not make it a public record.
>
> "Papers or memoranda in the possession of public officers which are not required by law to be kept by them as official records are not public records; memoranda of public officers made for their own convenience, even if made at the public expense, are not public records unless made so by statute.
>
> "A record is intended not only to give an instrument perpetuity but also publicity; public records and documents are such as are placed on the public files for the use or information of the public."
>
> No. 8. "Every citizen has a right to inspect and take a copy of any public writing of this State except as otherwise expressly provided by statute."
>
> No. 9. "A public record is a record made by a public officer in pursuance of duty, the immediate purpose of which is to disseminate information to the public or to serve as a memorial of official transactions for public reference."
>
> No. 10. "The mere fact that a document is in a public office or in custody of a public officer does not make it a public record."
>
> No. 11. "The mere fact, if it be a fact, that a document or documents were taken from the office of the Sheriff of the County of Los Angeles is not a violation of Section 6200 of the Government Code if the said document or documents remained in the custody of a deputy sheriff of the County of Los Angeles who was entitled to have custody of said document or documents."
>
> No. 12. "The word 'remove' as used in Section 6200 of the Government Code means more than just the mere physical moving from a place or position or moving from a room.
>
> "The word 'remove' as used in Section 6200 of the Government Code implies and is used in connection with the meaning of the word 'secrete'."
>
> No. 14. "Circumstantial evidence is the evidence of the existence of facts from which is sought to be inferred the existence of other material facts bearing upon the question at issue, or the fact to be proved.
>
> "When a conviction is sought upon circumstantial evidence, then each essential independent fact necessary to complete the chain or series of independent facts by which the prosecution seeks to establish the guilt of the defendant must be established to the same degree of certainty as the main fact which these independent circumstances taken together may tend to establish; that is, each essential independent fact in a chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt and to the entire satisfaction of each member of the jury. The circumstances must all concur and must be such as are absolutely opposed upon any reasonable hypothesis to the innocence of the accused, and incapable of explanation upon any reasonable theory other than that of the guilt of the accused. If all the essential independent facts are not proven beyond a reasonable doubt, the defendant is entitled to an acquittal."
>
> No. 15. "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."
>
> No. 16. "I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendant guilty of the crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion."
>
> No. 17. "Where circumstantial evidence is relied upon, each circumstance necessary to complete the chain which must be established to create a presumption of guilt, must be established to a moral certainty and beyond a reasonable doubt. The circumstances must all concur to show that defendant committed the crime, and they must not only be consistent with each other, but must be con-

ty, 14 Cal.App. 224, 111 P. 513. They do not border on the law as it relates to section 6200 which was read to the jury. That section includes *book, paper,* and *proceeding,* as well as *record* and *map,* and *any paper, placed in his hands for any purpose.* Nos. 8 and 9 would have been erroneous. No. 8 is immaterial; No. 9 would have deflected the jury's attention from the issue of an officer's removing and secreting papers deposited in a public office. No. 10 was meaningless. "Public records" are not necessarily involved. In fact, appellant testified that the papers of the vice squad were not open to public inspection. Public policy requires that documents in the sheriff's office relating to law enforcement be treated as confidential. Runyon v. Board of Prison Terms and Paroles, 26 Cal. App.2d 183, 184, 79 P.2d 101. The contents of such documents are not to be divulged by their custodian when their secrecy would serve the public interest. Code Civ.Proc., sec. 1881, subd. 5; People v. King, 122 Cal.App. 50, 56–57, 10 P.2d 89. No. 11 is directly contrary to the inhibition contained in section 6200 and Pearson testified that he caused Schaffer to remove the papers from the vice squad office and that he, himself, in the nighttime, without the consent of a superior officer, possessed them in the office of Rummel and removed from the county file certain selected papers which did not appear until the trial. No. 12 could have added nothing to the general charge. Refusal to instruct on a mere commonplace is not prejudicial. People v. Cravens, 79 Cal.App.2d 658, 669, 180 P.2d 453.

[29–32] Proposed instructions numbered 15, 16, 17, 18, 19 and 40 appertain to

sistent as well with the hypothesis that the defendant is guilty, and at the same time inconsistent with any other rational conclusion, and must exclude to a moral certainty and to the entire satisfaction of the jury any other hypothesis but the single one of guilt."

No. 18. "In order to convict the defendant upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that a crime was committed as alleged in the indictment, but that the defendant was the one who committed such crime and that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for, and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt, or the jury must find the defendant not guilty."

No. 19. "In order to sustain a conviction on circumstantial evidence, all the circumstances proved must not only be consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt.

"If the circumstantial evidence relied upon in a case is such that it may reasonably lead to two opposite conclusions, one pointing to the guilt of the defendant and the other to his innocence, then it is not sufficient to convict upon, for in such an event, the jury must adopt the hypothesis of innocence, and find the defendant not guilty."

No. 40. "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."

No. 42. "One who does not actively commit an offense, but who aids, promotes, or encourages its commission, either by act or counsel or both, is not deemed by law to be guilty and shall not be found guilty of the crime unless he did what he did knowingly and with criminal intent. To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of such criminal offense."

circumstantial evidence and were therefore not required since the prosecution relied upon direct evidence. People v. Nunn, 65 Cal.App.2d 188, 194, 150 P.2d 476. Where the evidence is not entirely or even substantially circumstantial it is not error to reject proposed instructions adapted to purely circumstantial evidence. People v. Hill, 76 Cal.App.2d 330, 341, 173 P.2d 26. Proposed instruction 40 was covered by the court's instruction, as were likewise proposed instructions 23, 24 and 27. The court read the conventional and well seasoned instructions with reference to accomplices founded upon long established principles as reshaped and crystallized in "Caljic." California Jury Instructions, Criminal. Having so stated the law as applicable to all the issues, the trial court was not obliged to repeat any of them. People v. Bickerstaff, 46 Cal.App. 764, 775, 190 P. 656, approved in People v. Hill, supra.

[33] As to offered instruction No. 42, the knowledge and intent essential to the commission of a crime were covered by the court's instructions on *intent, wilfully, fraudulent purpose not required,* and by section 20 of the Penal Code.

[34] Taken as a whole, the instructions given fairly and fully covered every issue. They defined section 6200 of the Government Code, *officer, intent required, secrete, accomplice* and the factors essential to corroboration; presumption of innocence, reasonable doubt, credibility of witnesses. With such a complete performance, the jury could not have been misled. In no material respect did appellant suffer prejudice. People v. Rhoades, 93 Cal.App.2d 448, 451, 209 P.2d 33.

Rulings on Appellant's Objections Not Prejudicial

Twenty-one rulings on objections to evidence are assigned as prejudicial errors.

(A) The first was to the introduction of any evidence on the ground that the court did not have jurisdiction. The bases of such objection are that the transcript of the grand jury proceedings show that (1) no offense was committed by Pearson; (2) the indictment was not found as prescribed by the Penal Code in that the evidence unexplained or uncontradicted would not warrant a conviction; (3) no prima facie showing of a corpus delicti without the testimony of Schaffer, an accomplice, was made; the documents removed are not public records, and there was no removal of them; (4) the indictment was not presented as prescribed by law in that a transcript of the entire testimony taken by the grand jury cannot be furnished defendant as provided by section 925 of the Penal Code, it having been taken off the record; (5) the indictment does not conform with section 950 of the Penal Code in that it does not contain a concise statement of the acts constituting the alleged offense, and it cannot be ascertained whether the documents removed or secreted constituted public records; (6) section 6200 is unconstitutional. Most of the foregoing reasons for the objection have already been answered. This court denied appellant's petition for a writ of prohibition (March 19, 1951, cause numbered 18442) prior to the trial.

[35] Appellant's testimony before the grand jury was itself sufficient to support the indictment. See People v. Hopkins, 101 Cal.App.2d 704, 708, 226 P.2d 74. He had met Guasti, see People v. Guasti, 110 Cal.App.2d 456, 243 P.2d 59, and Rummel on Sunday afternoon, December 10, 1950; had met Rummel on three prior occasions when his gambling clients were under arrest. He told the grand jury: that he did not desire at that time to explain how he happened to return to Rummel's client, Saul Davis, a gambling equipment "and approximately $8000 in cash to him"; that Rummel told him he had some information for Pearson and asked the latter if he had any records that had anything to do with the Guarantee Finance and told Pearson to bring them; that he was a law-enforcement officer and Rummel was a defense attorney; that he called Schaffer about the package of reports and "my pencil notes in the safe" and "I asked Schaffer to bring them with him which he did." He identified the package Schaffer had brought to Rummel's office. "At least out of the first folder there are some matters that might be considered the official records of the Sheriff's office," he told the grand jury, and he "did take certain

records out of that package and keep them * * * my own pencil notes." Such testimony alone was sufficient to warrant an indictment. Whether it was a sufficient basis for the indictment is of no concern at this stage of the action. Lorenson v. Superior Court, 35 Cal.2d 49, 55, 216 P.2d 859; People v. Wells, 33 Cal.2d 330, 337, 202 P.2d 53.

[36] (B) Appellant's general objection to the question to Schaffer as to what was the conversation the latter heard between Rummel and Pearson before the package had been opened was properly overruled. The answer was responsive and of evidential value. The conversation was res gestæ. It disclosed Pearson's knowledge of the purpose and nature of Rummel's inspection.

(C) The motion to strike Schaffer's answer was of course properly denied.

[37] (D) Appellant contends that he was prejudiced by the order overruling his general objection to the question addressed to Schaffer, to wit, "What was said after the package was opened and the folders were exposed between Pearson and Rummel concerning the various documents and what took place?" That the ruling was correct is established by the testimony about the conversation of the two men.

[38] (E) To the inquiry of Schaffer whether the oftmentioned Guarantee Finance referred to the bookmaking syndicate on East Florence Avenue, the objection that it called for a conclusion was properly overruled. The answer made clearly positive what was already apparently true by a witness who knew the fact. The ruling was distinctly within the scope of the trial judge's discretion.

[39] (F) The general objection was lodged against the question to Schaffer: "What was the conversation you had with Mr. Pearson at that time?" Its relevancy was proved by the answer which recounted the witness' telephonic conversation with appellant on the morning of December 11. That was when Pearson advised Schaffer to leave with him the matter of reporting the visit to Rummel's office. The conversation of Pearson and his conduct after he exhibited the papers to Rummel were relevant. People v. Moore, 70 Cal.App.2d 158, 163, 160 P.2d 857.

[40] (G) Admitting in evidence, over objection, the papers and documents taken by Schaffer to Pearson at Rummel's office was essential to a full presentation of the State's case. They were not hearsay. Ample foundation was laid by Schaffer's testimony.

[41] (H) The inquiry of Schaffer concerning a receipt for the Saul Davis gambling equipment was proper. Such a receipt should have been among the files carried away by Schaffer to Pearson. Whether such documents had been removed or secreted was the paramount issue.

[42] (I) The inquiry of Schaffer as to whether he obtained permission from any person to remove the papers and records to Rummel's office was proper. The good faith of appellant and his emissary was a factor calculated to shed light upon the extent or degree of their guilt.

[43] (J, K, L) For the same reason the objections were properly overruled to (1) the question to Schaffer whether Chotiner represented him in seeking a dismissal as to Schaffer; (2) to the inquiries of Captain Smith as to whether he granted Schaffer permission to take the vice-squad records out and to take them to Rummel's office. No sound reasons for sustaining such objections have been suggested.

[44–46] (M) The reading of appellant's testimony before the grand jury was not error. The corpus delicti had been established. The identity of the offender is not a part of the corpus delicti. People v. Mainhurst, 67 Cal.App.2d 882, 884, 155 P.2d 843. The corroboration of Schaffer was not essential to the establishment of the corpus delicti. Stern v. Superior Court, 78 Cal.App.2d 9, 17, 177 P.2d 308; People v. Hudson, 139 Cal.App. 543, 544, 34 P.2d 741; 4 Cal.Jur. 10-year Supp., p. 747, sec. 303. Appellant's confessions alone corroborated Schaffer. People v. Fountain, 91 Cal.App.2d 158, 162, 204 P.2d 639. In addition were the inferences from the detailed circumstances of the removal of the papers. People v. Thompson, 69 Cal.App.2d 80, 86, 158 P.2d 213.

[47, 48] (N, O, P, Q, R) Since no authority was cited in support of these assignments, they are deemed to have been abandoned. People v. Thompson, supra, 69 Cal.App.2d page 85, 158 P.2d 213. All relate to matters within the scope of the trial judge's discretion and concerned appellant's testimony before the grand jury. Captain Smith testified that he permitted the papers to remain in the safe; he never removed them; deputy Smeltz testified that he was on duty alone when Schaffer, empty handed, called about 8:30 p. m. on December 10, 1950, entered the room that contained the safe, and emerged with the package wrapped with newspaper. After he asked Schaffer his purpose, the latter left. Such facts taken with Schaffer's testimony established the corpus delicti for the admission of appellant's statements before the grand jury. People v. Bradford, 95 Cal.App.2d 372, 379, 213 P.2d 37.

[49] The general objection was interposed to each of a number of other questions. No specific vice of any of such questions was suggested. The contents of the answers disclose their propriety and advantage. They contributed to the fuller understanding of appellant's ill-conceived purpose, revealed his reactions after the crime was known to his superiors, along with indications of his consciousness of guilt. People v. Goldstein, 84 Cal.App.2d 581, 588, 191 P.2d 102; People v. Zerillo, 36 Cal.2d 222, 228–229, 223 P.2d 223.

Prosecution's Objections Were Properly Sustained

[50] (1) The question to Schaffer on cross-examination, to wit, whether the public had access to the papers and documents removed by Schaffer and Pearson, was not relevant, nor was it proper cross-examination. They contained confidential information. To expose them to the bookie shop keepers and gamblers would have given such elements three leaps ahead of the vice probers and law enforcers. They were not open to the public. Runyon v. Board of Prison Terms and Paroles, 26 Cal.App.2d 183, 184, 79 P.2d 101.

[51] (2) Whether Captain Smith would have permitted Pearson to take his "personal notes and papers" from the office called for a conclusion and the question was properly not allowed. The answer could have been no more than a conjecture.

[52, 53] (3) The question to the witness Kapic, a deputy under Captain Pearson, as to what his reason was for not returning any papers "back into the files of the Vice Squad" was properly excluded. The function of any witness to occurrences is to tell what was done. To inquire into what went on in his mind is not material to any issue. His answer could have been no more than a conclusion or a speculation.

[54] (4) Pearson was asked by his counsel to tell "the status in connection with that application for reinstatement in connection with the outcome of this case." The objection thereto was properly sustained. Pearson had already testified that he was discharged on December 12, 1950, and that his application for reinstatement was pending.

Denial of Motion to Annul the Indictment

[55–57] Section 995 of the Penal Code requires the superior court to set aside an indictment (1) "Where it is not found, endorsed, and presented as prescribed in this code"; (2) where "the defendant has been indicted without reasonable or probable cause." Appellant assigns as prejudicial the court's denial of his motion to dismiss. His arguments have already been answered in our discussion of his first objection to the admissibility of any evidence. Moreover, the indictment charges in the language of the statute and in such words as gave notice of the offense. Such indictment is sufficient. People v. Williams, 27 Cal.2d 220, 226, 163 P.2d 692; People v. Saffell, 74 Cal.App.2d Supp. 967, 974, 168 P.2d 497. Greater liberality is now indulged in adjudging the sufficiency of an indictment. People v. Humphrey, 27 Cal.App.2d 631, 638, 81 P.2d 588. But on this point appellant occupies an unfortunate position in that an attack upon an indictment cannot be considered on appeal from an order denying a motion for new trial. People v. Raines, 66 Cal.App.2d 960, 963, 153 P.2d 424; People v. Duncan, 50 Cal.App.2d 184, 186, 122 P.2d 587. The discussion under this heading and under that referred to disposes of the assignment that appellant was prejudiced by the overruling of his demurrer and the denial of his motion in arrest of judgment.

Section 6200 is a Valid Statute

[58–61] Appellant contends that the section is void "unless the words record, map or book" are construed to mean public record, public map, or public book to conform to the title of Chapter 3, Division 7, Title 1 of the Government Code. He bases such thesis upon section 24, Article IV of the Constitution, requiring a statute to embrace but one subject expressed in the title, citing Shields v. Oxnard Harbor District, 46 Cal.App.2d 477, 116 P.2d 121; Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 57 P.2d 226; People v. Murguia, 6 Cal.2d 190, 57 P.2d 115; Pierce v. Riley, 21 Cal.App.2d 513, 70 P.2d 206.

Chapter 3 relates to crimes against public records, documents, certificates. The record made by the captain of the vice squad for the regulation and control of the operations of that law-enforcing group of public officers is a public record. A reasonable construction of section 6200 would require such conclusion. The *filing* of a document imports that it is thereby placed in the custody of a public official to be preserved by him for public use. Because for a season its value is best conserved by maintaining its confidential character by excluding public gaze, it becomes no less a public record. People v. Tomalty, 14 Cal.App. 224, 232, 111 P. 513; Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 395, 121 P.2d 829. In the Shaw case (People v. Shaw, 17 Cal.2d 778, 811, 112 P.2d 241) it was effectually held that application blanks and rough sheets were parts of permanent records of the Civil Service Department within the meaning of section 113 of the Penal Code which became section 6200, Government Code. A reporter's transcript is such a public document as cannot be altered. Whitlow v. Superior Court, 87 Cal.App.2d 175, 182, 196 P.2d 590. The register of Probate proceedings is a public document. People v. McAtee, 35 Cal.App.2d 329, 332, 95 P.2d 471. A public record embraces any document or record which may properly be kept by an officer in connection with the discharge of official duties. People v. Purcell, 22 Cal.App.2d 126, 131, 70 P.2d 706. But the statute is violated if the paper or document removed had been *placed in the hands of a public official for any purpose.* (Ibid.) Inasmuch as the constitutionality of a statute is not a ground for a new trial (Penal Code, sec. 1181) it is supererogation to discuss this point. See People v. McEntyre, 32 Cal.App.Supp.2d 752, 761, 84 P.2d 560.

The order is affirmed.

McCOMB and FOX, JJ., concur.

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110 Cal.App.2d 748

STONE v. BURKE et al.

Civ. 18747.

District Court of Appeal, Second District,
Division 1, California.
May 6, 1952.

Rehearing Denied May 28, 1952.
Hearing Denied June 26, 1952.

Action by T. C. Stone against Osburn Burke and another for declaratory relief under employment contract which provided that upon death of the survivor of defendants, certain realty would be devised to plaintiff, and that if defendants placed any person other than themselves or another named person in charge of their property, the contract should automatically mature and plaintiff would be entitled to a deed to the land, and that if defendants sold the land along with adjacent property, a proportionate share of the proceeds would be invested in government bonds which would be bequeathed to plaintiff upon the death of the survivor of defendants. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment for plaintiff on the ground that defendants had sold the property and awarded damages to plaintiff by reason of defendants' inability to give a deed to the property, and defendants appealed. The

District Court of Appeals, White, P. J., held, inter alia, that the contract did not automatically mature upon the sale of the property pursuant to the terms of the contract and that plaintiff could not maintain the action.

Reversed.

1. Contracts ⚷10(1), 78

The rule that agreements are void for lack of mutuality and consideration when they contain an absolute and unconditional right of revocation by either party applies to executory contracts.

2. Contracts ⚷10(1)

Lack of mutuality which renders a contract void is tantamount to want of consideration, and if sufficient consideration is present, mutuality is not essential.

3. Contracts ⚷10(1)

Mutuality becomes essential to validity of a contract only when by its absence, a party is left without a valid or available consideration for his promise.

4. Contracts ⚷52

The existence of good consideration is not dependent upon fact that benefit should be conferred upon promissor, but it is sufficient that prejudice be suffered or agreed to be suffered by promisee.

5. Master and Servant ⚷3(1)

Where employee gave up existing employment because employers agreed to give him permanent employment, employee suffered prejudice which was sufficient consideration for employers' promise of permanent employment. Civ.Code, § 1605.

6. Specific Performance ⚷6

Even if employee could have terminated employment contract without liability, performance by employee of his obligations under such contract so far as such performance lay within his power, created a mutuality of remedy so as to justify employee's seeking appropriate relief for alleged failure of employers to conform with terms of agreement. Civ.Code, § 1605.

7. Specific Performance ⚷73

The rule that specific performance of an obligation to perform personal services may not be had does not defeat the right to have specific benefit of enforcible obligation made in consideration of personal services, where such services have been fully or substantially performed. Civ.Code, § 3390.

8. Master and Servant ⚷70(1)

Where employment contract provided that upon death of survivor of employers, certain realty would be devised to employee, and that if any overseer other than employers or another named person be put in charge of employers' realty, contract would automatically mature, and employee would be entitled to a deed, and that in case of sale, a proportionate share of the proceeds would be placed in government bonds and such bonds would be substituted for land, upon sale of the realty involved, employee was not entitled to damages by reason of the fact that employers were unable to give a deed, as contended, but would be entitled to the government bonds for the proportionate share of the proceeds of the sale upon the death of the survivor of employers. Code Civ.Proc. § 1060; Civ.Code, §§ 1605, 3390.

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L. A. Lewis, Michael F. Shannon, and Thomas A. Wood, Los Angeles, for appellants.

William T. Selby, Ventura, and Edward M. Selby, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendants appeal from an adverse judgment rendered against them in an action for declaratory relief under the provisions of section 1060 of the Code of Civil Procedure, construing a contract of employment entered into between them and plaintiff.

The action was predicated upon a contract dated April 16, 1947 wherein it was set forth that plaintiff had been in defendants' employ for a number of years past, that the former was "to continue to assist first parties (defendants) in the care and control of the properties belonging" to defendants and that the latter were willing to compensate and reward plaintiff "with a bonus or additional reward in excess of the monthly wages or salary to be paid" to plaintiff.

Following a pledge of "the highest degree of good faith" between the parties, the contract provided that plaintiff "will continue to assist" defendants in the care and maintenance of certain real properties belonging to the latter, and that in consideration for such services defendants agree to pay plaintiff current wages for the same type or similar work for services in the Rivera, La Habra and Whittier districts.

The agreement sets forth that "the parties hereto each fully understand that first parties (defendants) have made an agreement with D. E. Stone, brother of the second party (plaintiff) wherein and whereby the North six acres of that certain 10.922 acres (giving legal description) is, after the death of first parties (defendants), to be distributed to said D. E. Stone".

It is then provided that, "as a further compensation and reward by first parties (defendants) to second party (plaintiff), the remaining portion of said last mentioned parcel of 10.922 acres (after setting apart said six acres for said D. E. Stone) shall not be sold by first parties (defendants) but that this contract shall affect said remaining portion of said parcel of land, and that in all instances where said land is referred to, it shall be understood as referring to the remaining portion of said 10.922 acres and being the balance of said 10.922 acres after deducting therefrom the North six acres thereof."

Paragraph 4 of the contract reads:

> "It is understood that if second party (plaintiff) shall well and truly in good faith serve and assist first parties (defendants) in the maintenance, care and upkeep of their real properties in the Rivera District, as long as either of the first parties (defendants) shall be alive, then upon the death of the survivor of first parties (defendants), said land hereinabove referred to shall be willed, distributed and set apart by the wills of first parties (defendants) to second party (plaintiff). This is upon the express condition that if any other overseer other than first parties (defendants), or either of them, or D. E. Stone, is put in charge of first parties' (defendants') real properties, then at that time this contract shall automatically mature in the same manner as if both of the first parties (defendants) were deceased and second party (plaintiff) would in that instance, and upon the happening of that event, be entitled to demand and to receive from first parties (defendants) a good and sufficient deed covering the land hereinbefore mentioned".

Then follow two paragraphs dealing with the respective rights of the parties in and to an existing oil lease on defendants' properties in their entirety, and with reference to their respective rights in event subsequent oil leases might be consummated. Since such contractual provisions are not in issue here we do not set them forth.

Paragraph 8 is as follows:

> "It is further understood and agreed that in the event of the termination of this contract by permanent illness, dissatisfaction or quitting of second party (plaintiff), then and in that event second party (plaintiff) shall be entitled only to the payment at the rate of $600.00 per year and shall have no interest in and to any oil rights or oil leases covering the land hereinabove referred to."

Following a provision forbidding recordation of the contract, the tenth and final paragraph thereof provides:

> "In the event that prior to the death of first parties (defendants), or both of them, *it should be deemed advisable to sell the land* hereinabove mentioned and covered by this contract, then and in that event it is agreed by second party (plaintiff) that first parties (defendants) may sell and dispose of said land in conjunction with the sale of their other properties adjacent thereto, and at the same proportionate price thereof and the proceeds of that portion covered by this contract shall be held intact and placed in Government Bonds at the discretion of first parties (defendants) and such bonds shall be substituted for and in place of the land covered by this contract". (Emphasis added.)

Since the cause was submitted to the court on an agreed statement of facts and the aforesaid contract, we deem it unnecessary to here set forth the contents of the respective pleadings, except as hereinafter referred to.

The agreed statement of facts is as follows:

"1. It is true that the defendants were the owners of 75 acres of land in the vicinity of Rivera, in the County of Los Angeles, mostly planted to citrus trees, including a parcel of 10.922 acres, during the years 1940 up to about the 20th day of January, 1950.

"2. It is true that on or about the 20th day of January, 1950, the defendants sold said 75 acres and received therefor net the sum of $225,375.25, or $3,005.00 per acre.

"3. It is true that plaintiff was employed by defendants for more than one year prior to 1943, but was employed elsewhere commencing in 1943, and until about the 10th day of March, 1946; that during said time, *and for the purpose of inducing plaintiff to terminate employment elsewhere and to return to the service of defendants* in the care and maintenance of their properties, said defendants did state and represent and *promise to plaintiff that if he would return to said service of defendants they would give to plaintiff permanent employment.* That plaintiff did terminate his employment elsewhere and did return and enter the employment of defendants on the 10th day of March, 1946. At the request of said plaintiff, the terms and conditions of said employment *was* reduced to writing on the 16th day of April, 1947, a full and complete copy of said contract being set forth in paragraph IV of plaintiff's Amended Complaint." (Emphasis added.)

"4. That the plaintiff continued in said employment pursuant to the terms and conditions of said contract, commencing as of the 10th day of March, 1946, up to and including the 12th day of April, 1950, when the plaintiff's employment was terminated by defendants.

"5. That the brother of plaintiff, D. E. Stone, was employed by the defendants under an oral contract, and that said employment terminated on or about the 12th day of April, 1950, with the exception of such work as the said defendants had in and upon the premises retained by said defendants, being approximately 3 acres.

"6. That the 10.922 acres described in said contract set forth in paragraph IV of plaintiff's Amended Complaint were sold by the said defendants for the price of $3,005.00 per acre.

"7. That the defendants have not paid to the plaintiff any sum as wages, or otherwise, since the 27th day of February, 1950, except that on or about the 14th day of April, 1950, the defendants tendered to the plaintiff their check No. 3257, drawn on the Whittier Branch, Bank of America, in the sum of $11.90, which purported to pay the plaintiff for services rendered in February and March of 1950, being a total of fourteen hours at eighty-five cents an hour."

Following trial, the court made findings that "for the purpose of inducing plaintiff to terminate employment elsewhere and to return to the service of defendants in the care and maintenance of their properties, said defendants did state and represent and promise to plaintiff that if he would return to said service of defendants they would give to plaintiff permanent employment. That plaintiff did terminate his employment elsewhere and did return and enter the employment of defendants on the 10th day of March, 1946. At the request of said plaintiff, the terms and conditions of said employment was reduced to writing on the 16th day of April, 1947". (The agreement hereinabove set forth).

The court further found that pursuant to the aforesaid agreement plaintiff continued in his employment from May 10, 1946, to and including April 12, 1950, "when the plaintiff's employment was terminated by defendants".

"That the brother of plaintiff, D. E. Stone, was employed by the defendants under an oral contract, and that said employment terminated on or about the 12th day of April, 1950, with the exception of such work as the said defendants had in and upon the premises retained by said defendants being approximately 3 acres.

"That the 10.922 acres described in said contract set forth in paragraph IV of plaintiff's Amended Complaint were sold by the said defendants for the price of $3,005.00 per acre".

It was further found "That on or about the 12th day of April, 1950, defendants terminated the employment of said D. E. Stone as overseer of their said properties and placed said properties in charge of persons other than said D. E. Stone, or said defendants, or either of them, and then notified this plaintiff that he was no longer in their employ, and that he was not to report further for work.

"That by the sale of their property and the discharge of plaintiff and his brother D. E. Stone, the defendants placed an overseer * * * 'other than first parties, or either of them, or D. E. Stone, * * * in charge of first parties' real properties,' within the meaning of paragraph 4 of the contract, and that by virtue of such action said contract did * * * 'automatically mature in the same manner as if both of the first parties were deceased,' as provided in paragraph 4 of said contract, and that upon the occurrence of such events plaintiff forthwith became * * * 'entitled to demand and to receive from first parties a good and sufficient deed covering the land' * * * therein described.

"That by reason of the sale of said property and the resultant inability of the defendants to deliver to the plaintiff a deed to the property to which he thereby became entitled, it became the duty of the defendants to deliver to him government bonds in lieu thereof, as provided in paragraph 10 of said contract; and that defendants having failed to tender or deliver such bonds, plaintiff is entitled to the cash value thereof as fixed by the sale price of the property.

"That the employment of the plaintiff T. C. Stone by the defendants Osburn Burke and Mary E. Burke was not terminated by the said plaintiff. That the provisions of paragraph V of the contract, dated the 16th day of April, 1947, and made by and between the plaintiff and the defendants, which said contract is the contract embodied in paragraph IV of plaintiff's Complaint, are not applicable.

"That is was the true intention and understanding of all parties to said contract dated the 16th day of April, 1947, that the rights, duties, and obligations of the plaintiff and defendants arising out of said agreement should be as they are herein stated and it is found that such was the true intent and meaning of said contract".

From the foregoing findings of fact the court concluded that plaintiff was entitled to a judgment against the defendants and both of them in the sum of $14,790.61 with interest thereon from the 12th day of April, 1950, at the rate of 7% per annum. Judgment was entered accordingly.

As the first ground for reversal appellants contend that the complaint does not allege facts sufficient to state a cause of action.

In this regard it is asserted that the allegations of the amended complaint attempt to bring respondent within the aforesaid agreement wherein it provides, among other things, that respondent's "brother D. E. Stone has an arrangement with appellants whereby under certain undisclosed conditions he is to receive 6 acres of land and that the respondent is to receive 4.922 acres of land out of a parcel of 10.922 acres". This claim, appellants urge, is made in the amended complaint in connection with the language contained in the agreement and hereinbefore set forth, under the terms of which, generally speaking, it was understood that if respondent "shall well and truly in good faith serve and assist first parties (appellants) in the maintenance, care and upkeep of their real properties in the Rivera District, as long as either of the first parties (appellants) shall be alive, then upon the death of the survivor of first parties (appellants), said land hereinabove referred to shall be willed, distributed and set apart by the wills of first parties (appellants) to second party (respondent). This is, upon the express condition that if any other overseer other than first parties (appellants), or either of them, or D. E. Stone, is put in charge of first parties' (appellants') real properties, then at that time his contract shall automatically mature in the same manner as if both of the first parties (appellants) were deceased and second party (respondent) would in that instance, and upon the happening of that event, be entitled to demand and to receive from first parties (appellants) a good and sufficient deed covering the land hereinbefore mentioned".

Appellants' contention is that while the amended complaint alleges, "that defendants terminated the employment of said D. E. Stone as overseer of their said properties and placed said properties in charge of persons other than said D. E. Stone, or said defendants, or either of them", the pleading nevertheless, discloses that the termination of employment came about by reason of a sale of the properties, which right of sale was reserved in the tenth and final paragraph of the contract hereinbefore quoted. This last mentioned provision, it is argued by appellants, clearly indicates that a possible sale of the land was considered and in the event of such sale, there was to be substituted for the land government bonds at the discretion of appellants, but these government bonds were not to be available to the respondent otherwise than by the last will and testament of the appellants, in the same manner that the land was to be made available to the respondent.

Appellants then point out that under the terms of the contract, respondent had the right of terminating the same at will, as evidenced by the language therein contained, "or in the event second party shall become dissatisfied and leave first parties' employment". That respondent could thus terminate his employment without liability, say appellants, made the contract void from its very inception.

[1–3] In this regard appellants rely upon the oft repeated rule that agreements are void for lack of mutuality and consideration when they contain an absolute and unconditional right of revocation by either party. But this rule applies to executory contracts. And lack of mutuality is tantamount to want of consideration. If sufficient consideration is present mutuality is not essential. It becomes essential only when by its absence, a party is left without a valid or available consideration for his promise. Brawley v. Crosby Research Foundation, 73 Cal.App.2d 103, 112, 166 P.2d 392.

In the case now engaging our attention the agreed statement of facts contains the recital that respondent was induced to leave his former employment and "return to the service of" appellants by the promise of permanent employment. Section 1605 of the Civil Code makes any prejudice suffered or agreed to be suffered by the promisee, as an inducement to the promisor, which the promisee is not legally bound to suffer, good consideration for a promise. Where, as in the instant case, the respondent was induced to give up his existing employment because appellants agreed to give him permanent employment, and the former expressly agreed to those terms, it would seem clear that the prospective employee, to paraphrase the language of section 1605 of the Civil Code, in giving up his present employment, suffers a prejudice as an inducement to the promisor for the latter's promise of permanent employment.

[4, 5] The existence of a good consideration is not dependent upon the fact that a benefit should be conferred upon the promisor. It is sufficient that a "prejudice suffered or agreed to be suffered" by the promisee. Millsap v. Nat. Funding Corp., 57 Cal.App.2d 772, 776, 135 P.2d 407, 409. We therefore hold that there was sufficient consideration for the promise of permanent employment.

[6] And, though it be conceded there was no mutuality in the first instance, or at the inception of the agreement, this condition was cured by respondent's complete or substantial performance of the contract so far as such performance lay within his power, prior to his efforts to enforce the terms of the contract. Whatever stricture may attach to the question of mutuality of obligation in the first instance, the performance by respondent prior to the commencement of this action was sufficient to create a mutuality of remedy so as to justify his seeking appropriate relief in this litigation for the alleged failure of appellants to conform with the terms of the agreement. Van Fossen v. Yager, 65 Cal.App.2d 591, 596, 151 P.2d 14; Thurber v. Meves, 119 Cal. 35, 38, 50 P. 1063, 51 P. 536; Gosnell v. Lloyd, 215 Cal. 244, 253, 10 P.2d 45.

[7] The rule that specific performance of an obligation to perform personal services may not be had, Civil Code, section 3390, does not defeat the right to have the specific benefit of an enforceable obligation made in consideration of personal services, where such services have been fully or *substantially* performed. Thurber v. Meves, supra, 119 Cal. at page 38, 50 P. 1063, 51 P. 536; Sayward v. Houghton, 119 Cal. 545, 548, 51 P. 853, 52 P. 44; Nevada Bank of San Francisco v. Steinmitz, 64 Cal. 301, 313, 30 P. 970.

While the present action may not be regarded as essentially one for the specific performance of the contract except insofar as such relief is necessarily incidental to the enforcement of respondent's rights in the premises, yet the cases just cited support our view that substantial performance by the demanding party makes the contract no longer executory as to that party and entitles him to have specific performance.

The cases of County of Alameda v. Ross, 32 Cal.App.2d 135, 89 P.2d 460, and Charles Brown & Sons v. White Lunch Co., 92 Cal. App. 457, 268 P. 490, relied upon by appellants, are readily distinguishable from the case at bar. If the issue in the instant case was appellants' right to terminate respondent's employment the doctrine announced in the cited cases might be applicable. But the issue here is not whether respondent could justly be discharged. No claim is here made by respondent that he is entitled to damages for wrongful discharge. His contention is that having fully performed, he is entitled to his wage and bonus in full.

We come now to the more serious contention urged by appellants that the cause of action attempted to be stated in respondent's amended complaint has not matured, and we are persuaded that this claim must be resolved in favor of appellants.

From an examination of the aforesaid agreement it is manifest that respondent was entitled to receive a deed to the land prior to the death of appellants upon one consideration only, and that condition is contained in paragraph 4 of the contract, wherein it is provided: "that if any overseer other than first parties, or either of them, or D. E. Stone, is put in charge of first parties' real properties, then at that time this contract shall automatically *mature* in the same manner as if both of the first parties were deceased" (emphasis added). Upon the happening of this event, respondent would be entitled to demand and receive from appellants a deed covering the 4.922 acres of land. That this contingency never arose is reflected in the amended complaint and agreed statement of facts, from both of which it appears that appellants did not place any other overseer in charge of the property What they did was to exercise the right vested in them by the tenth and final paragraph of the agreement (hereinabove set forth) to sell the property. This last mentioned clause in the contract authorized appellants to sell the property covered by the contract and provided in that event, "the proceeds of that portion covered by this contract (the aforesaid 4.922 acres) shall be held intact and placed in Government Bonds at the discretion of first parties and such bonds shall be substituted for and in place of the land covered by this contract". Appellants having exercised this right, the contract did not mature as it would have had there been a substitution of overseers as provided for in paragraph 4 of aforesaid. That is to say, had appellants, while still owning the land, employed some one other than respondent's brother as overseer, unless appellants themselves undertook to manage their own properties, the provisions of paragraph 4 would apply.

The agreed statement of facts reveals that while D. E. Stone's employment was terminated about April 12, 1950, it was terminated only insofar as it affected the property sold. It is recited in the agreed statement that respondent's brother was retained as overseer of that portion of the land, approximately 3 acres, which was not sold.

[8] By reason of the foregoing, respondent has no cause of action at the present time. Under the terms of the contract the government bonds for the proportionate share of proceeds acquired from the sale of the 4.922 acres was substituted for the land, and respondent is to receive this in the will of the last survivor of the appellants. Under the provisions of the tenth and last paragraph of the contract, pursuant to which appellants sold the land in question, we see no escape from this conclusion.

Neither the agreed statement of facts nor any fact admitted by the pleadings supports the court's finding that appellants terminated the employment of respondent's brother and placed "said properties in charge of persons other than said D. E. Stone, or said defendants, or either of them".

The same may be said of the findings that by reason of the preceding finding the contract did "'automatically mature in the same manner as if both of first parties (appellants) were deceased', as provided in paragraph 4 of said contract, and that upon the occurrence of such events plaintiff forthwith became * * * 'entitled to demand a good and sufficient deed covering the land' * * * therein described".

The inconsistency of this interpretation of the contract is shown by the next finding which is as follows:

> "That by reason of the sale of said property and the resultant inability of the defendants to deliver to plaintiff a deed to the property to which he thereby became entitled, it became the duty of the defendants to deliver to him Government Bonds in lieu thereof, as provided in paragraph 10 of said contract; and that defendants having failed to tender or deliver such bonds, plaintiff is entitled to the cash value thereof as fixed by the sale price of the property".

By the last quoted finding the court determines that appellants not being able to deliver a deed for property they were authorized to sell, must deliver to respondent government bonds, which under the terms of the contract take the place of the land only in the event of authorized sale under the tenth and final paragraph of the agreement, and which bonds, the contract itself provides, are to go to respondent, if at all, upon the death of the last survivor of the appellants. The court then finds that appellants having failed to tender or deliver such bonds respondent is presently "entitled to the cash value thereof as fixed by the sale of the property".

We are satisfied that under the terms of the contract in question, the pleadings and the agreed statement of facts, that while the terms of the contract, for the reasons hereinabove set forth are enforceable, respondent's cause of action does not arise under the provisions of the tenth and final paragraph of the contract and consequently is not available to respondent until the death of the last survivor of the appellants.

The judgment is reversed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

110 Cal.App.2d 820

FLETTER v. CITY AND COUNTY OF SAN FRANCISCO.

No. 15051.

District Court of Appeal, First District, Division 1, California.

May 9, 1952.

Rehearing Denied June 7, 1952.

Oliver Watson Fletter sued the City and County of San Francisco to recover for personal injuries sustained by plaintiff when he stepped from lift into an open space separating parallel lifts in theatre leased by defendants to plaintiff's employer. The Superior Court, City and County of San Francisco, Robert McWilliams, J., rendered judgment for defendant, notwithstanding a verdict in favor of plaintiff, and plaintiff appealed. The District Court of Appeal, Bray, J., held that contributory negligence was established as a matter of law.

Affirmed.

1. Landlord and Tenant ⚷169(11)

In lessee's employee's action against lessor of opera house for injuries sustained when he stepped from one elevator into space between parallel theatrical elevators, evidence established contributory negligence as a matter of law.

2. Appeal and Error ⚷934(1)

In considering judgment notwithstanding the verdict, appellate court is required to view evidence and reasonable inferences therefrom most strongly in plaintiff's favor.

3. Landlord and Tenant ⚷164(6), 165(4)

In absence of fraud or concealment or covenant in lease, lessor is not liable to lessee or latter's agents or employees for injuries due to defective or faulty construction of demised premises, except when defects are known to lessor and he has reason to believe that lessee will not discover them and lessee does not know of condition.

4. Landlord and Tenant ⚷168(1)

Even where plaintiff in personal injury action is person, such as invitee, to whom landlord owes duty of care, where dangerous condition complained of is obvious one or is as well known to plaintiff as it is to landlord, plaintiff cannot recover from landlord.

Emmett R. Burns, Arthur C. Zief, and Rinaldo A. Carmazzi, all of San Francisco, for appellant.

Dion R. Holm, City Atty., City & County of San Francisco, Lawrence S. Mana, and Donald Kropp, Deputy City Attys., all of San Francisco, for respondent.

BRAY, Justice.

Action for damages for personal injuries. The jury rendered a verdict in favor of plaintiff for $4000. From a judgment for defendant notwithstanding the verdict, plaintiff appeals.

Question Presented.

Although the question as to the liability of a landlord towards the employee of a tenant is raised, the main question is whether plaintiff was contributively negligent as a matter of law.

Facts.

Defendant owns the Memorial Opera House. The San Francisco Opera Association had entered into a lease, in writing, with defendant under which the tenant was to have the occupancy of the house for the presentation of the Ballet Russe de Monte Carlo. Plaintiff, a stagehand, was employed by the tenant and was engaged in the "loading out" of the show after the completion of its final performance. During the performance plaintiff had worked on the stage and was thereafter assigned by the tenant to go down into the basement and remove the trunks and crates from the dressing rooms. Defendant had nothing to do with this operation, it being directed by the stage manager of the Ballet and carried out by employees of the tenant, including plaintiff. At the time of the accident, plaintiff was engaged in moving with a hand truck the costume crates and trunks from the dressing rooms to a type of elevator called lifts, bridges or risers. They are used mainly for scenic or choral effects on the stage. In an area of approximately 52 feet by 22 in the basement, there are four of these lifts. They are 52 feet long, about 4 feet wide and are separated by a narrow open space about 16 inches in width and several feet deep. This space is unguarded. These lifts may be visualized as narrow platforms which can be raised, and which are separated from each other by this narrow space. The area of the four lifts is lighted by only two lights. There are columns and beams which support the stage surrounding the lifts, and steam pipes under the lights, all of which cast shadows. The lifts were piled with trunks and crates, and chairs left by the San Francisco Symphony Orchestra, casting shadows, and thereby the lighting was further reduced. About ten days prior plaintiff had been in the basement bringing trunks and crates in but used only the freight elevators and had not used the lifts. This night plaintiff was working on the number 3 or 4 lift. He had made eight trips from the dressing rooms to the lift, trucking trunks and crates. Immediately before the accident he left his hand truck "behind on the main body of the platform and walked out onto the lift to push the trunks and crates together." When he went back to get it, trunks brought there by other men blocked the end of the lift so he could not get back to his truck. As he was standing on the lift he saw another hand truck on an adjoining lift. In his direct examination he states what then happened:

> "Well, I reached across to the adjoining lift to get a small truck, and with that I fell in the opening.
>
> "Q. Now, prior to your falling into this opening, did you have any cognizance of the fact that this opening was there? A. I knew it was there, yes.
>
> "Mr. Carroll: [counsel for defendant] May I have that answer, your Honor?
>
> "The Witness: I knew it was there, Mr. Carroll. * * *
>
> "Mr. Zief [counsel for plaintiff]: Q. As you were going over and reaching over this elevator, this adjoining elevator, to pick up this truck, at that time did you know that there was—realize that there was an opening there, that there was this drop down? A. Yes.
>
> "Q. Did you know that it was unguarded? A. Yes.
>
> "Q. You knew that there wasn't any screen or anything in between, is that true? A. Yes.
>
> "Q. Now, will you tell the jury what happened as you reached across to get the other hand truck? A. Well, I fell in between the two lifts. * * *"

He caught his weight by his two hands, one resting on one lift and one on the other, and held himself from dropping to the bottom of the space until he was rescued. He suffered severe ankle, arm and shoulder injuries. Again, plaintiff stated:

> "Q. Now, when you stepped over to reach for this, did you realize that you were stepping at that time into an opening? A. No. I thought I was stepping on the other lift. * * * Well, as I reached over to get this other truck, I fell in between the two lifts, and grabbed either side of the two lifts."

On cross-examination he testified:

> "Q. I will ask you one question about your accident, Mr. Fletter: It is true, isn't it, that you didn't slip or you didn't trip or you didn't fall, you just walked into this space, isn't that true. A. I fell into it, yes.
>
> "Q. Isn't it true you just walked into it? Maybe I will make that simpler for her. I will withdraw it. Isn't it true you just stepped into this open space? A. Yes, fell into it. * * *
>
> "Q. Isn't it true that you stepped into this open space, Mr. Fletter? A. Yes, sir."

On redirect examination he was asked if at any time before the accident he ever examined the spaces between the lifts.

> "The Court: Do you mean look down into them? The Witness: No, sir, I never did."

He then said that he did not know how deep the openings were, and then:

> "The Court: By saying you never looked down in them, you don't mean in passing you never looked down in them, you didn't get down on your knees and look down? The Witness:

I never looked down at all, your Honor. I was trucking on there with my hand trucks, I was watching the wheels to keep it on the lifts.

"The Court: But I understood from your prior testimony you knew those openings were there? The Witness: From passing.

"The Court: From passing, that is true, is it not? The Witness: Yes. * * * A. Well, in trucking back and forth I noticed that in the center section there were steel beams in there, and in looking down like that I naturally saw the edges of the elevators. I didn't see any upright screens that a normal elevator has at all, and I just was looking downward in trucking on and off.

"Q. Is that the time that you noticed that there was a space in between elevators, at the south end of the elevators, Mr. Fletter? A. The question, please?

"Q. Was that the time that you noticed there was a space in between the number 3 and 4 elevators at the south end? A. Yes."

He testified that the costume crates which he had trucked onto the lift were about three and a half feet wide and that some of the trunks were possibly three feet wide. He would truck the crates or trunks onto the lift, put the truck down, take the crate or trunk off, pull the truck back and turn around and wheel the truck back along the lift. He was aware that the lift was only about four feet wide. In his deposition he stated:

"A. Well, I reached across to the adjoining lift to get a small truck and with that I fell in the opening.

"Q. Now, prior to your falling into this opening, did you have any cognizance of the fact that this opening was there? A. I knew it was there, yes. * * *

"Q. As you were going over to reach over this elevator that is adjoining your elevator to take up this truck, at that time did you know that there was—realize that there was an opening there, that there was this drop down? A. Yes.

"Q. Did you know that it was unguarded? A. Yes.

"Q. You knew there wasn't any screen or anything in between, is that true? A. Yes."

He reaffirmed these statements on the stand.

Contributory Negligence.

[1, 2] It is obvious from the foregoing, which is all the testimony given by plaintiff himself as to the circumstances of the fall, that plaintiff was contributively negligent as a matter of law. He had been trucking back and forth on a bridge approximately four feet wide trunks and crates which were almost as wide as the bridge itself. He had turned his hand truck several times on that bridge. He had noticed that on each side of this narrow pathway there were openings about 16 inches wide. His testimony is subject to only one interpretation, that knowing of the existence of the opening, he purposely stepped across for a hand truck, misjudged the distance, and fell into the opening. But at no time did he testify that the lighting prevented him from seeing, or that the dimness in any way obscured his vision. In one portion of his testimony he said that "it was rather a dull lighting." Likewise, there was testimony of other witnesses as to shadows and the fact that the lighting was poor. However, plaintiff did not say that the shadows or the dull lighting hampered his work, or interfered in any way with his seeing the openings or the edges of the openings either before or at the time of his fall. The jury was instructed that forgetfulness of a known danger will not always operate to prevent recovery by a person injured. But plaintiff at no time claimed that he had forgotten the opening. In fact his testimony shows that he remembered it and took his chances of crossing it. Therefore, he did not bring himself within the rule of Davis v. Pacific Power Co., 107 Cal. 563, 40 P. 950, where it was held that the question of whether a lapse of memory constituted negligence was one for the jury.

The plaintiff's own testimony as to the occurrence of the accident prevents the application of the rules set forth in Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576, where the fact that the jury, as in our case, viewed the premises was given considerable weight and there was evidence that plaintiff momentarily forgot the dangerous situation when she stepped aside on a stairway to allow other persons to pass.

In considering judgments notwithstanding the verdict we are required to view the evidence and the reasonable inferences therefrom most strongly in plaintiff's favor. Applying such rule here, nevertheless we are required to hold that as a matter of law plaintiff was guilty of contributory negligence. Hence the trial court did not err in disregarding the verdict of the jury.

Liability of the City.

[3, 4] Plaintiff concedes that the general rule is that, in the absence of fraud or concealment, or covenant in the lease, the lessor is not liable to the lessee or the latter's agents or employees, for injuries due to the defective or faulty construction of the demised premises, except where the defects are known to the lessor and he has reason to believe that the lessee will not discover them and the lessee does not know of the condition. See Hassell v. Denning, 84 Cal.App. 479, 258 P. 426; Restatement, Torts, § 359. Plaintiff also admits that he has been unable to find any authority applying the rule of liability of a landlord towards a patron of a semi-public place in the possession of a tenant,* to either the tenant or an employee of the tenant, but contends that such rule should be extended to the plaintiff because of the extremely short lease (it was for only six hours a day for 22 days, defendant having the right to lease the Opera House to other tenants for the other 18 hours of the day); the retention of certain control, supervision and management by defendant over the leased premises; the clauses in the lease forbidding the tenant to make repairs or even to alter the premises in small details without the lessor's consent; the fact that the association had neither the time nor the money to make repairs of the type necessary to fill the openings between the lifts, and the fact that the landlord knew that the tenant would have several or many employees. However, we do not deem it necessary to discuss this question for two reasons: (1) Assuming that there is a liability of a landlord to the employee of a tenant under the circumstances here, plaintiff cannot recover because of his contributory negligence; and (2) even where there is a liability of a landlord to a person injured on leased premises such as an invitee, where the dangerous condition complained of is an obvious one or as well known to the injured person as to the landlord, the former may not recover from the latter. Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76 (cited by plaintiff); Vitrano v. Westgate Sea Products Co., 34 Cal.App.2d 462, 93 P.2d 832; Funari v. Gravem-Inglis Baking Co., 40 Cal.App.2d 25, 104 P.2d 44. Plaintiff's own testimony shows that the danger was an obvious one and one of which he knew at the very moment he was attempting to step across the danger point.

For the same reasons, it is unnecessary to consider plaintiff's contention that defendant was guilty of active negligence in allowing, as contended by plaintiff, the lifts to become cluttered so as to diminish the lighting.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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* For discussion of this rule, see 50 Harvard Law Review, 741; 62 Harvard Law Review, 669; 84 U. of Penn.L.Rev. 467; 100 U. of Penn.L.Rev. 629; Oxford v. Leathe, 165 Mass. 254, 43 N.E. 92; Restatement, Torts, § 359, comment E.

In re MacLEAN'S GUARDIANSHIP.

GOTTLIEB v. MacLEAN.

Civ. 15031.

District Court of Appeal, First District,
Division 2, California.

May 16, 1952.

Rehearing Denied June 14, 1952.

Hearing Denied July 15, 1952.

Proceeding in the matter of the estate and guardianship of Kenneth Peter MacLean, a minor, wherein Lottie Gottlieb filed a petition for letters of guardianship based upon nomination by minor, and was opposed by Kenneth A. MacLean. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., denied the petition, and the petitioner appealed. The District Court of Appeal, Goodell, J., held that denial of petition on ground of unsuitability of nominee was not abuse of discretion.

Order affirmed.

Nourse, P. J., dissented.

1. Guardian and Ward ⚷10

In proceeding for letters of guardianship based on nomination by minor, court can exercise discretion only in determining whether nominee is suitable person. Probate Code, § 1406.

2. Guardian and Ward ⚷13(4)

In proceeding for letters of guardianship based on nomination by minor, wherein only question before court was nominee's suitability to administer that trust as officer of court, denial of petition was not abuse of discretion in view of nominee's own testimony that she flouted orders of the court. Probate Code, § 1406.

3. Guardian and Ward ⚷10

Where nominee for guardianship was defendant in suit by estate of minor's deceased mother respecting certain property held in nominee's name, and nominee asserted in her proceeding for letters of guardianship based on nomination by minor that property was hers, if estate should prevail minor would have substantial interest in property which would be in conflict with asserted interest of nominee, and hence denial of guardianship to nominee was not abuse of discretion. Probate Code, § 1406.

4. Guardian and Ward ⚷10

Upon denial of petition for guardianship based on nomination by minor, minor would have right to make another nomination which if made would again have to be submitted for judicial approval. Probate Code, § 1406.

On Petition for Rehearing.

5. Costs ⚷256(1)

Where, in proceeding for letters of guardianship, guardian on petitioner's appeal served and filed notice of additional papers or records to be included in record on appeal, but section of transcript was not necessary or proper in presentation of appeal, costs incurred by petitioner for preparation of such part of transcript would be taxed against guardian in his individual capacity.

◆

John R. Golden, San Francisco, for appellant.

Anthony S. DeVoto, San Francisco, for respondent.

GOODELL, Justice.

The minor is the son of respondent and his deceased wife. The parents had been divorced, with custody of the minor awarded to his mother.

Mrs. MacLean died in March, 1950, and on April 17, 1950 respondent was appointed guardian of the person and estate of the minor who was then 13. Mrs. MacLean and appellant were sisters.

From the time of respondent's appointment (and before that) the minor was unfriendly toward him; his attitude challenged respondent's authority as father and guardian. The minor was living in the household of appellant, who shared this attitude. The situation became so strained that in July, 1950 the father as guardian filed in this court a petition for a writ of habeas corpus to obtain the custody of the minor. At the hearing on the writ on August 14, 1950 the minor appeared before us (without counsel) and it was apparent that he rebelled against living with his father or having anything to do with him. The father had remarried and was living in Oakland. It appeared also that the minor would reach the age of 14 on December 23, 1950, when of course he could name his own guardian. We dismissed the habeas corpus proceeding and things remained as they were for the ensuing four months.

On the minor's 14th birthday he nominated appellant as guardian of his person and estate and three days later, on December 26, she filed in the Superior Court in San

Francisco, where the guardianship was pending, a petition for letters of guardianship based on the nomination.

At the hearing the following month respondent, who was still guardian, opposed the approval of the nomination. The court denied appellant's petition and this appeal was taken.

[1] Section 1406 Probate Code provides that the nominee "must be appointed if approved by the court" and Guardianship of Kirkman, 168 Cal. 688, 690, 144 P. 745, holds that in such cases "The discretion of the court can be exercised only in the determination of the question whether the nominee is a 'suitable person.'" That being so, the only question now presented is whether there was an abuse of discretion.

The court wrote an opinion wherein numerous reasons were given for its action, but it is not necessary to quote at any length from either the opinion or the findings.

We are satisfied that there are at least two grounds, regardless of any others there may be, upon which it must be held that this record shows no abuse of discretion.

In the memorandum opinion the court, in speaking of the earlier proceedings said: "It is fair to state that petitioner has, without cause or justification, and by her own admission, thrown every possible obstacle in the way to prevent the father from obtaining the physical custody of the minor to which he is entitled. Her appeals, subsequently dismissed, were patently frivolous and are typical of the tactics to which she has resorted to balk the execution of the order of the court, which she has contemptuously ignored, and she in fact testified that she had done everything she could to prevent the father from obtaining the custody to which he was legally entitled."

That statement was based on the history of the proceedings pending before the same judge from April, 1950 to January, 1951. It was also unquestionably based in part on the following testimony which the appellant with the utmost frankness gave under cross-examination at the hearing:

"Mr. Devoto: Q. I am asking you, didn't you repeatedly ignore and disregard the court order? A. Yes, on legal advice. * * *

"Q. You knew of the order appointing the father guardian pending the appeal? A. Yes.

"Q. And you did everything to ignore and disregard that order, didn't you? Isn't that correct? A. Yes—

"Mr. Golden: This is all calling for a conclusion, and argumentative.

"The Court: Well, it would go to the question of whether she prejudiced the mind of the boy or not, and I think this evidence is admissible on that subject. * * *

"Mr. Devoto: Q. If you didn't consider yourself beyond and above the law, why didn't you obey those orders and turn the custody of the boy over to the father—answer that question. A. Because Peter didn't want to go to his father. I was fighting for Peter.

"Q. That is your only reason? A. That is the only reason.

"Q. You don't think you should have given any more respect to a court order than that? A. No, sir. Peter was at stake, not the Court."

On the same subject the court found: "That at all times herein mentioned said Lottie Gottlieb has contemptuously ignored the order of this court appointing said father such guardian, and has, without cause or justification, thrown every possible obstacle in the way to frustrate said father in obtaining the physical custody of said minor * * * that as a direct result thereof, said father was at all times deprived of the actual custody and possession of said minor."

[2] It should be borne in mind that appellant was testifying in support of her own petition to become guardian in a proceeding wherein the only question before the court was her suitability to administer that trust as an officer of the court, the orders of which she frankly admitted flouting. The court in ruling said that appellant's attitude bore on the question "whether she prejudiced the mind of the boy or not", but, more than that, it was an index of her

lack of amenability to the authority of the court of which she purposed becoming a sworn officer in a highly trusted relation. We find no abuse of discretion on this count.

In the opinion the court also said: "In addition to the personal unfitness of petitioner to be appointed guardian of this minor, the court also considered that there is real estate involved in this proceeding which formerly stood in the name of the minor's mother, and which now stands in the name of petitioner, Lottie Gottlieb. This property is the house in which the mother of the minor lived for many years, and in which it may be presumed the minor has a beneficial interest. Petitioner has stated in open court that this property belongs to her, and therefore has an interest adverse to the minor, who obviously could not be adequately represented by petitioner in litigation to assert his interest."

And on the same subject the court found: "That said Lottie Gottlieb is interested in certain improved real property * * * adversely to the interest of said minor, which property said Lottie Gottlieb claims to have been deeded to her by said minor's mother, a few days before, or on the day of, the death of said mother, the validity of which deed said father as such guardian questions and intends to have determined in appropriate legal proceedings."

[3] Appellant testified that the property was hers and had stood in her name, but that for a reason of her own she had put the title in the name of Mrs. MacLean. When Mrs. MacLean was on her death-bed appellant got her to deed the property back to her. During cross-examination appellant was told by respondent's counsel that a suit was to be brought respecting this property, and in the briefs we are told that such suit has since been brought by the special administratrix of Mrs. MacLean's estate. If the estate prevails obviously Peter as an heir of his mother will have a substantial interest in the property. Appellant's assertion that the property is hers presents a clear-cut conflict of interests between appellant and the minor. We find no abuse of discretion on this count. See In re Estate of Bedford, 158 Cal. 145, 110 P. 302.

[4] In the opinion filed by the court it is said: "It is * * * the opinion of this court that the best interest of the minor will be served by his remaining under the guardianship of his father * *." The formal order says nothing with respect to a continuance of the guardianship in the father, and indeed that question was not before the court. The only question was the approval or disapproval of the minor's nominee. Under § 1406 as it now reads it would seem that on the denial of this approval the minor has the right to make another nomination which if made must again be submitted for judicial approval.

The order appealed from is affirmed.*

DOOLING, J., concurs.

NOURSE, Presiding Justice.

I dissent upon the ground that neither the petitioner nor the minor was accorded a fair or impartial trial. The order appealed from was the result of religious intolerance and judicial indiscretion. The interests of the minor were not considered at any stage of the proceeding and are given no consideration in Justice Goodell's opinion of affirmance.

In the year 1940 the minor's mother was divorced from the father on the ground of the latter's cruelty. Custody of the child, then about four years of age, was given to the mother and the father was ordered to pay $7 a week for his maintenance. Immediately upon the death of the mother the father stopped such payments and since that time, March 13, 1950, he has not paid anything whatever for the support, education or maintenance of his son except the sum of $150 for tuition in the St. Joseph's School. All other expenses have been paid by the appellant herein.

Almost coincident with the divorce in 1940 the petitioner herein, who was the sister of the deceased and the aunt of the minor, provided a home for her invalid sister, the minor involved herein, and a daughter of the sister by a previous marriage. The mother had frequently expressed the desire that the son should be raised as a Catholic and had placed him in a Catholic school in San Francisco for religious training. The petitioner herein was a Jewess. She was insulted, threatened, intimidated and abused throughout the hearing.

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* For amended judgment on rehearing, see 244 P.2d 69.

The trial court assumed without reason that the petitioner had placed the minor in this Catholic school to "sequester" him from his father and to unjustly influence the court through religious pressure. That there was no justification for this assumption will appear later. This was the second hearing relating to the guardianship of the minor. On the previous hearing the father had been appointed guardian and the application of the aunt had been denied. The hearing had been conducted with great bitterness and because of that counsel for the petitioner in this proceeding urged the court to transfer the proceeding to another department where they could have a fair and impartial trial. The motion was denied. It should have been granted. The order under appeal was not made with any consideration for the welfare of the minor but it was sought and granted to enable the father to take the minor out of the Catholic school he was attending and to compel him to move to his father's home in Oakland, there to attend the public schools. The persistence of the minor in his desire to continue his religious and clerical education followed by study for the priesthood angered the court and the father. These circumstances explain the otherwise inconceivable findings of facts which are not supported by any competent evidence.

It was found that "The present petitioner appealed from the order of this Court awarding letters of guardianship to the father. She also appealed from the order of this Court awarding custody of the minor to the father pending the determination of the first appeal. Both of these appeals, being wholly without merit, as petitioner at all times well knew, were voluntarily dismissed by her." A cursory examination of the record on the former appeal (which however is not properly a part of this record) shows that the appeal was far from being "wholly without merit." In fact it shows that there was very substantial merit in it. But the appeal was considered a reflection on the Court for which the appellant was denounced and penalized in this proceeding.

It was found that "*In defiance* of the order of this Court appointing the father as guardian, the petitioner herein then *sequestered* the minor in a seminary in Santa Clara County, that thus the father might be further frustrated in obtaining possession of his boy." The evidence is wholly to the contrary. Let us look at the record. The minor, on cross-examination, testified:

"Q. How did you happen to enter that academy? A. Before that I talked to Father Davenport, and I had gone with other boys who were going down there, and I decided then that I wanted to go.

"Q. Did anybody advise you to enter the academy? A. No, sir. I went to a Catholic school, and I thought for myself whether I wanted to go or not.

"Q. You did that of your own will? A. Yes.

"Q. Nobody advised you to do it? A. No, sir.

"Q. Your aunt, Miss Gottlieb, didn't advise you to go into this academy, did she? A. No, sir.

"Q. She didn't ask you to enter this academy so that you couldn't get into the custody of your father? A. No, sir.

"Q. When you were down there in this academy, you wrote a letter to your father, did you not? A. He wrote a letter to me first.

"Q. He wrote a letter to you first? A. Yes.

"Q. Then you answered, did you not—you answered him? A. Yes."

On further examination it developed that his aunt, the petitioner herein, paid all but three months of his tuition as well as all the expenses of food, clothing, medical care and spending money. The father has paid nothing for the support or maintenance of the minor since his mother died in March,

1950. We should read further in this cross-examination of the minor:

"Mr. Devoto: Q. When did you decide to become educated for the priesthood? A. Sir, I decided when I was in the 8th grade, and I thought about it, and I asked my mother, but my mother really didn't have a chance to think about it.

"Q. You were on the witness stand in the guardianship proceedings and you made no statement at that time that you wanted to enter the priesthood, did you?

"Mr. Golden: I will object to that. I will object to the form of the question. This is an attempt to impeach him, and we ought to find out where there is something occurring in the transcript, or where he was asked that and didn't give that answer.

"The Court: Well, that objection would ordinarily be good, but in a proceeding of this kind, where we want to get at the boy's intention, and when he made up his mind—he didn't say in any proceeding here before that he wanted to be a priest. That was one of the things that they set up when this matter was before the Appellate Court. I will allow it. I think it should all be brought out."

The reference to the proceeding in the Appellate Court is to a petition in habeas corpus brought by the father to gain immediate possession of the minor. The father was represented by counsel, the minor appeared in propria persona. When it appeared to us that the minor desired to enter the seminary, that he would lose all the advantages of his prior studies if the father had his wish to prevent it, and that in a few months the minor would have reached the age when he could choose his own guardian, the judges of this court dismissed the petition. The trial judge openly resented our action and held it to the prejudice of the petitioner in this proceeding.

It was further found: "It is fair to state that petitioner has, without cause or justification, and by her own admission, thrown every possible obstacle in the way to prevent the father from obtaining the physical custody of the minor to which he is entitled." This is really the meat of the controversy. It is the ground upon which my associates affirm the order. The point is that since the appellant and the minor resisted the efforts of the court to thwart the ambition of the minor to study for the priesthood both should be forced to knuckle down to the orders of the court without regard for the moral or temporal welfare of the minor. In a proceeding of this kind the interests of the minor are the real issue. Here the minor had voluntarily chosen to attend a Catholic seminary to study for the priesthood. It had been the wish of his mother. The father objected and wanted to take him out and put him in the public schools. The court approved the father's action. The resentment against the minor's choice of a religious education is inconceivable. However the petitioner sided with the boy and told the court in explanation of her conduct that she was "fighting for Peter," that "Peter was at stake, not the Court." Thereupon she lost her case. But as to the facts, both the petitioner and the minor testified on numerous occasions that the petitioner had frequently told the minor that he could go to his father whenever he desired to do so, that the refusal of the minor to do so was a matter of his own choosing and was caused by his religious and clerical education in the Seminary at Mountain View. (Pending the appeal and because of this opposition, the boy has been forced to drop out of the institution.)

It was further found: "It is apparent that the minor herein is not of strong character for his age, and that petitioner has taken advantage of this moral weakness to poison his mind against his father, and to procure from him her own nomination. Under the circumstances it is evident that the minor was not acting freely and voluntarily in signing the nomination, but did so as a result of the domination and undue influence exercised over him by petitioner." The only evidence touching the "moral weakness" of the minor is that showing his set determination to continue his religious studies in opposition to the demands of his father to gain possession of his person and estate for monetary reasons. As to the rest of the finding all the evidence is directly contrary.

The court then referred to the "personal unfitness of the petitioner." It is not clear upon what this statement is based. The father did not appear in the proceeding. He was represented by counsel who made many statements of facts outside the record, but who was not sworn as a witness. The only evidence of personal fitness is that found in the testimony of the petitioner and of the minor. Certainly none of that testimony showed personal unfitness. To the contrary the evidence is that for more than eighteen years the petitioner has been conducting her own business in which she has had a good reputation and which has yielded her approximately $400 a month; that she acquired a home into which she moved her divorced sister and the two children and where she supported them for approximately twelve years. At the time of the hearing she was paying the minor's tuition in the academy, all expenses of his board, lodging, clothes, medical and dental bills, and provided a home during the vacation period. The father was paying nothing.

This court has put up a straw man in relation to the litigation over the home property which appellant had purchased and deeded to her sister after the divorce. Such litigation would be under the control of the administrator of the sister's estate. The guardian of the minor could do nothing, at least without the sanction of the court.

The foregoing statement of facts presents the legal question involved in the appeal—the power of the court to arbitrarily reject a guardian nominated by a minor of the age of fourteen years when such action may wreck the whole life of the minor. In a proceeding of this kind the minor is the real party in interest though his nominee is the nominal petitioner. The real issue, therefore, is the *moral and temporal welfare of the minor.* This is made clear by the words of the statute. Here the welfare of the minor was not given the slightest consideration by the lower court, nor by the majority of this court. The right of the minor is statutory. Section 1406 of the Probate Code provides: "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the *best interest of the child in respect to its temporal and mental and moral welfare* * * *. If the child * * * is over fourteen years of age, he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed if approved by the court." (Emphasis added.) The section is based on the former section 1749 of the Code of Civil Procedure which contained the provision: "If the guardian nominated by the minor is not approved by the court, * * * the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years." This portion of the section was omitted when section 1406, Probate Code was enacted in 1931 so that the power of the court to reject the nominee of the minor and appoint one of its own selection no longer exists. The proper procedure under the new section is that if the minor's nominee is rejected by the court for some *judicial* reason the court should forthwith notify the minor to make another nomination within the ten day period mentioned in the section. The court has no power to appoint a guardian of its own choice or to continue in office one formerly appointed against the objection of the minor. In re Guardianship of Kerr, 29 Cal. App.2d 439, 441, 85 P.2d 145; Collins v. Superior Court, 52 Cal.App. 579, 581, 199 P. 352; 25 Am.Jur. p. 24; 39 C.J.S., Guardian and Ward, § 14, pages 26, 27.

The applicable rule is clearly and succinctly stated in Collins v. Superior Court, supra, 52 Cal.App. at pages 580, 581, 199 P. at page 353: "He [the minor] is 14 years of age, and has the absolute right to select and nominate his guardian, who, if approved by the court, must be appointed. Code Civ.Proc. § 1748; [In re] Guardianship of Kirkman, 168 Cal. 688, 144 P. 745; Guardianship of Meiklejohn, 171 Cal. 247, 152 P. 734; Guardianship of McSwain, 176 Cal. 287, 168 P. 117. These cases are also authority for holding that a minor, upon arriving at the age of 14 years, may nominate and displace a guardian already appointed, and that even though the displaced guardian may be one of his parents. 'The whole scheme,' says the court, in discussing the provisions of the Code of Civil Procedure relating to the appointment of guardians, 'contemplates the absolute right of the minor to have a guardian of his own selection after he is 14 years of age, provided always he selects a person who is, in the judgment of the court, a suitable person to act as [his] guardian. The discretion of the court can be exercised only in the determination of the question whether the nominee is a "suitable person." Guardianship of Kirkman, supra.

"To uphold the contention of the respondent would be to deny the minor the exercise of this absolute right."

There is evidence that the mother of the minor left an insurance policy of which the minor is a beneficiary in the sum of about $1,000. At a subsequent hearing the trial court, with threats of contempt and immediate imprisonment, forced appellant to turn the policy over to counsel for respondent though it was the expressed wish of the mother that it be allowed to accumulate and be used for the minor's education. We are told in one of the briefs that pending the appeal the proceeds of the policy have been collected by respondent and it is a natural assumption that they will be consumed by guardianship and counsel fees as that appears to be the only interest the father has in his son. The proceeds of the policy should be preserved for the benefit of the minor. Hence the costs herein should be charged to the respondent individually and should not be taxed to the guardianship estate. Furthermore, in all fairness to the minor and to the appellant herein the proceedings should be transferred to another department of the superior court.

Another matter calls for attention. A petition for letters accompanied by the minor's written consent and nomination was filed by the maternal aunt of the minor. No pleadings were filed by the father but his attorney appeared in opposition to the petition. A hearing was conducted with the aunt and minor as the sole witnesses. No other testimony or evidence was offered. Following the adverse judgment the petitioner appealed and notified the clerk to prepare a transcript under Rule 5(a), Rules on Appeal. Thereafter counsel for the father, purporting to act under Rule 5(b) requested the clerk to include in the transcript the reporter's transcript of testimony at a hearing on the father's petition for letters had on April 3, 1950. This transcript was not introduced in evidence in the present hearing and is not a proper part of the transcript on appeal herein. Rule 5(b) of the Rules on Appeal authorizes the respondent to request the clerk to include in the transcript "additional papers or records, including the clerk's minutes, any written opinion of the superior court, and exhibits either admitted in evidence or rejected * * *." The clear purpose of this rule is to permit the respondent to procure the inclusion in the clerk's transcript papers, records and exhibits which were offered in evidence during the trial or rejected when such documents have been omitted from the notice filed with the clerk by the appellant. It does not permit the respondent to include papers, records, exhibits or anything else which were not before the trial court and which are wholly foreign to a proper record of the proceedings which are under review. For this reason the appellant should be reimbursed for the cost of that portion of the transcript.

The order should be reversed with directions to grant the petition as prayed.

On Petition for Rehearing

PER CURIAM.

It appearing that on the preparation of the record on appeal respondent served on appellant and filed with the clerk "a notice designating additional papers or records * * * to be included in the record on appeal" (Rule 5(b)), the same consisting of the reporter's transcript of testimony taken at the hearing in proceeding numbered 117,096, and that the second section of the Reporter's Transcript herein consisting of pages 1 to 95 inclusive was not necessary or proper in the presentation of this appeal,—

[5] It is ordered that the judgment filed herein on May 16, 1952 be and it is amended by adding after the words "The order appealed from is affirmed" the following: "Further ordered that the costs incurred by appellant for the preparation of that part of the Reporter's Transcript consisting of the second section be taxed against the respondent in his individual capacity and not as guardian."

Appellant's petition for a rehearing is denied.

Hearing denied; SCHAUER, J., dissenting.

110 Cal.App.2d 785

SHERRILLO v. STONE & WEBSTER ENGINEERING CORP.

Civ. 18642.

District Court of Appeal, Second District, Division 1, California.

May 8, 1952.

Rehearing Denied May 28, 1952.
Hearing Denied July 7, 1952.

Fred Sherrillo, employee of subcontractor, brought action against Stone & Webster Engineering Corporation, contractor, for injuries sustained when employee stepped and fell through allegedly negligently erected and maintained scaffold. The Superior Court of Los Angeles County, Arthur Crum, J., entered a judgment on a verdict returned for the defendant, and the plaintiff appealed. The District Court of Appeal, White, P. J., held that evidence on issue of whether defendant exercised ordinary care was sufficient to sustain the verdict.

Judgment affirmed.

1. Workmen's Compensation ⟹2238

In an action by workman injured in his employment against person not his employer, it is better that jurors be fully instructed that workman should be fully compensated according to rules for ascertaining damages without regard to workman's compensation received, since insurance carrier who paid compensation will be reimbursed out of judgment, than that jurors, knowing that workman received some compensation, but not knowing or being uncertain as to law applicable, should be left to speculate in jury room as to effect of their verdict.

2. Workmen's Compensation ⟹2238

In action against contractor for injuries sustained during employment by employee of subcontractor, plaintiff would have been entitled to instruction, if so requested, that insurance carrier of employer had paid compensation to plaintiff, that carrier had first lien upon any judgment recovered, and that therefore jury in assessing damages should not deduct any amounts received by plaintiff from insurance carrier. Labor Code, §§ 3850–3863.

3. Appeal and Error ⟹216(2)

When request for more specific instructions than those given is not made, and instructions given are accurate, error cannot be urged because of failure of trial court to give more specific or enlarged instructions.

4. Appeal and Error ⟹1067

Where, in action against contractor for injuries sustained in course of employment by employee of subcontractor, issue of insurance was injected by plaintiff's witness and defendant attempted to clarify same by showing that it was workmen's compensation insurance, and, upon plaintiff's objection, court instructed jury that insurance had nothing to do with issue being tried, failure of court to instruct jury that amount plaintiff might have received as compensation insurance should not be considered in ascertaining damages because insurance carrier had first lien upon judgment, was not prejudicial error in absence of request therefor. Labor Code, §§ 3850–3863.

5. Trial ⟹260(8)

In action against contractor for injuries sustained by employee of subcontractor when he stepped and fell through allegedly negligently erected and maintained scaffold, wherein court properly instructed jury as to degree of care required of defendant toward plaintiff, requested instructions as to who is an invitee and duty owed toward an invitee would have been no aid to jury and refusal thereof was not error.

6. Trial ⟹260(8)

In action against contractor for injuries sustained by employee of subcontractor who stepped and fell through allegedly negligently erected and maintained scaffold, wherein court gave favorable instruction on doctrine of res ipsa loquitur that from happening of accident there arose an inference of negligence, additional instructions proffered by plaintiff relating to control of instrumentality, lack of knowledge of plaintiff as to cause of accident, and fact that properly constructed scaffolds do not break or fall, were superfluous, and properly refused.

7. Trial ⟹203(2)

A party is only entitled to full, fair and correct instructions upon all issues tendered by pleadings or raised by evidence.

8. Negligence ⚷119(3)

Defense of unavoidable accident need not be specially pleaded, but is raised by general denial of negligence.

9. Negligence ⚷63

A showing of unavoidable accident is equivalent to showing that defendant was not negligent or that his negligence was not proximate cause of accident.

10. Negligence ⚷138(3)

In action against contractor for injuries sustained by employee of subcontractor who fell through allegedly negligently erected and maintained scaffold, wherein there was conflict of evidence on question of defendant's negligence, instruction as to unavoidable accident was proper though not specially pleaded, since it was raised by general denial of negligence.

11. Negligence ⚷121(1, 5)

Plaintiff had burden to show negligence and that same proximately caused accident.

12. Negligence ⚷135(4)

In action against contractor for injuries sustained by employee of subcontractor who stepped and fell through allegedly negligently erected and maintained scaffold, evidence authorized inference that defendant took safety measures by posting bulletins requesting workmen on scaffold to not interfere with planking, and that plaintiff should have read bulletins, and, in light thereof, taken precautions before stepping on scaffold, and evidence that planks were at times disarranged warranted conclusion that plaintiff, knowing conditions from bulletin warnings, was negligent.

13. Negligence ⚷139(1)

In action against contractor for injuries sustained by employee of subcontractor who stepped and fell through allegedly negligently erected and maintained scaffold, instruction that it was obligation of defendant to furnish employees of subcontractor safe place to work so far as reasonable care on his part would enable him to do so sufficiently covered rule that defendant's duty of ordinary care was a "continuing" duty.

14. Negligence ⚷134(8)

In action against contractor for injuries sustained by employee of subcontractor who stepped and fell through allegedly negligently erected and maintained scaffold, evidence on issue of whether defendant exercised ordinary care in taking safety measures, including inspections and safety bulletins and warnings to workmen, was sufficient to sustain verdict for defendant.

◆

Victor C. Rose and Alfred M. Klein, Los Angeles, Robert P. Dockeray, Los Angeles, of counsel, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff appeals from a judgment for defendants, entered upon the verdict of a jury, in an action for damages for personal injuries sustained by plaintiff when he stepped on and fell through a scaffold erected and maintained by the defendant, Stone & Webster Engineering Corporation. Plaintiff was a workman in the employ of a sub-contractor on a building project of which defendant was the general contractor. It was charged that the scaffold was erected in a negligent manner, with the result that when plaintiff stepped upon the scaffold it collapsed.

Appellant presents the following assignments of error:

> "(1) The court and respondent committed misconduct in bringing to the attention of the jury the fact that appellant was entitled to receive workmen's compensation benefits.
>
> "(2) The court erred in refusing to instruct the jury upon the subject of what constitutes an invitee.
>
> "(3) The court erred in instructing the jury upon the subject of contributory negligence when there was no evidence sufficient to justify such an instruction.
>
> "(4) The court committed error in refusing certain instructions requested by appellant on the subject of res ipsa loquitur.
>
> "(5) The court erred in instructing the jury on the subject of imputed negligence without at the same time giving

plaintiff's requested instruction on defendant's continuing duty.

"(6) The court erred in instructing the jury with respect to an unavoidable or inevitable accident.

"(7) The verdict of the jury is contrary to the evidence."

The admission of evidence concerning the receipt of workmen's compensation benefits by the plaintiff came about in the following manner: On direct examination of a medical expert testifying on behalf of the plaintiff, the witness, in describing certain measures taken in the treatment of plaintiff, said, "And, incidentally, I remember distinctly calling the insurance company for a consultant in chest diseases and a Dr. Robinson was sent out, * * *." On cross-examination of the witness by defendant's counsel, the following occurred:

"Q. Yes. And in order that there shall be no misunderstanding here, you say that when this lung condition was most acute you called the insurance company to get a specialist in? A. That is right.

"Mr. Sokol (Plaintiff's attorney): Object to that as incompetent, irrelevant and immaterial; prejudicial.

"The Court: Objection overruled.

"Q. By Mr. Bauder (Defendant's attorney): Is that right? A. That is right.

"Q. And that was the company that was involved in this case through the Midwest Pipe Company (plaintiff's employer), wasn't it? A. That is right.

"Q. Sir?

"Mr. Sokol: Object to that, formal objection, your Honor, under the Dodds v. Liberty Mutual case[1], decided by the Supreme Court, and move that the jury be admonished to disregard any reference to it.

"The Court: Well, I will now instruct the jury *as was intimated by counsel at the outset of this case,* that the fact that there may be insurance involved on behalf of any party to this action has nothing to do with the issue we are trying here.

"Mr. Bauder: That is correct, your Honor.

"The Court: Of course, it must be obvious to all of us that this man, being hurt in the course of his employment, would be subject to the benefits of the Compensation Act before the Industrial Accident Commission. That, however, does not bar him from bringing this action here.

"Mr. Bauder: Not at all.

" Mr. Sokol: In fairness, your Honor, I move that under Dodds v. Liberty Mutual I have to ask your Honor to—

"The Court: All right, what is your citation to it? Let's get it.

"Mr. Sokol: Well, I won't take the time now. Your Honor made the statement that—

"The Court: Your witness has already referred to something he did with respect to some insurance carrier. Now, it is proper to clean the matter up for the jury angle. If he hadn't alluded to it, I would have held it out. * *."

Thus the record shows that the question of insurance was first injected into the trial (aside from whatever intimations in that regard were made by counsel as indicated in the court's remarks above quoted) by the statement of plaintiff's own witness that he had called "the insurance company" for a consultant, a statement that might well be deemed prejudicial to the defendant. Defendant's counsel thereupon sought to bring out that the insurance company referred to was not an insurer of defendant but the compensation insurance carrier of plaintiff's employer. Then, after the colloquy between court and counsel and the court's statement, hereinabove quoted, the matter was apparently dropped, and, so far as the record discloses, plaintiff made no further request that the court give to the jury any further instruction or admonition on the subject.

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[1] Presumably Dodds v. Stellar, 30 Cal.2d 496, 183 P.2d 658, involving the lien of the employer or the employer's insurance carrier on the claim of an injured workman against a third party.

[1] The average reasonably well-informed person who may be called to serve upon a jury knows that a workman injured in his employment receives compensation. It is a delusion to think that this aspect of the case can be kept from the minds of the jurors simply by not alluding to it in the course of the trial. It is better that the jurors be fully instructed as to the law—that the plaintiff should be fully compensated according to the rules for ascertaining his damages without regard to compensation he may have received, since the insurance carrier who paid his compensation will be reimbursed out of his judgment—than that the jurors, knowing that the plaintiff has received some compensation, but not knowing or being uncertain as to the law applicable, should be left to speculate in the jury room as to the effect of their verdict.

[2] So here, under the circumstances presented by the record, the plaintiff would have been entitled to have the court instruct the jury as was done in Adams v. Southern Pacific Co., 82 Cal.App.2d 560, 564, 565, 186 P.2d 729. In that case the trial court explained to the jury that the insurance carrier had paid compensation to the plaintiffs; that it had a first lien upon any judgment recovered (Labor Code, secs. 3850–3863), and that therefore the jury, in assessing the damages, should not deduct any amounts received by the plaintiffs from the insurance carrier.

[3] However, as heretofore noted, no request for an amplified instruction on the subject of compensation was made. The plaintiff cannot now assert prejudicial error with reference to the court's statement to the jury when he failed to offer such instructions as he deemed proper. Had suitable instructions been requested, undoubtedly they would have been given, but the plaintiff apparently elected to leave the matter as it stood. The law is well established that when a request for more specific instructions than those given is not made by an appellant, and when the instructions given are accurate, error cannot be urged in this court because of the failure of the trial court to give more specific or enlarged instructions. As was said in People v. Carothers, 77 Cal.App.2d 252, 255, 175 P.2d 30, 32, "Where an instruction on a particular point or points as given by the court is correct as far as it goes, and the only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness, or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit instructions on such point or points, he must properly request the same, otherwise error cannot be predicated upon the failure to give such additional instruction."

[4] The prejudice, if any, to defendant resulting from the omission of the trial court to give a fuller instruction on the subject of workmen's compensation was occasioned by his own omission to request such instruction. The fact of "insurance" was first brought into the case by plaintiff's own witness. In these circumstances, a reversal of the judgment is not warranted.

[5] There is no merit to the contention that the court erred in rejecting proffered instructions on who is an invitee and the duty owed toward an invitee. The court properly instructed the jury as to the degree of care required of defendant toward plaintiff in the circumstances of this particular case, and the proffered instructions would have been of no aid to the jury. The degree of care owed the plaintiff by defendant was not challenged at the trial, and with reference to such degree of care there was no dispute.

[6, 7] The court gave an instruction on the doctrine of res ipsa loquitur, advising the jury that from the happening of the accident there arose an inference that its proximate cause was the negligence of the defendant; that if such inference preponderated over contrary evidence it warranted a verdict for plaintiff, and that it was incumbent upon defendant to rebut the inference by showing that it exercised ordinary care or that the accident occurred without being proximately caused by any failure of duty on its part. Appellant urges that further instructions on the subject of res ipsa loquitur, proffered by him, should have been given. His contention cannot be sus-

tained. The trial court gave a favorable instruction, to the effect that under the evidence the doctrine was applicable. The instructions offered by plaintiff, relating to "control of the instrumentality", lack of knowledge of plaintiff as to the cause of the accident, the fact that properly constructed scaffolds do no break or fall, were superfluous, in view of the instruction given and all the other instructions in the case. Had the trial court given the instructions requested by plaintiff the effect would have been to simply emphasize one aspect of the case in favor of plaintiff. An examination of the entire record discloses that the court fully, fairly and correctly instructed the jury upon all of the issues tendered by the pleadings or raised by the evidence. This was all either party was entitled to.

[8–12] The court did not err in giving the jury an instruction to the effect that "In law we recognize what is termed an unavoidable * * * accident. * * * an accident that occurred without having been proximately caused by negligence. * *" Nor was it error to instruct the jury on the subject of contributory negligence. The defense of unavoidable accident need not be specially pleaded, but is raised by a general denial of negligence. Parker v. Womack, 37 Cal.2d 116, 121, 230 P.2d 823, 825. An instruction on the subject is appropriate when there is a conflict of evidence on the question of defendant's negligence, since the burden of proof is on plaintiff to show that there was negligence and that it proximately caused the accident, and a failure of proof in this regard may warrant a conclusion that the accident was unavoidable. A showing of unavoidable accident is equivalent to a showing that the defendant was not negligent or that his negligence was not a proximate cause of the accident. Parker v. Womack, supra; Jolley v. Clemens, 28 Cal.App.2d 55, 72, 73, 82 P.2d 51. With reference to contributory negligence, there was evidence from which it could be inferred by the jury that the defendants took safety measures, including, aside from inspections, the posting of safety bulletins requesting that workmen on the scaffold should not interfere with the planking in the course of their operations, and that plaintiff in the exercise of ordinary care should have read these bulletins and in the light thereof taken reasonable precautions before stepping on the scaffold. There was evidence that the planks and plywood used on the scaffold were disarranged from time to time, and the jury would be warranted in concluding that plaintiff, knowing these conditions from the warnings contained in the safety bulletins, failed to exercise ordinary care.

[13] Appellant's point No. 5 affords no ground for reversal. That defendant's duty of ordinary care was a "continuing" duty was sufficiently covered by the instruction that it was the obligation of the defendant to furnish to the employees of the sub-contractors a safe place to work, "so far as reasonable care on his part will enable him to do so."

[14] The argument that the verdict is contrary to the evidence may not be sustained. Under the evidence, the jury could well have concluded that the defendant exercised ordinary care in the taking of safety measures, including inspections and safety bulletins and warnings to the workmen. The evidence of care on the part of defendant was such as to present to the triers of fact the question of whether the inference of negligence had been met and overcome.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.

110 Cal.App.2d 703

ANDERSON et al. v. SAN JOAQUIN COUNTY.

Civ. 8083.

District Court of Appeal, Third District, California.

May 2, 1952.

Hearing Denied June 26, 1952.

Action by Vera M. Anderson, individually, and Richard Walter Anderson and others, by and through their general guardian, Vera M. Anderson, against the County of San Joaquin, to recover damages for wrongful death of Walter Anderson. The Court, San Joaquin County, M. G. Woodward, J., entered judgment for plaintiffs and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Schottky, J. pro tem, held that the evidence supported the implied findings that the highway was in a dangerous and defective condition, that defendant was aware or should have known of such condition and did not correct it, and that the death of deceased was due to the negligence of defendant.

Affirmed.

1. Automobiles ⚷306(4, 5, 7)

In action against county for death of motorist whose collision with oncoming truck was allegedly caused by defective condition of county road, evidence supported implied findings of jury that road was in dangerous and defective condition, that county was aware or should have been aware of such condition and did not correct it, and that death of motorist was due to negligence of county.

2. Appeal and Error ⚷1001(1)
Highways ⚷213(2)

Whether a dangerous condition exists with respect to a county road and whether county has had actual or constructive notice thereof so as to be liable under statute for injuries resulting from such condition are questions of fact for jury, and jury verdict will not be disturbed on appeal if supported by substantial evidence.

3. Automobiles ⚷309(1)

In action against county for death of motorist whose collision with oncoming truck was allegedly caused by defective condition of county road, instruction that plaintiff was entitled to benefit of presumption that motorist was exercising due care for his safety and protection at time of accident, was proper.

◆

Blewett, Blewett & Macey, Jones, Lane & Weaver, and Frederick L. Felton, all of Stockton, for appellant.

Hoberg & Finger, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This action was brought against appellant county by the surviving widow and children of Walter Anderson who was killed in an automobile accident alleged to have been caused by the defective condition of a county road. The jury returned a verdict in favor of plaintiffs in the amount of $50,000, and judgment was entered in that amount. Defendant's motion for a new trial was denied. The county has appealed from the judgment. This court in 97 Cal.App.2d 330, 217 P.2d 479, held that the claim filed by plaintiffs with the county sufficiently complied with the claims statute.

Appellant relies for a reversal of the judgment upon two main contentions: (1) that the evidence is insufficient to show that the county had actual or constructive notice of any dangerous or defective condition of the highway; and (2) that the court erred in giving to the jury an instruction on the presumption of due care of the deceased.

Before discussing these contentions we shall summarize briefly the evidence as shown by the record.

The accident occurred on the Kasson Road, a north-south county road which has existed for many years. The road is used as a short cut from U. S. Highway 50 to Modesto. The decedent was traveling in a southerly direction. At the place of the accident there is a slight curve to the west. At this curve the decedent lost control of his automobile and thereafter collided with a heavy truck proceeding in the opposite direction. There were various chuck holes in the pavement on this curve. Witness Northrup, a swamper riding in the truck, described the accident as follows: "I saw this car coming just the other side of the turn. He was, I presume, on the highway because the car was being handled all right and he come into the turn and the car started to bob and pitch around a little bit, and as he got in the middle of the turn, why, the car's bobbing got more violent and he come more around on our side yet. The right hand tires got off the highway onto the shoulder and then he come back onto the highway and come across the highway and collided with us."

The County Engineer, Manthey, testified that he had driven over the road 30 days before the accident, and had noted nothing unusual about its condition, i. e., didn't notice whether there was a drop from the pavement to the road shoulder; that he noticed nothing unusual in the condition of the road after the accident; that after the accident he observed no conditions requiring repairs; that chuck holes could occur in that road overnight. This witness testified that if he had seen such a condition as depicted by Plaintiff's Exhibit 3 (a photograph of the curve) he would have ordered it repaired.

Respondents produced several witnesses who testified in detail as to the condition of the road at the place of the accident, and the length of time the condition had existed. These witnesses were residents of the community and testified that the chuck holes at the curve were from two to six inches deep. These holes extended from the edge of the roadway into the traveled portion from one to one and one-half feet. There was not space enough for an automobile to travel the right side of the road without hitting the holes. Witness Dethlefsen testified: "Well, as you approach the turn on the right hand side going south, there were a number of chuck holes about fifty feet on each side and right at the center of the turn they became deeper. It was impossible to pass a car on that turn without driving off the pavement and straddling the chuck holes, one wheel on the pavement and the other on the shoulder of the road," and "as a farmer, I usually carry a rule in my pocket and I made a point to measure it, and it was slightly under six feet from the center line to the edge of the pavement."

As to the length of time the defective condition had existed, the following testimony was given: Witness Brazil testified that he traveled the road two or three times daily, and the condition had existed from five to six months before the accident. Witness Aspussin testified the condition had existed about three or four months. Witness Dethlefsen testified that the condition had existed for two or three months. Another witness testified the condition had existed for "at least two months." Another witness placed the time at "a month or six weeks, or maybe longer."

Respondents contend that the evidence amply establishes both actual and constructive notice to the appellant county. They cite Perry v. City of San Diego, 80 Cal. App.2d 166, 181 P.2d 98, 101, where the court quoted from Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625, 158 A. L.R. 773, as follows:

> "Actual notice of a defective or dangerous condition is not required. Constructive notice satisfies the statute. Laurenzi v. Vranizan, 1945, [25 Cal.2d 806, 812] 155 P.2d 633; Dawson v. Tulare Union High School, 1929, 98 Cal. App. 138, 142, 276 P. 424; Hook v. City of Sacramento, 1931, 118 Cal.App. 547, 553, 5 P.2d 643; Bennett v. Kings County, 1932, 124 Cal.App. 147, 153, 12 P.2d 47. Constructive notice is defined by section 19 of the Civil Code as that knowledge of circumstances 'sufficient to put a prudent man upon inquiry as to a particular fact' where 'by prosecuting such inquiry, he might have learned such fact.' The rules governing constructive notice require reasonable diligence in making inspections for the discovery of unsafe or defective conditions. Laurenzi v. Vranizan, 1945, supra, 25 Cal.2d at pages 811, 812, pages 636, 637 of 155 P.2d [633]; Nicholson v. City of Los Angeles, 1936, 5 Cal.2d 361, 364, 365, 54 P.2d 725."

In Maddern v. City and County of San Francisco, 74 Cal.App.2d 742, at page 752, 169 P.2d 425, at page 432 (hearing denied), the court said:

> "While it is true, as argued by defendant, that in practically all of the cases cited, a longer time than four or five days elapsed between the first evidence of a defect and the accident, we believe it is likewise true that there is no hard and fast rule as to the amount of time that must elapse before a court or jury will be justified in holding that a defendant had constructive notice of the dangerous and defective condition. What amounts to 'long continued neglect,' 'a considerable length of time' or 'an unreasonable length of time' are matters which must be determined in accordance with all the facts and circumstances of the particular case under consideration. What might be 'long continued neglect' or 'an unreasonable length of time' in one case might not be so in another, and we believe that under the authorities the true rule for an appellate tribunal to follow is that when reasonable minds may differ regarding the question as to whether defective conditions have existed for a sufficient length of time under the particular circumstances of a case to charge a municipality with constructive knowledge thereof, the conclusion of the jury in that regard may not be interfered with on appeal."

Appellant cites Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725, and Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990, in support of the contention that the county did not have notice of the defective condition. It was stated in the syllabus of the Nicholson case that "While a minor defect in a sidewalk may be dangerous to travel, it does not, by its mere existence, charge the city with constructive notice of its presence; and assuming that a finding of a dangerous and defective condition would be supported by evidence that there was a break in the sidewalk, with a difference in grade at the break of an inch and a half, such evidence will not support a finding that defendant had constructive notice of such condition for several months where there is no attempt to charge the city with actual notice and merely a showing that the defect had existed for several months," and "Where a city is charged with constructive notice of the defective or dangerous condition of a sidewalk on the basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition, that is, that had there been no neglect of duty there would have been actual knowledge on the part of the city officers a sufficient time before the accident to give reasonable opportunity to guard against it."

Respondent distinguishes these cases upon the ground that minor defects were involved, whereas in the present case the evidence shows substantial defects. The court states in Eastlick v. City of Los Angeles, 29 Cal.2d 661, 673, 177 P.2d 558, 566, 170 A.L.R. 225: "The cases of Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725, and Whiting v. City of National City, 9 Cal.2d 163, 69 P.2d 990, have no application here in relation to the establishment of defendant's liability, where it cannot be said that the break in the sidewalk was a minor or trivial defect as a matter of law. [Cases.]"

In support of their contention that under the facts of the instant case the appellant county had actual notice of the defects, respondents cite Hook v. City of Sacramento, 118 Cal.App. 547, at page 553, 5 P.2d 643, at page 645, where the court said:

> "Mrs. Meredith testified that the hole or depression had existed in the same condition since September or October, 1929. The accident happened on December 6, 1929. Having made inspections each month, Hageman must have seen the hole. It is inconceivable that a man engaged in examining and inspecting streets and sidewalks would overlook a defect 18 inches to 2 feet long. Therefore, sufficient evidence was shown that appellant had actual knowledge of the existence of the dangerous and defective condition of said apron for at least two months prior to the accident."

We believe that the evidence was sufficient to show that appellant county not only had constructive notice but also that it had actual notice. The following analysis made by the learned trial judge in denying the motion for a new trial is amply supported by the record:

> "It was established, by a preponderance of the evidence, that such defect existed; that it had existed for several months and that it was dangerous in character. Several witnesses testified they had narrowly escaped serious accidents at the same place. It was further shown that the county maintained a system of inspection for its secondary highways and that no reports of the defect had been made by any of its inspectors to the highway maintenance department. Plaintiff, therefore, relied on constructive notice, namely, that the dangerous defect had existed for so long a time that it could and would have been discovered and repaired had the county's agents exercised due care and performed the duties devolving upon them in a reasonably efficient manner. By its verdict the jury found that the county knew, or in the exercise of due care should have known, that the defect existed and that it was a dangerous hazard to the safety of the public.
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> "On this phase of the case the evidence was virtually undisputed. * *
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> * * * * * *
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> "* * * the law is well established that if the defect relied upon is so minor in character that it will escape the attention of an ordinarily prudent person charged with the responsibility of discovering and remedying defects in highways, the doctrine of constructive notice does not apply. But, in the instant case the jury found that the defect was not inconspicuous. It did not occur overnight because several people living in the vicinity testified that it had existed for several months and that they themselves had experienced minor accidents there. The jury was carefully instructed on this aspect of the question and found that the county knew, or in the exercise of due care should have known, that the defect existed, that it was dangerous in character, and that unless remedied could bring disaster to persons lawfully upon the highway and themselves exercising due care."

[1, 2] The language of this court in Murphy v. County of Lake, 106 Cal.App.2d 61, at page 67, 234 P.2d 712, 716, is quite applicable to the instant case: "Whether or not a dangerous condition exists and whether or not the county has had actual or constructive notice thereof are questions of fact for the jury, and their verdict will not be disturbed on appeal if it is supported by substantial evidence. Bigelow v. City of Ontario, [37 Cal.App.2d 198, 99 P.2d 298] supra; Rowland v. City of Pomona, 82 Cal.App.2d 622, 186 P.2d 447. In the present case, in view of the narrowness of the road, there can be no question but that the unpaved shoulder necessarily would have to be traveled on by larger vehicles when passing other cars. There was evidence that the generally dangerous condition of the 'Soda Bay Road' was known in the locality and had been brought to the attention of the supervisors of the county at least a year prior to the accident. Furthermore, there was evidence that the type of construction of the shoulder created an inherently dangerous condition. Upon a thorough examination of the record we conclude that there was substantial evidence to support the implied finding of the jury that the accident resulted from a dangerous or defective condition of the road of which the County of Lake had notice."

[3] Appellant next contends that the court erred in giving the following instructions on the presumption of due care of the deceased:

> "You are instructed that the law presumes that Walter Anderson, deceased, at the time and place of the happening of the accident in question, exercised due care for his own safety and protection, and that such presumption, unless and until dispelled by competent evidence, is itself evidence in the case which you must take into consideration in your deliberations respecting a verdict. If such presumption has not been dispelled by competent evidence, then it is your duty throughout your deliber-

> ations in this case to presume that decedent at the time and place in question acted as an ordinarily prudent person would have acted under the same or similar circumstances."

Appellant argues that the evidence introduced by respondents disclosed the acts and conduct of deceased in detail. Appellant relies principally upon the case of Tice v. Kaiser Co., 102 Cal.App.2d 44, 226 P.2d 624, 628, which was a wrongful death case, in which a new trial was granted defendant upon the grounds of insufficiency of the evidence and the giving of an instruction on the presumption of due care. Upon appeal the court said:

> "The trial court's conclusion, on the motion for new trial, that the giving of the instruction as to the presumption of due care, under the evidence produced by plaintiff was error, is sustainable. * * *
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> * * * * * *
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> "It should be here noted that plaintiffs produced the workmen employed on the job with the deceased at the time as their own witnesses and they testified in detail as to all the surrounding facts pertaining to the actions and conduct of the deceased up to the very time of his fatal injury.
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> "Heretofore some confusion existed in relation to this presumption and its application. (See discussion of cases in note 'Battle of the Presumptions', B.A. J.I. No. 135, p. 159, 161, and 1950 Supp., p. 113, No. 135.) The general rule is announced in Mundy v. Marshall, 8 Cal. 2d 294, 296, 65 P.2d 65, that the manner in which the deceased was crossing the street having been covered by the plaintiff's own evidence, there is no room for the operation of the presumption that he was exercising due care. It is said in Paulsen v. McDuffie, 4 Cal.2d 111, 119, 47 P.2d 709, 714, that: 'What he did on that occasion was entirely covered by the evidence in the case, and there was neither necessity nor reason for indulging in any presumption upon that subject.'
>
> "In order to be entitled to such a presumption, the party relying upon it must first establish a sphere or field within which the presumption may operate. Whether the evidence introduced establishes such a field or sphere is, in the first instance, a question for the court. Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529; Hoppe v. Bradshaw, 42 Cal.App.2d 334, 108 P.2d 947. The disputable presumption that a decedent exercises due care is dispelled, has no probative value, and disappears from the case when the litigant relying upon the presumption introduces evidence contrary to the fact presumed. Mundy v. Marshall, supra; Young v. Pacific Electric Ry. Co., 208 Cal. 568, 283 P. 61. See, also Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510.
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> "In Speck v. Sarver, 20 Cal.2d 585, 587, 128 P.2d 16, the clarified rule in respect to the application of such a presumption appears to be that an instruction as to the rebuttable presumption set forth in sec. 1963 subdivision 4 of the Code of Civil Procedure may properly be given to the jury in certain situations, but such an instruction should not be given where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time in question. The court there adopts the same rule that was applied in Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884. See, also, Cole v. Ridings, 95 Cal.App.2d 136, 212 P.2d 597; Chakmakjian v. Lowe, 33 Cal.2d 308, 201 P.2d 801. No other errors appear."

Appellant submits "that the rule of the Tice case, as stated above, is now the law of California" and that it has cleared up the confusion that theretofore existed. For that reason appellant states that it would be an unreasonable burden upon the court's time to cite the prior decisions of the Supreme Court in Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590, Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826, and other cases relied upon by respondent.

In Westberg v. Willde, supra, the court said 14 Cal.2d at page 365, 94 P.2d 590, at page 593:

"From these decisions, and others of this court which might be cited, the rule is firmly established in this state that a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence. People v. Milner, 122 Cal. 171, 54 P. 833; Sarraille v. Calmon, 142 Cal. 651, 76 P. 497; People v. Siemsen, 153 Cal. 387, 95 P. 863; Pabst v. Shearer, 172 Cal. 239, 156 P. 466; Thompson v. Davis, 172 Cal. 491, 157 P. 595; Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 171 P. 1066; Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393; Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269, [supra]; Pacific Portland Cement Co. v. Reinecke, 30 Cal.App. 501, 158 P. 1041; Grantham v. Ordway, 40 Cal.App. 758, 182 P. 73.

"In the case of Mar Shee v. Maryland Assur. Corp., [supra,] this court had before it the question as to whether the presumption in favor of one of the parties to said action had been 'overcome by satisfactory evidence'. In that case the rule was announced that 'a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.'

"In the instant case the defendants do not contend that as a matter of law decedent must be held to have been guilty of contributory negligence. That is, they do not urge that the evidence is 'wholly irreconcilable' with the presumption. It was therefore no error to give the questioned instructions under those circumstances. Ellison v. Lang Transp. Co., 12 Cal.2d 355, 84 P.2d 510.

"The further claim is made that the giving of the said instruction was improper, in view of the fact that the witnesses on behalf of respondents and those of the appellants testified fully as to the acts and conduct of the deceased at the time of and immediately prior to the collision, and therefore that there was no place for a presumption as to his conduct on that occasion. Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65, 66 is cited in support of this last mentioned contention. In that case, however, the court held that, 'There is only one reasonable conclusion to be drawn from the facts established by the testimony of the plaintiff's own witness'. That conclusion was that the deceased in that action had been guilty of contributory negligence. In other words, the court concluded that the deceased's negligence was established by 'uncontradicted testimony' of the witnesses of the plaintiff, and the case was therefore brought within the rule of the Mar Shee case.

* * * * * *

"* * * But in the other situation, where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this court following the Mar Shee case, an instruction that the deceased is presumed to have exercised ordinary care of his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction. Ellison v. Lang Transp. Co., supra."

And in Anthony v. Hobbie, supra, the court said, 25 Cal.2d at page 819, 155 P.2d at page 829:

"In the instant case, disregarding the testimony of defendant under section 2055, which is unfavorable to plaintiffs, the most that appears from plaintiffs' evidence is that at the time of the accident decedent was on the highway probably near the middle thereof, and defendant was driving on his right hand side of the road. It does not appear whether decedent was standing there for no purpose, was in the process of walking across the highway, or was endeavoring to flag down a passing motorist for assistance. It may be true that he was in a place of danger, but that is true of any pedestrian on the highway at night or in the daytime. Merely being on the highway is not necessarily negligence on his part. It may have been that he was there for a legitimate purpose, such as crossing the highway, and that he was observant of oncoming traffic, but was blinded by defendant's headlights, or misjudged defendant's speed. Those conditions would indicate a lack of contributory negligence rather than its existence. At most it cannot be said that merely being afoot on a highway at night alone leads to only one possible conclusion, that is, contributory negligence; or that if it was negligence, it proximately contributed to the accident. Hence, it cannot be said the plaintiffs' evidence established contributory negligence as a matter of law. But in addition to the foregoing, even the evidence elicited from defendant does not necessarily establish that conclusion. He testified that when he saw decedent he was three feet *west* of the center line and facing east. If so, he may well have been in a proper position waiting for defendant to pass, or may have been endeavoring to flag defendant down to obtain assistance for the parked car which was stuck in the mud.

"The plaintiffs are entitled to the aid of the presumption that decedent used due care for his own concerns. Code Civ.Proc., sec.1963(4). The case was a proper one for the application of that presumption. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. That such presumption was not dispelled from the case is obvious from the foregoing discussion showing that plaintiffs' own evidence did not show decedent was guilty of contributory negligence as a matter of law. Certainly if he was not guilty of contributory negligence as a matter of law, there is no evidence completely refuting the presumption that he was not. The rule is stated in Westberg v. Willde, supra, 14 Cal.2d at page 365, 94 P.2d at page 593, quoting from Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269:

> " ' "a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."
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> " 'In the instant case the defendants do not contend that *as a matter of law decedent must be held to have been guilty of contributory negligence.* That is, they do not urge that the evidence is "wholly irreconcilable" with the presumption. It was therefore no error to give the questioned instructions under those circumstances.' (Italics added.) We have seen that in the instant case the evidence is not wholly irreconcilable with the exercise of ordinary care by decedent, but is in fact compatible with it."

In Scott v. Sheedy, 39 Cal.App.2d 96, at pages 101–102, 102 P.2d 575, at page 578, (hearing in Supreme Court denied), the court, in approving the giving of an instruction on the presumption of due care, said:

> "* * * In other words, notwithstanding the evidence from other witnesses, 'all possible facts both in favor of and against the alleged negligence of the plaintiff' (Westberg v. Willde, supra) were not before the court. In this case no witness could have testified that plaintiff saw the danger. A witness might place him in a position from which an inference might be drawn

that he could see or realize danger, but that would not be sufficient if a reasonable inference otherwise could be drawn. If the acts and conduct of an incapacitated party must be testified to by other witnesses, we conclude that the test given in the Westberg case and in Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269, is proper. In the Mar Shee case, the court, 190 Cal. at page 9, 210 P. at page 273, said: '* * * We deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.'

"Examining the testimony of plaintiff's witnesses on the subject of whether or not plaintiff was guilty of contributory negligence; we find that all witnesses agree that defendant Hagan drove through the opening only after plaintiff had given him a hand signal. This act of hand signalling as a matter of law would not be sufficient under the facts of this case to find plaintiff guilty of contributory negligence unless it might be assumed that it was a guarantee that the space through which the truck was to pass was of sufficient width, when it may have been proven that as a fact it was not. However, the evidence shows that if the truck had been properly centered, there would have been ample clearance on each side. Wiley v. McNab & Smith, 8 Cal.App. 135, 96 P. 332. The evidence from which a conclusion of contributory negligence on the part of plaintiff might be drawn was produced by witnesses called on his behalf. There was some difference in the testimony as to the number of signals given, and a slight variation as to the position occupied by plaintiff at the time of the accident. Some of the witnesses noted the direction in which plaintiff turned his head. When considered as a whole, we cannot conclude as a matter of law that contributory negligence was or was not established by the uncontradicted testimony of the witnesses, or that the facts proven were wholly irreconcilable with the disputable presumption given in the court's instructions. Mar Shee v. Maryland Assur. Corp., supra; Westberg v. Willde, supra."

In the case of Tice v. Kaiser Company, supra, so strongly relied upon by appellant, there was no petition for a hearing in the Supreme Court, and the opinion makes no mention of the cases of Westberg v. Willde, and Anthony v. Hobbie. The court stated, 102 Cal.App.2d, at page 51, 226 P.2d at page 629 that "[plaintiff's witnesses] testified in detail as to all the surrounding facts pertaining to the actions and conduct of the deceased up to the very time of his fatal injury," and the court then held that the instruction of the presumption of due care should not have been given because it "is dispelled, has no probative value, and disappears from the case when the litigant relying upon the presumption introduced evidence contrary to the fact presumed." If by the phrase "evidence contrary to the fact presumed" is meant evidence which is "wholly irreconcilable with the presumption sought to be invoked," then it may be that, upon the record in the Tice case, which is not before us, the instruction should not have been given in that case, but we do not believe that, in view of the decisions of our Supreme Court heretofore cited (which as an intermediate appellate court we are bound to follow), we would be justified in holding that the giving of the instruction was error in the instant case. For the following resumé of the facts by the trial court, amply supported by the record, shows clearly that the evidence produced by plaintiff was far from "irreconcilable with the presumption sought to be invoked":

> "* * * The highway had the usual white line in the center and yet it was so narrow that two cars approach-

> ing from opposite directions could not pass without one of them leaving the improved surface. The decedent, who was not familiar with the highway, suddenly discovered that he could not avoid an accident by merely remaining on his side of the white line, as one would ordinarily assume; and it was when he turned slightly off the improved surface that he struck the hole and lost control of the car. This hole, which was subsequently measured and the dimensions thereof brought to the attention of the jury, had actually eroded into the improved surface.
>
> "The driver of the truck and his helper both testified that decedent, just prior to the accident, was operating the car in a normal manner and was entirely on his side of the highway until he struck the hole, at which time the car veered over into the path of the truck. Strenuous efforts were made by defendant's counsel to impeach these two witnesses by showing that they had each previously given an entirely different version of the 'normal' manner in which decedent's car was being driven. One of them admitted frankly that at that time he sought to cast blame upon the decedent he was under the impression that he and his associate were liable to a charge of manslaughter and he had shaded his story with the view of protecting himself. Defendant came no nearer than this to establishing contributory negligence, and the jury believed that the two witnesses were telling the truth when they testified at the trial."

We conclude, therefore, that the court properly instructed the jury that plaintiff was entitled to the benefit of the presumption that the deceased was exercising due care for his safety and protection at the time of the accident.

In view of the foregoing we are satisfied that the record amply supports the implied findings of the jury that the highway was in a dangerous and defective condition, that appellant county was aware or should have been aware of such condition and did not correct it, and that the death of deceased was due to the negligence of defendant county. The jury was fully and correctly instructed.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

111 Cal.App.2d 99

SHARPE v. ARABIAN AMERICAN OIL CO.

Civ. 18704.

District Court of Appeal, Second District, Division 3, California.

May 14, 1952.

Rehearing Denied June 9, 1952.

Hearing Denied July 10, 1952.

Action by Edward A. Sharpe against Arabian American Oil Company to recover overtime compensation under contract of employment as tugboat captain and pilot in Arabia. The Superior Court, Los Angeles County, Eugene P. Fay, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Shinn, P. J., held that plaintiff was not entitled to overtime compensation for time in excess of 8 hours per day during which he was on call or on standby, in absence of contract provision for compensation in addition to stipulated monthly salary.

Judgment reversed with instructions.

1. Shipping 🔑69

Provision in written contract of employment as tugboat captain and pilot in Arabia or any other foreign locality at stated monthly salary that if employee worked less than 8 hours per day, 6 days per week, his pay would be reduced proportionately did not imply an agreement that if he worked more than 8 hours per day his monthly salary would be increased proportionately, and, in absence of provision for overtime compensation, he was not entitled to additional compensation for time in excess of 8 hours per day during which he was on call or on standby.

2. Contracts 🔑168

If the parties omit from agreement something which was so clearly a part of their understanding that agreement is unworkable without it, and which would have been incorporated without question if either party had requested it, omitted stipulation will be implied as a part of agreement, but justification and necessity therefor must be found in the agreement.

3. Contracts 🔑168

Nothing may be added to agreement by way of implication except that which is necessary to carry out intentions of the parties as derived from the agreement itself and not merely from the circumstances under which it was made.

4. Contracts 🔑168, 175(1)

If agreement, as written, is complete as to the matters which it purports to cover and is workable, courts will not read into it any stipulation which would add to or detract from the respective burdens or privileges the parties have declared to be their agreement, and it will be conclusively presumed that agreement expresses their entire understanding.

5. Customs and Usages 🔑5

Evidence of custom with respect to overtime compensation of tugboat captains in Long Beach Harbor was inadmissible on issue of overtime compensation payable under contract of employment as tugboat captain and pilot in Arabia or any other foreign locality, in absence of showing that such custom was of universal application or a general and uniform custom followed at other ports. Civ.Code, § 1646; Code Civ.Proc. § 1870, subd. 12.

6. Customs and Usages 🔑15(1)

Evidence of usage is admissible only as an instrument of interpretation. Code Civ.Proc. § 1870, subd. 12.

7. Contracts 🔑220

In the interpretation of an unambiguous contract, conditions may be read into it which are necessary to carry out the expressed intentions of the parties and which they clearly took for granted without statement thereof.

8. Customs and Usages 🔑12(2)

Evidence of usage and custom may be received as a means of interpretation if it is shown that such usage or custom was of such general and universal application that the parties may be conclusively presumed to have known of it. Code Civ.Proc. § 1870, subd. 12.

9. Customs and Usages 🔑19(1)

In action to recover overtime compensation under contract of employment as tugboat captain and pilot in Arabia, containing no express provision for such compensation, plaintiff had the burden of proving any custom in Arabia with respect to overtime pay or any custom or practice other than that followed by employer.

10. Customs and Usages 🔑13

Parties may be bound by a special or local custom if they have knowledge of it and contract with reference to it.

11. Labor Relations 🔑1262

Master and Servant 🔑72

Compensation cannot be collected for overtime work which is of the same nature as the work contracted for, in absence of express agreement for such compensation, even though the hours of labor are fixed by contract or statute.

◆

Lawler, Felix & Hall, Los Angeles, for appellant.

William P. Crawford, Long Beach, Charles J. Colden, San Pedro, for respondent.

SHINN, Presiding Justice.

Plaintiff was employed in California for a minimum of 24 months service as tugboat captain in Saudi Arabia, or any other foreign locality to which he might be transferred. His services were rendered as tugboat captain from November 22, 1948 to January 31, 1949, when he was promoted to pilot, in which capacity he served until he voluntarily resigned May 10, 1949. He received monthly pay of $495 as tugboat captain and $520 as pilot and, in addition, lodging and meals. Upon his return to California he brought this action claiming that under his contract of employment 8 hours constituted a full day's work, that he had remained on duty (including time when he was "on call" or on "standby"), and therefore had worked, 24 hours a day, during the term of his employment, and had put in overtime of 16 hours each working day, which totaled 1232 hours as tugboat captain and 952 hours as pilot. As tugboat captain plaintiff lived on the ship and was available for duty 24 hours per day, 7 days per week. As one of six pilots he was required to report in 20 minutes while "on call", and to report in one hour when on "standby". He was "on call" 24 hours, on "standby" the next 24 hours and "off duty" the third 24 hours. He sought additional pay at the rate of $2.372 per hour as captain and $2.492 per hour as pilot for the alleged overtime. Findings were in his favor and he had judgment for $2,922.30 with interest from January 31, 1949 and $2,372.34 with interest from May 5, 1949. Defendant appeals.

The facts of the case are not in dispute. The controversy involves nothing more than an interpretation of the written agreement under which plaintiff was employed and rendered his services, and a definition of the rights and duties of the parties thereunder. The controlling paragraph reads as follows: "Your salary will be U. S. $450.00 a month, effective Oct. 10, 1948, which salary shall not be reduced during your current Tour of Foreign Duty. However, in the event you fail to work an eight-hour day, six-day week, your pay may be reduced proportionately to the number of lost hours or days in a month, provided such loss is not caused by illness, accident, or other causes beyond your control."

Plaintiff contends that 8 hours constituted a work day, that everything over 8 hours was overtime, that he was working 24 hours a day because he was "on call" or "on standby" when he was not actually working, that the agreement calls for pay for all overtime, and that the rate of pay was to be based upon the yearly wage reduced to an hourly rate. The trial court agreed with these contentions. Plaintiff did not allege or attempt to prove that he worked more than 8 hours per day, exclusive of the hours he was merely "on call" or "on standby".

It is not contended by plaintiff that these various agreements are expressed in the writing. He states his theory in these words: "Implicit in the express provision for proportionate reduction of pay is a provision for increased pay proportionate to the number of overtime hours. It is simply a question of *reciprocity* based on *reasonable expectation.*" He also relies upon certain evidence which he claims proved there was a general custom under which tugboat captains and pilots are paid time, or time and a half, for hours they work in excess of 8 hours per day. This custom, he contends, supplies whatever is needed to justify his version of the agreement.

[1] Plaintiff has not cited any statutory or case law which supports his position and we doubt that any can be found. An agreement that if an employe works less than 8 hours a day, 6 days a week, his pay will be reduced proportionately, is not an agreement that if he works more than 8 hours a day his monthly salary will be increased proportionately. Neither is it an agreement that when he has worked 8 hours his day's work is done and he may discontinue what he is doing, whether or not it is completed. These are matters to be arranged and stated in the agreement of employment if the parties have considered them and reached an understanding.

[2-4] If the parties have omitted from the agreement something that was so clearly a part of their understanding that the agreement would be unworkable without it, and which would have been incorporated without question if either party had requested it, the missing stipulation will be implied as a part of the agreement. But before this may be done justification, and the necessity for it, must be found in the agreement. Nothing may be added by way of implication except that which is necessary to carry out the intentions of the parties, as derived from the agreement itself and not merely from the circumstances under which it was made. If the agreement, as written, is complete as to the matters

which it purports to cover, and is workable, the court will not read into it any stipulation which would add to or detract from the respective burdens or privileges the parties have declared to be their agreement. And, in the construction of such an agreement it will be conclusively presumed that it expresses their entire understanding. These principles have been expounded too often to require further discussion. Foley v. Euless, 214 Cal. 506, 6 P.2d 956; Stockton Dry Goods Co. v. Girsh, 36 Cal.2d 677, 227 P.2d 1, 22 A.L.R. 2d 1460; Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 113 P.2d 878; United States B. & L. Ass'n v. Salisbury, 217 Cal. 35, 17 P.2d 140; Gero v. Richey, 38 Cal.App. 21, 175 P. 91; Withers v. Moore, 140 Cal. 591–597, 74 P. 159; Sickelco v. Union Pac. R. Co., 9 Cir., 111 F.2d 746.

The agreement is utterly silent as to all the matters which plaintiff says should be implied. No claim is made that the parties had any understanding that was not expressed in the agreement nor that plaintiff misunderstood what it said or what it meant. If we should accept the theory upon which plaintiff's action is predicated it would mean that plaintiff was employed at a salary of $1,485 per month to run a tugboat, and $1,560 per month to act as pilot, in addition to board and lodging. There is nothing in the agreement which suggests that the parties had any such intentions. Plaintiff's duties as tugboat captain required him to assist in the docking of tankers and freighters as they came into and left the dock at Ras Tanura. The tug towed barges and pile drivers, served as a fire boat and was used in many miscellaneous activities. Plaintiff was an experienced seafaring man. He contracted to furnish his services without any agreement as to the maximum number of hours per day he might have to remain "on call" or "on standby" when not actually on duty, and whether he would be entitled to pay for overtime while actually working or while he was "on call" or "on standby". We can conceive of no reason for believing that defendant, in preparing the contract, did not incorporate everything that was necessary to express its understanding of the terms of plaintiff's employment. It made no representation or promise to plaintiff that he would not have to be available for duty more than eight hours per day. Even if it be assumed that plaintiff believed he would be free of all responsibility 16 hours out of every 24, or was under a misapprehension as to other conditions he would encounter in Saudi Arabia, this would not have a bearing upon the proper interpretation of the agreement. The fact that he discovered he had made what he considered to be a bad bargain does not entitle him to be given a better one by the court. Defendant stated the terms of its offer and plaintiff accepted them. It would be in excess of its authority for the court to attempt to make a new contract by adding all or any of the conditions which are the basis of plaintiff's claims. It is too clear for argument that there is nothing in the agreement to suggest that defendant would have agreed to any of those conditions if plaintiff had suggested them. The interpretation placed upon the agreement was clearly erroneous. It is complete as to all the conditions of plaintiff's employment to which it relates. Other matters which were intentionally omitted may not be added under the guise of interpretation. By its judgment the trial court did not interpret the contract in such a manner as to carry out the intentions of the parties; it attempted to make a new contract. If it had been the mutual intention of the parties that plaintiff would be paid overtime for 16 hours out of 24, because some service might be required of him while he was off active duty, he would doubtless still be working for the company as a pilot at $18,000 a year, plus board and lodging, provided he had not retired upon his savings.

Plaintiff testified over objection that he was familiar with shipping operations in the harbors of the major ports of this country and in a majority of harbors all over the world, and with the rate of pay and compensation of tugboat masters and pilots and with tugboat operations in Los Angeles Harbor and Long Beach Harbor. In answer to a question what was the usage and custom as to the manner of pay of tugboat operators in Los Angeles Harbor he answered, over objection, that at Long Beach Harbor "You were paid for the amount of excess hours you put in over the stipulated number of hours that you were supposed to work * * * . Overtime was based on your hourly rate, * * * and you would be paid overtime at your straight hourly rate. In some instances, however, the same rule applied that in certain kinds of work that you were paid what is called time and a half, that is your straight hourly rate plus half your straight hourly rate, which was called time and a half, as overtime."

[5, 6] Defendant's objection, upon numerous grounds, should have been sustained. Evidence of usage is never admissible except as an instrument of interpretation. Code Civ.Proc., sec. 1870, subd. 12.

[7, 8] Under the rules previously stated, in the interpretation of an unambiguous contract, conditions may be read into it which are necessary to carry out the expressed intentions of the parties and which they clearly took for granted without their being stated. Consistently with this rule, evidence of usage and custom may be received as a means of interpretation if it is shown that it was of such general and universal application that the parties may be conclusively presumed to have known of it. In Pastorino v. Greene Brothers, 90 Cal. App.2d 841, 204 P.2d 368, it was held that evidence was admissible to prove custom or usage "followed by all of the people in the fishing business" and "of universal application to all those engaged in the commercial fishing industry", under which the captain of a boat has complete control of its movements during a fishing venture. Plaintiff endeavored to bring himself within this rule. He failed to do so.

It was not shown that the custom which plaintiff testified obtained at Los Angeles Harbor or Long Beach Harbor was a general and uniform custom or that it was followed at other ports. Although he testified that at Los Angeles Harbor (meaning Long Beach Harbor) "You were paid for the amount of excess hours *you put in* over the stipulated number of hours that you were supposed to work" he did not explain whether the "hours *you put in*" included time when the employee was merely "on call", or "on standby", or whether tugboat captains or pilots were "on call" or "on standby" where the alleged custom prevailed, or whether they were paid by the month or by the hour, or whether they were in the employ of the owners of ships they helped to dock at monthly wages or worked by the hour for harbor authorities. (Italics ours.)

[9] Section 1646, Civil Code, provides that where a contract indicates a place of performance it is to be interpreted according to the law and usage of that place. The contract was to be performed in Saudi Arabia or other foreign locality. Plaintiff says that in the absence of proof of foreign law California law governs. 5 Cal. Jur., sec. 12, p. 431. It is California law we have been discussing. There was no evidence of any custom among ship owners and operators in Saudi Arabia or of American companies employing captains or pilots for service in Saudi Arabia to pay their tugboat captains or pilots anything more than their monthly salaries, even though they actually worked or were "on call" or "on standby" more than 8 hours, or any other given number of hours per day. If there was a custom in Saudi Arabia, with respect to overtime pay, or any custom or practice other than that followed by defendant, plaintiff had the burden of proving it, and should have known of it at the time of trial. It seems clear from his testimony that he is complaining of the fact there was no such custom.

[10] Parties may be bound by a special or local custom if they have knowledge of it and contract with reference to it. Plaintiff did not attempt to bring himself within this rule and does not rely upon it.

[11] In its very thorough opening brief defendant cited numerous cases stating the rule that in the absence of express agreement compensation cannot be collected for overtime work which is of the same nature as the work contracted for, even though the hours of labor are fixed by contract or by statute. Plaintiff answers that he is not claiming overtime pay under an implied

contract, but solely under the express written agreement which he pleaded. We have fully answered his contentions, and there are no additional points which need be considered.

Upon a retrial plaintiff could not establish a right under his contract to be paid for overtime.

The judgment is reversed with instructions to make new findings and conclusions in accordance with the views herein expressed and to enter judgment for defendant.

WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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110 Cal.App.2d 723

In re PETERS' ESTATE.

FUENNING et al. v. CLARK, U. S. Atty. Gen.

Civ. 17235.

District Court of Appeal, Second District, Division 2, California.

May 5, 1952.

Proceeding in the matter of the estate of Marie W. Peters, deceased, Security-First National Bank, executor, wherein Anna Fredericka Fuenning and Hermann Theodor Peters filed petitions to determine heirship, and were opposed by Tom C. Clark, Attorney General, U. S. A., as successor to the alien property custodian, who had vested decedent's estate on ground that legatees under will were residents of Germany. The Superior Court of Los Angeles County, Harold B. Jeffery, J., concluded that Hermann Theodor Peters who was a son of a legatee and a United States citizen was entitled to distribution of his proportionate share, and that residue of estate would escheat, and the petitioners appealed. The District Court of Appeals, McComb, J., held that striking of evidence as to German laws tending to show United States citizens have no reciprocal right to inherit from German decedents was prejudicial error.

Reversed.

Appeal and Error 🔑1047(3)

War and National Defense 🔑12

In proceeding to determine heirship relative to property bequeathed to German residents and vested in alien property custodian on ground legatees were enemy nationals, by sister allegedly the only qualified heir to take distribution, and by a legatee's son, a United States resident, wherein issue was whether United States citizens had reciprocal right to inherit from German residents so that German residents could take property disposed of in United States, German statute which could deprive United States citizen of inheritance from German if denationalized German became naturalized American citizen, and German law providing for escheat of Jewish person's property, were material and granting Attorney General's motion to strike same from evidence was prejudicial error. Executive Order No. 9788, 50 U.S.C.A. Appendix, § 6 note; Probate Code, §§ 259, 259.1.

Joseph R. Vaughan and Pat B. Trapp, Los Angeles, for appellants.

Harold I. Baynton, Asst. Atty. Gen. of the United States, Director, Office of Alien Property; Walter S. Binns, U. S. Atty., Southern District of California; Clyde C. Downing, Asst. U. S. Atty., Chief of Civil Division, Los Angeles, Valantine C. Hammack, Sp. Asst. to the Atty. Gen.; James D. Hill, George B. Searls, John F. Cushman, Attys., Department of Justice, Washington, D. C., for respondent.

McCOMB, Justice.

Petitioners appeal from a probate decree determining heirship and that decedent's estate escheated to the United States.

Facts: Marie W. Peters died on or about May 15, 1944. She left a will under the terms of which one third of her estate was bequeathed to two legatees who were residents of Germany; the remaining two thirds of the estate was bequeathed to unnamed issue of persons named in the will, also residents of Germany.

The estate consisted entirely of personal property with the exception of one piece of real property which decedent, just prior to her death, had contracted to sell. The sale was consummated by the executor of the estate.

On September 4, 1946, the Alien Property Custodian issued an order vesting in himself for the benefit of the United States all the interest in the estate of all the legatees named or described in the will. The order determined that the property was payable or deliverable to or claimed by nationals of an enemy country and stated that as to such nationals who were not within an enemy country the interest of the United States required that they be treated as nationals of a designated enemy country.

Pursuant to an Executive Order of October 14, 1946, No. 9788, 50 U.S.C.A. Appendix, § 6 note, the Attorney General of the United States succeeded to the rights and duties of the Alien Property Custodian.

A petition for determination of heirship was filed on September 10, 1946, by Anna F. Fuenning, the sister of decedent, a resident of the United States. She alleged that she was the only heir qualified to take distribution from decedent's estate by reason of the fact that if the legatees' names in the will are still living they are aliens residing in Germany and are precluded from testamentary disposition under section 259 of the Probate Code of California, because under the laws of Germany on May 15, 1944, a United States citizen was not given a reciprocal right of inheritance.

The Attorney General of the United States, hereinafter referred to as "objector", filed an answer to the petition. There is also a petition for determination of heirship filed on June 26, 1947, by Hermann T. Peters, a United States resident, the nephew of John F. Peters and the son of one of the legatees in the will. Both petitioners by agreement in writing filed in the proceeding resolved their differences and the petitioners and the objector entered into a stipulation that the court need not in this proceeding determine the difference of interest in the estate, if any, between the two petitioners.

The trial court, after hearing, found "that on May 15, 1944, the date of death of the decedent, citizens of the United States had the right to take personal property and the proceeds thereof on the same terms and conditions as residents and citizens of Germany;" and that on that date "except for the existence of a state of war, citizens of the United States had under the laws of Germany the right to receive by payment to them within the United States or its territories money originating from the estates of persons dying within Germany provided that such United States citizens could obtain a license under the provisions of the German Foreign Funds Control Laws."

From the foregoing findings the trial court concluded that under the laws of Germany on May 15, 1944, there existed a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of Germany, and to receive by payment to them within the United States money originating from the estates of persons dying within Germany. The court then concluded that petitioner Hermann T. Peters would be entitled to distribution of his proportionate share of the residue of the estate except for the vesting order, and that objector, pursuant to such order, was entitled to all the residue of defendant's estate. During the course of the trial the court on motion of objector struck from the record evidence relative to the German law of succession.

Question: Did the trial court err in granting objector's motion to strike evidence of German law relative to (a) restricting the rights of succession and inheritance because of antisocial conduct, dated November 5, 1937, and (b) the Jewish escheat statute, viz., the 13th decree for the execution of the Reich Citizenship Law of July 1, 1943?

Yes. The main issue before the court was whether a citizen of the United States had a reciprocal right to inherit from German decedents upon the same terms and conditions as residents and citizens of Germany had a right to receive by payment within the United States money originating from German estates within the terms of section 259 of the Probate Code.

The pertinent sections of the Probate Code here involved are:

> "Sec. 259. Right of aliens to inherit: [Dependence on reciprocal rights]. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.
>
> "Sec. 259.1. Burden of proof [as to reciprocal rights]. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259."

(a) The law restricting the rights of succession and inheritance because of antisocial conduct provided that a person who had been deprived of his nationality (by behavior contrary to his duty of loyalty to the Reich or by reason of his failure to return to Germany from abroad to register and serve in the German army) could not take by succession or inheritance from a German national nor could the spouse and children of such persons to whom the loss of nationality extended inherit from a German. This law might very well deprive a United States citizen of inheritance from a German if such a denationalized German became a naturalized American citizen, for he would not be able to take on the same terms and conditions as a German citizen but would be barred from taking under this law of succession.

It is apparent that this particular statute was material to the issue before the court and that it erred prejudicially in granting objector's motion to strike it from the evidence.

(b) The evidence with respect to the Jewish escheat statute was likewise material.

Under such law upon the death of a Jew his estate did escheat to the Reich, but the Reich might grant a settlement to non-Jewish heirs and persons entitled to support having their residence within Germany.

Objector's contention that the law could have no application to American citizens as it provided for the estate of a German Jewish decedent is erroneous. If a Jewish person, a resident of Germany, died, his American heir would take nothing because the Jewish person's property would escheat to the Reich. The decree of September 1, 1944, providing that the 13th decree was not applicable to foreign Jews did not alter the situation with respect to the admissibility of evidence as to the 13th decree because it was not issued until September 1, 1944, which was subsequent to the date of death of decedent. Thus the 13th decree was in effect without amendment at the time of her demise. In addition the decree of September 1, 1944, purports to eliminate the escheat provision in so far as a nonresident Jew leaving property in Germany is concerned, but the statute would still apply to the estate of a resident German Jew so as to defeat the rights of his American heirs.

The evidence excluded was material and relevant to the determination of the issue before the court. It was prejudicially erroneous for the trial judge to strike it out. (Mashbir v. Mashbir, 29 Cal.App.2d 733, 736 et seq., 85 P.2d 482; Bole v. Bole, 76 Cal.App.2d 344, 345 [1], 172 P.2d 936.)

In view of our conclusions it is unnecessary to consider other points argued by counsel.

Reversed.

MOORE, P. J., and FOX, J., concur.

110 Cal.App.2d 683

BARTLETT v. PACIFIC NAT. BANK.

Civ. 14943.

District Court of Appeal, First District,
Division 1, California.

May 1, 1952.

Rehearing Denied May 31, 1952.

Hearing Denied June 26, 1952.

Louis Bartlett, an attorney, brought an action based on an employment contract against the Pacific National Bank (a National Bank). The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., rendered a judgment for plaintiff and defendant appealed. The District Court of Appeal, Bray, J., held that evidence justified finding that plaintiff, who was attorney for a bondholders' protective committee and for corporation which held bonds of an irrigation district which had defaulted bonds, had lien against money received by corporation for bonds which had been delivered to defendant bank as escrow agent to receive money for bonds from the Reconstruction Finance Corporation.

Judgment affirmed.

1. Attorney and Client ⇐176

Ordinarily an attorney does not have a lien for his services, not even where he has a contract for payment of a contingent fee, but such lien may be secured by contract.

2. Attorney and Client ⇐192(2)

Evidence justified finding that attorney for a bondholders' protective committee and corporation, which held bonds of an irrigation district which had defaulted bonds, had lien against money received by corporation for bonds.

3. Appeal and Error ⇐1010(1)

Where evidence was susceptible of interpretation that attorney for bondholders' protective committee and corporation which held bonds of irrigation district which had defaulted bonds, did not have lien against money received by corporation for bonds, but such interpretation was not compelled by evidence, District Court of Appeal was bound by determination of trial court that attorney had lien against such money.

4. Attorney and Client ⇐123(1)

Contract drawn by attorney would be construed most strongly against such attorney in action by such attorney based upon contract.

5. Estoppel ⇐85

In view of conversations held by representatives of defendant bank and by attorney for bondholders' protective committee and corporation which, before delivering bonds to defendant as escrow agent, held bonds of irrigation district which had defaulted bonds, indicating that bank would comply with notices given to bank by plaintiff to withhold from money received for bonds enough money to protect plaintiff who claimed to have lien against such money for legal services rendered by plaintiff to committee and corporation, bank was estopped to deny that lien held by plaintiff included interest.

6. Limitation of Actions ⇐55(5), 95(1)

Ordinarily statute of limitations runs from date of conversion and lack of knowledge by injured party does not toll the statute.

7. Limitation of Actions ⇐104(1)

Where defendant bank, which allegedly wrongfully paid to others money belonging to plaintiff, allegedly concealed fact of such payment from plaintiff, statute of limitations did not commence to run against plaintiff's cause of action against bank until plaintiff discovered that plaintiff's money had been paid to others.

8. Estoppel ⇐85

If bank which held bonds as escrow agent was one having a right to money received for bonds superior to right of attorney for bondholders' protective committee and corporation which held bonds of irrigation district which had defaulted bonds before delivering bonds to bank as escrow agent, which attorney had lien against money received for bonds by escrow agent from Reconstruction Finance Corporation, and if lien did not include interest on money received by bank and paid to corporation in disregard of plaintiff's lien, the bank by promising to withhold sufficient money to cover interest as well as principal, in consideration of plaintiff not interpleading bank in litigation, was estopped to deny that plaintiff's lien did not include interest or that plaintiff was not entitled to recover interest.

Cooley, Crowley & Gaither, San Francisco, for appellant.

Scott Elder, San Francisco, Warren Olney, III, Berkeley, for respondent.

BRAY, Justice.

Defendant appeals from a judgment in favor of plaintiff for $14,693.42 plus interest thereon at 7 per cent per annum from July 31, 1946, and costs.

Questions Presented.

1. Does the contract for attorney's fees provide a lien?
2. Were the escrowed bonds those of the corporation?
3. Sufficiency of the findings.
4. Statute of limitations.
5. Rule of damages.

Facts.

This litigation is based on a contract entered into by Provident Irrigation District Bondholders Protective Committee and Provident Land Corporation with plaintiff, an attorney at law. The Provident Irrigation District had defaulted its bonds. The committee had been formed by certain bondholders and held certain bonds. The corporation was thereafter formed and title to most of these bonds was transferred to it. On May 7, 1936, plaintiff wrote a letter addressed to both the committee and the corporation, giving a statement of the suits and procedures on behalf of the bondholders which Bartlett recommended be brought to enforce the rights of the bondholders. Then follows the clause upon which this action is based:

> "My compensation for this work is to be retainer of $500.00 payable now, and one-fourth of all money recovered for the Committee and/or Corporation, whether by legal action or by compromise acceptable to the Committee and/or Corporation, and shall be payable upon receipt of the money by them. * * *
>
> "Summarizing the costs:
>
> "Retainer of $500.00 payable now.
>
> "One-fourth of the money recovered with or without litigation.
>
> "Actual necessary expenses, estimated at $1000.00."

The committee and the corporation accepted this proposition. It is conceded that it thereby became a binding contract. It will not be necessary to detail the services rendered by plaintiff under said contract as plaintiff obtained a judgment for said services in the sum of $33,150, against the committee and the corporation. See Provident Land Corp. v. Bartlett, 72 Cal.App.2d 672, 165 P.2d 469.[1] There is a conflict in the evidence as to most of the facts from now on. There is substantial evidence to support the court's findings resolving this conflict in plaintiff's favor. About 1940 the corporation made an arrangement to get a loan from the R.F.C. enabling the district to discharge its bonded indebtedness. The R.F.C. was to purchase the bonds for 20 cents on the dollar par value. To accomplish this an escrow was set up with defendant bank by which the bonds were deposited to be delivered to the R.F.C. on receipt for the corporation of the agreed sum. George H. McKaig was president of the corporation and also one of the members of the committee. On September 28, 1939, the corporation transmitted to defendant bank 511 bonds authorizing it to deliver the bonds to McKaig's order on receipt for the corporation of a sum equivalent to 15 per cent of their par value. McKaig, the same day, wrote the bank directing it to deliver these bonds to the R.F.C. or the district upon receipt by the bank for McKaig of a sum equivalent to 20 per cent of their par value. Bartlett learned of the intended R.F.C. purchase and on April 30, 1940, wrote a letter to defendant "as agent and escrow holder," in which he referred to the contract of May 7, 1936, and set forth the portion thereof hereinbefore quoted. He referred to the deposit of bonds with defendant and the intended loan from the R.F.C. Plaintiff then referred to the services he had rendered and the fact that defendant held in escrow bonds of the par value of $570,000 and would receive from the R.F.C. 20 per cent thereof, or $114,000; that under plaintiff's contract he was entitled to one-fourth thereof and that therefore, upon the receipt of the money by defendant, $28,500 would belong to him. He then referred to certain detached coupons in the escrow for which the R.F.C. was to pay the par value of $13,000, one-fourth of which, or $3250, would also belong to plaintiff, making his one-fourth of all moneys to be received by defendant under said escrow $31,750. He added: "Your liability to account to me will arise by virtue of my contract of employment with the depositors of securities with you, and my services performed thereunder, as recited above, payment to you as agent of the depositors of the bonds and coupons, and this notice of my ownership of one-fourth of the moneys so received by you." Plaintiff then referred to Elliott v. Leopard Mining Co., 52 Cal. 355, "in which the circumstances were almost precisely similar, which states a universally accepted proposition of law." At the same time plaintiff sent a similar notice to the Bank of America and to the R.F.C. as to funds which might pass through their hands. Defendant's trust officer replied by letter, stating that the bank was merely an escrow holder, that any deviation from its instructions would expose it to liability to the depositors and that it could not assume such responsibility, and that it was advised that the Elliott case did not compel it to do so. It then invited plaintiff to discuss the matter personally. On May 17, 1940, plaintiff and the trust officer met in the latter's office. Plaintiff testified that he understood the trust officer to say that the bank would start an interpleader action to determine plaintiff's right to any of the money it might receive. May 22nd, plaintiff wrote the bank to that effect. May 24th, the bank replied that although the matter of an interpleader action had been discussed, there had been no commitment to file such action. On the contrary, plaintiff had been advised that the bank would be governed entirely by its counsel's advice. "As yet, we do not know what course we will be advised to pursue." September 19, 1940, the R.F.C. notified plaintiff that pursuant to his request the Federal Reserve Bank (acting for the R.F.C.) would withhold $31,750 from the purchase price of any bonds. In the meantime the bank consulted one of its firm of attorneys. The attorney knew that plaintiff was claiming an equitable interest in the money to be received. At first he indicated to the trust officer that it might be necessary to interplead. Then on May 24th the attorney advised the trust officer to the effect that the bank might have to consider carefully plaintiff's claim of an equitable interest in the proceeds from the bonds and advised that the bank refuse payment of the proceeds to the bondholders, thereby precipitating an interpleader action. However, McKaig and the corporation were anxious that the proceeds be distributed to the bondholders as soon as received by the bank. So on September 6th an agreement between the bank, McKaig and the corporation was entered into in which after stating that plaintiff had notified the bank that he had an "equitable interest" in the bond proceeds and was entitled to be paid thereunder $31,750, the bank agreed to pay to the bondholders all proceeds from the bonds when and as received, and McKaig and the corporation agreed to indemnify the bank against all claims. In addition the corporation agreed to deposit with the bank before such payment by the bank should be made, $28,000 as security for the indemnity promise of McKaig and the bank. The corporation also agreed to institute proper legal proceedings to determine the validity of plaintiff's claims. (This resulted in the Bartlett case.) The bank learned that the R.F.C. was to withhold $31,750. The bank's attorney advised the bank that to be fully protected it must insist that a fund of $31,750 be available for payment of any judgment plaintiff might obtain, and that the fact that the R.F.C. had a fund, while intended to, did not necessarily provide protection for the bank. Later, it was agreed between the bank, McKaig and the corporation that the bank would pay the bondholders upon receipt of the bond proceeds the full amount thereof "less the $31,750 retained by the" R.F.C. Between September 20 and October 8, 1940, the bank paid out (other than to Bartlett) all of the money received by it from the R.F.C. with respect to the 511 bonds. It also paid out the $28,000 above mentioned. It apparently relied upon the fact that the Federal Reserve Bank withheld from the moneys paid by it to the bank $31,750. This amount the Federal Reserve Bank paid to defendant for plaintiff July 31, 1946, upon his giving the former a release of all claims against the R.F.C.

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[1] Hereafter referred to as "the Bartlett case."

Going back to 1940, plaintiff was served in the Bartlett case. Sometime between October 4th and 21st he and his attorney talked to the trust officer in the latter's office. Plaintiff claims he told the trust officer that it would be necessary for plaintiff to join the bank in that action as a defendant, "in order to be able to collect the money that was coming to me; that $31,750 was being withheld by the R.F.C., but that my claim might prove to be larger than that, and in any event interest would certainly accrue on it before the matter was determined, and that the bank—I would hold the bank responsible for the other amount, and I would have to make the bank a defendant in the action unless I received assurance from the bank that they would withhold sufficient funds to meet whatever judgment in excess of the $31,750 might be obtained. And * * * [the trust officer] said, 'The bank is holding money enough to protect you.' 'Well,' I said, 'how much?' He said, 'Plenty, we are holding plenty.'" The trust officer then suggested that plaintiff take the matter up with its attorneys. Plaintiff then saw another member of the firm and told him "that I didn't want to sue the bank if I had the assurance that the bank was holding out enough money to protect me. And he gave me the assurance that the bank would hold out whatever was necessary." On October 21st plaintiff wrote defendant stating, among other matters, that he had been informed that it had received about September 20, 1940, from the R.F.C. approximately $95,250 and that one-fourth thereof was owned by him and he was making demand therefor, and further, that one-fourth of the balance to be paid by the R.F.C. also belonged to him. Early in November plaintiff and his accountant went to the bank to get data to be used in the Bartlett case. Plaintiff testified that he then was informed that the bank was withholding funds to take care of his claim. When he asked the trust officer the amount, the latter referred him to the bank's attorneys, "but there is plenty to take care of your claim." Plaintiff saw the bank's attorney about getting information which he desired for use in the Bartlett suit. There followed certain transactions with the attorney, the trust officer's secretary, and an examination of certain records of the bank. In none of these transactions did the bank disclose that, disregarding plaintiff's notice, it had paid out all the bond money. It was not until the fall of 1942 that plaintiff learned that the bank did not withhold any moneys but had paid it all out. This action was brought within eighteen months of the time plaintiff claimed he first learned that defendant was no longer withholding money for him. The trust officer and the bank's attorney admitted the fact of the conversations testified to by plaintiff but denied the essential parts thereof. There is substantial evidence to support the court's finding that the $31,750 paid by defendant to plaintiff on July 31, 1946, was the money withheld by the R.F.C. pursuant to plaintiff's notice to the latter and was not any money withheld by defendant pursuant to plaintiff's notice to defendant.

1. Lien.

[1] Ordinarily an attorney does not have a lien for his services, not even where he has a contract for the payment of a contingent fee. Rosenberg v. Lawrence, 10 Cal.2d 590, 75 P.2d 1082. "But the attorney may secure such a lien by contract. [Citations.] In order to create such a lien the parties are not required to use the word 'lien' in their contract. The real question in each case is, whether or not the parties have contracted that the lawyer is to look to the judgment he may secure as security for his fee. If so, an equitable lien is crea-

ted. * * * Such a lien is, in reality, an equitable assignment for security, and is fundamentally different from a power coupled with an interest. The equity courts look with favor upon equitable liens, and frequently such liens are employed to do justice and equity and to prevent unfair results. [Citations.]" Wagner v. Sariotti, 56 Cal.App.2d 693, 697–698, 133 P.2d 430, 432.

[2, 3] The court found that in and by the contract it was agreed that plaintiff's compensation would be a lien upon the money recovered and payable out of it upon receipt thereof by the corporation and the committee. Our task, then, is to determine whether there is any substantial evidence to support this finding. It is obvious from the situation at the time of the making of the contract that it was contemplated that plaintiff's compensation could only come from the moneys recovered from the bonds. Neither the committee nor the corporation had, or would have, any other funds. This fact alone would not establish a lien or even that the parties contemplated one. It occurs in most of the contingency fee contract cases. Here, however, it is a circumstance to be considered in view of the commitments later made by defendant to plaintiff as bearing on the interpretation of the contract made by defendant and the parties to it. From the very beginning plaintiff claimed an equitable interest in the proceeds of the bonds. As soon as plaintiff learned of the proposed sale of the bonds he notified defendant, the R.F.C. and the Bank of America that he claimed one-fourth of all moneys they might receive. The trust officer of the bank and its attorney knew that plaintiff claimed such equitable interest. In the indemnity agreement of September 6, 1940, between defendant, McKaig and the corporation, reference is made to the fact that plaintiff had served notice upon the bank that "under and pursuant to" the agreement of May 7, 1936, "he had an equitable interest in the proceeds of sale of the bonds of the District, and particularly the 511 bonds deposited by McKaig * * *." The agreement then stated that the bank had communicated to McKaig its intention to withhold the $31,750 mentioned in plaintiff's notice, and the purpose of the agreement was to indemnify the bank so that it would pay the proceeds of the bonds to the bondholders without awaiting the outcome of the suit to be brought by the corporation to test plaintiff's claims. In 1942 when plaintiff learned that the bank was not withholding any moneys he told the bank's attorneys in effect that if he knew to whom the moneys were disbursed he could follow the money. The record fails to show any indication that either the committee or the corporation prior to suit ever disputed that if plaintiff was entitled to any compensation he had an equitable interest in the bond proceeds. They, of course, disputed his claim to compensation in any amount, but at no time did they attack his claim of a lien. Coupling together the fact that the only possible source of compensation was the bond proceeds, the language of the contract "payable upon receipt of the money by them" and "one-fourth of all money recovered". See Bennett v. Potter, 180 Cal. 736, 183 P. 156, where the court interpreted the phrase that the attorneys should receive "as their compensation 10 per cent of whatever is recovered" to mean, not 10 per cent of *the value* of whatever is recovered, but *of the thing itself*, the apparent interpretation of the contract by the parties to it, the agreement of defendant to withhold, and all the circumstances of the case, there is substantial evidence to support the court's finding that a lien was created. We add, that the evidence is susceptible of a contrary interpretation, but as such interpretation is not compelled by the evidence we are bound by the court's determination.

In Provident Land Corp. v. Bartlett, supra, 72 Cal.App.2d 672, at page 687, 165 P.2d 469, at page 478, the court said: "Bartlett occupied the position solely of a creditor of the corporation and the committee. He was neither a bondholder nor a stockholder." Defendant contends that such language constituted a holding that plaintiff was not a lienholder. It has no such effect. Whether plaintiff was or was not a lienholder was not an issue in that case. The court was discussing alleged misconduct of the members of the bondholders committee and said that such misconduct, if any, could not injure plaintiff "unless that misconduct prejudiced his position as such creditor." 72 Cal.App.2d at page 687, 165 P.2d at page 478. In the sense used there, the term "creditor" would include a lienholder.

[4] It is true that the contract having been drawn by plaintiff, an attorney, is to be construed most strongly against him. Bennett v. Potter, supra, 180 Cal. 736, 183 P. 156. However, such rule does not compel a finding against plaintiff where, applying such rule, the evidence still shows that the intention of the parties was as contended by the attorney.

Defendant cites a number of cases such as Morrison v. Havens, 24 Cal.App.2d 504, 75 P.2d 515, in which it has been held that language in an agreement somewhat similar to that in the agreement here does not create a lien. Those cases are distinguishable from ours for the reason that either there was no evidence other than the bare words of the agreement to show the intention of the parties, or on conflicting evidence the trial court found against the lien theory.

2. Ownership of Bonds.

Defendant contends that the 511 bonds escrowed with defendant belonged to McKaig and hence plaintiff's lien could not attach thereto.[2] It is a little difficult to understand the true situation, as the corporation or McKaig in one escrow was to get 20 cents on the dollar for its bonds from the R.F.C., but in the other escrow the corporation was to get only 15 cents on the dollar from McKaig, its president and member of the bondholders committee, apparently giving him a 5 per cent profit. The instructions by the corporation in the first escrow, #1259, stated that the bonds were deposited "for the purpose of effecting a sale of all thereof *by* Mr. George H. McKaig *for* this Corporation" at 15 cents on the dollar. (Emphasis added.) Although the indemnity agreement recites that McKaig had purchased "the bonds from Provident" the evidence justifies the conclusion that McKaig was acting for the corporation and the defendant knew it. In any event, the evidence amply supports the court's finding that McKaig's interest, if any, was derived with full notice and knowledge of plaintiff's interest in the bond proceeds.

3. Findings.

Defendant attacks many of the findings as being contrary to the law and evidence, conflicting and contradictory. It is unnecessary to discuss these in detail. The main criticism is based upon the contentions (a) that plaintiff had no lien, (b) that the bond proceeds received by the bank belonged to McKaig and not to the corporation or committee, and hence the findings to the contrary were erroneous. We have heretofore shown that the facts were as found by the court and not as contended by defendant.

[5] The court found that the $31,750 paid by defendant to plaintiff on July 31, 1946, was received by defendant that day from the R.F.C. for plaintiff and was not moneys withheld for plaintiff under the notice to withhold theretofore given defendant by plaintiff, and that, in effect, plaintiff properly applied that sum first in payment of interest due him on his judgment against the corporation, leaving a balance due him thereon of $14,693.42 together with interest from July 31 at 7 per cent per annum. Defendant contends that this finding is improper because, among other things, plaintiff's notice to withhold, while it stated that he was entitled to one-fourth of the proceeds of the bonds, mentioned the specific sum of $31,750, and plaintiff had actually received that sum, even though he received it indirectly from the R.F.C. Perhaps if plaintiff were relying solely on the written notice of April 30, 1940, this contention might apply. However, it overlooks the testimony of plaintiff, evidently believed by the court, that

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[2] There were additional bonds escrowed, apparently belonging to certain bondholders rather than the corporation. Inasmuch as plaintiff makes no claim as to the proceeds of any of them, we have disregarded them throughout this opinion.

early in October, 1940, he told the trust officer "my claim might prove to be larger" (than the $31,750) "and in any event interest would certainly accrue on it" and that he would hold the bank "responsible for the other amount," and was informed by the trust officer that the bank was withholding plenty to protect plaintiff. The same day he saw the bank's attorney who assured him, after being told that plaintiff wanted to be protected in the event that the amount withheld by the R.F.C. proved to be insufficient, that "the bank would hold out whatever was necessary." In both these conversations plaintiff definitely stated that unless he secured the bank's assurance that sufficient moneys were withheld he would have to sue the bank or interplead them in the suit brought by the corporation. The bank people stated that they did not want such action taken. In view of these conversations and the notices to withhold given, the bank is estopped to deny that the lien held by plaintiff included interest. Moreover, the bank had no right to assume that the $31,750 withheld by the R.F.C. relieved the bank of its obligation to see that plaintiff received all he was entitled to. Nor could the fact that plaintiff testified that in giving notice to defendant, the R.F.C. and the Bank of America, he had not contemplated that there would be withheld three times $31,750, change the situation. The effect of such notices was that each one notified was required before paying any money to or for the corporation to see that plaintiff's claim was fully paid or that, regardless of what the others were doing, the one held back sufficient sums to protect plaintiff.

4. Statute of Limitations.

The court found that the conversion took place between September 20 and October 8, 1940. Plaintiff testified that he did not discover that the bank was not withholding moneys to protect him until the fall of 1942, less than two years before the institution of the action. Defendant contends that the evidence shows that plaintiff knew in 1940 that the bank was not withholding moneys for him. This contention is partly based upon plaintiff's letter to his attorney of October 7, 1940, in which plaintiff said he was considering suing the bank for the money due him. This letter does not necessarily establish that plaintiff then knew the bank was not going to withhold. The purpose stated in the letter is that such a suit might assist plaintiff in getting certain information from the bank for use in the case of the corporation against plaintiff. Nor does the letter of October 21, 1940, to the bank necessarily show knowledge by plaintiff of the bank's failure to withhold. In that letter plaintiff states that he is informed that the bank has already received from the R.F.C. approximately $95,250 and demanded immediate payment of one-fourth thereof. Nor does his failure to follow this letter by suit start the statute running. It was after this that plaintiff received assurances that his money was being withheld. In the meantime the case of the corporation against plaintiff was proceeding. In his cross-complaint in the action brought against him by the corporation, plaintiff asked that the contract by which the corporation was apparently selling 511 bonds to McKaig be cancelled and any and all sums received by McKaig through transactions with the corporation be restored to the corporation. Again the knowledge of the deal between McKaig and the corporation and that the bank had paid moneys to McKaig would not necessarily be knowledge that the bank was not holding back sufficient moneys to protect plaintiff as it had promised. The evidence supports the trial court's conclusion that in such examination of the records as was permitted plaintiff and his auditor, the records showing the payment of all money by the bank were not revealed. These writings and other circumstances in the case could be considered to raise an inference that plaintiff then knew defendant had not kept its agreement, but do not compel such inference.

[6, 7] Ordinarily the statute of limitations runs from the date of conversion and lack of knowledge by the injured party does not toll the statute. Nighbert v. First Nat. Bank of Bakersfield, 26 Cal.App.2d 624, 633, 79 P.2d 1105. However, here the court found, and the evidence supports such finding, that between April 30, 1940, and

October, 1942, defendant fraudulently represented to plaintiff that it was respecting his notices and demands and was withholding sufficient moneys for him and fraudulently concealed the fact of the conversion of his money by it, and that the fraud was practiced to conceal such fact from him and to induce him not to involve defendant in the litigation then pending, that plaintiff believed the misrepresentations and was thereby induced to make no further inquiry or investigation. These facts bring the case under the rule set forth in Pashley v. Pacific Electric R. Co., 25 Cal.2d 226, at page 229, 153 P.2d 325, at page 327: "* * * when the defendant is guilty of fraudulent concealment of the cause of action the statute is deemed not to become operative until the aggrieved party discovers the existence of the cause of action. [Citations.] * * * '* * * in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations.'" "In reality the ground of relief is that the defendant, having by fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong." 25 Cal.2d at page 231, 153 P.2d at page 328.

5. Rule of Damages.

[8] In its closing brief, and apparently not raised theretofore, defendant contends that the rule of damages should be not as set forth in section 3336 of the Civil Code, which in cases of wrongful conversion allows the recovery of interest, but as set forth in section 3338, which states: "One having a mere lien on personal property, cannot recover greater damages for its conversion, from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien * * *" (plus compensation for time and money expended in pursuit of the property —not applicable here). As we have heretofore pointed out, the lien under the circumstances of this case did include interest, and therefore interest was included in "the amount secured by the lien". If under this section defendant can be considered to be "one having a right thereto superior" to plaintiff and if the lien did not include interest, defendant, by reason of its conduct in promising to withhold sufficient moneys to cover interest as well as principal, in consideration of plaintiff not interpleading it in the prior litigation, is estopped to contend that plaintiff's lien did not include interest or that plaintiff is not entitled to recover interest.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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111 Cal.App.2d 173

PEOPLE v. ROMERSA.

Cr. 4740.

District Court of Appeal, Second District,
Division 3, California.
May 16, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, Clement D. Nye, J., for violation of Pen.Code, § 288, and from orders denying defendant's motion for a new trial and denying motion to modify the judgment, defendant appealed. The District Court of Appeal, Wood, J., held that refusal of the court to give requested instruction that the testimony of the eight year old prosecuting witness should be viewed with great caution and that if witness appeared to be incapable of relating facts truly, her testimony should be disregarded, was not error, in view of fact that competency of the witness was a question for the trial judge.

Orders affirmed.

1. Criminal Law ⚷814(20)

In prosecution for lewd and lascivious conduct against child under fourteen years of age, wherein defendant denied that he committed any act which would constitute offense charged or any lesser offense, and did not present his defense on theory that an act committed by him might be a lesser offense, refusal of trial court to give requested instruction that if jury should be convinced that act charged occurred and that defendant was not entitled to complete acquittal, they could convict defendant only of lesser offense of contributing to delinquency of a minor, was not error, notwithstanding fact that contributing to delinquency of a minor is an included lesser offense. Pen.Code, §§ 288, 1159.

2. Criminal Law 🔑795(1)

Whether jury in prosecution for lewd and lascivious conduct against child under fourteen years of age should be instructed to effect that they might convict defendant of lesser included offense of contributing to delinquency of a minor depends upon circumstances and evidence in particular case. Pen.Code, § 288.

3. Criminal Law 🔑778(2, 4), 789(4)

In prosecution for lewd and lascivious conduct against child under fourteen years of age, instructions that each of the elements of the offense charged must be proven to moral certainty and beyond a reasonable doubt, that jury should examine testimony of prosecuting witness with caution, and that testimony of any witness which purported to relate to an oral admission of defendant or an oral confession by him should be viewed with caution, were adequate as to presumption of innocence, reasonable doubt and burden of proof. Pen.Code, § 288.

4. Criminal Law 🔑829(16)

In prosecution for lewd and lascivious conduct against child under fourteen years of age, wherein jury was charged that they were sole judges of credibility of witnesses, and that term "witness" included every person whose testimony under oath had been received as evidence, whether by examination in court or through deposition, refusal to give requested instruction to effect that jurors were sole judges of credibility of witnesses and that testimony of a police officer was not entitled to any more credit than testimony of any other witness, was not error. Pen.Code, § 288.

5. Witnesses 🔑40(2)

Whether a child under ten years of age is a competent witness is a question for determination of trial judge. Code Civ.Proc, § 1880.

6. Criminal Law 🔑785(6)

In prosecution for lewd and lascivious conduct against child under 14 years of age, refusal of court to give requested instruction that testimony of eight year old prosecuting witness should be viewed with greatest of caution and that if witness appeared incapable of relating facts truly, her testimony should be disregarded, was not error in view of fact that competency of prosecuting witness was question for determination of trial judge. Pen.Code, § 288; Code Civ.Proc. § 1880.

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Lauren M. Handley, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Dan Kaufmann, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged in two counts with violation of section 288 of the Penal Code. (Two girls were the alleged victims.) In a trial by jury he was found guilty as to the first count and not guilty as to the second count. Defendant's motion for a new trial "or in the alternative for modification of judgment [by reducing the offense to a misdemeanor]" was denied. A hearing was then had as to the issue of sexual psychopathy, and the court found that defendant was not a sexual psychopath. Defendant was sentenced to imprisonment in the state prison. Probation was granted upon the condition that he serve six months in the county jail. Defendant appeals from the order denying his motion for a new trial or for modification of the judgment.

Appellant contends that the trial court erred in refusing to give certain instructions requested by him, and in denying defendant's motion to modify the judgment by reducing the offense to a misdemeanor. He also contends that this court should so modify the judgment; and that the verdict is contrary to law and the evidence.

Appellant, 63 years of age, is a music teacher and the proprietor of a music store. His store is in the front part of a one-story building and his music studio is in the rear part of the building. Between the store and the studio there is a hallway which is about 11 feet square. The entrance to the studio is through the store and the hallway. At the rear of the store there is a door to the hallway, and at the rear of the hallway there is a door to the studio. The walls inside the studio were covered with soundproof material. The prosecutrix (in the first count), who was 8 years of age, had been taking clarinet lessons from appellant about three months. During the lessons appellant played an accompaniment on a saxophone, and they sat on chairs with a music rack in front of them. On March 16, 1951, about 3 p. m., the prosecutrix went with her mother to the studio for a music lesson. The mother of the girl remained in the store with appellant's wife. Appellant and the girl went into the studio. The two doors between the store and the studio were closed. About 20 minutes later appellant and the girl came into the store, and then she and her mother went home.

The girl testified that after she and appellant were in the studio, they played some of their pieces of music; they sat on chairs which were about half an inch apart; after about 5 minutes, appellant asked her if she wanted to rest and she said, "Yes"; appellant laid his saxophone on a chair and put his arm around her neck, pulled her over and made her lean on him; he felt her chest and put his hand on her private parts; after that they played music; then appellant made her hold his private parts; then he gave her candy and told her not to tell anybody.

The mother of the girl testified that she had known the appellant about 4 years; appellant and the girl came out of the studio together and the witness noticed nothing unusual, but outside the building she noticed how upset the girl was; when they were a few steps from the building the girl told her mother that appellant had been "awful nasty"; there was candy in the girl's music case.

A police officer testified that, in the presence of another police officer, appellant told him that on the day of the alleged offense, while he was giving the girl a clarinet lesson, she became tired and rested her head on his chest; then he put his arm around her, and it was possible that he touched the outer portion of her thigh but he did not remember whether he did or not; and he did not intentionally touch her at any time in an improper way.

Defendant testified that he did not molest her or touch her body, and he did not exhibit his private parts to her; he did not remember telling the officer that the girl placed her head on his chest; and he did not tell him that he put his arm around her or that he might have touched her thigh. He testified further that he had been a music teacher for 22 years; he had known the family of the girl about 4 years, and during all that time he had been friendly with them; on Valentine's Day the girl brought him and his wife a valentine; thereafter he and his wife gave the girl some candy in return for the valentine; appellant also put candy on a cupboard in the studio; on the day of the alleged offense the girl acted as if she were tired; they sat on chairs, which were about 18 inches apart, and played about six pieces, which took about 20 minutes; she asked him why he would not give her the candy (which was on the cupboard), and he told her that he and his wife were not going to give her any more candy because her parents did not want them to give it to her; appellant then went into the store to get some music which the girl had said that she wanted, but that music was not there; the girl came out of the studio about 3 minutes later, and she and her mother then left the store; after they left, appellant went back into the studio and observed that all the candy was gone.

[1, 2] Appellant contends that the court erred in refusing to instruct the jury, as requested by him, to the effect that the jury might find defendant guilty of any offense

which is necessarily included in the offense charged, and that the offense charged necessarily includes the offense of contributing to the delinquency of a minor, a misdemeanor, and that if the jury should be convinced beyond a reasonable doubt that the acts charged occurred and that defendant is not entitled to a complete acquittal, the jury is authorized to convict defendant only of contributing to the delinquency of a minor which is a lesser offense than the offense charged. The offense of contributing to the delinquency of a minor is necessarily included in the offense defined in section 288 of the Penal Code, People v. Greer, 30 Cal.2d 589, 600, 184 P.2d 512, but the mere fact that it is so included does not require the court to give such an instruction as that requested by appellant. Whether the jury should be instructed to that effect depends upon the circumstances and evidence in the particular case under consideration. "In a criminal case instructions are always to be given or refused with reference to the facts introduced before the jury." People v. McCoy, 25 Cal.2d 177, 188, 153 P.2d 315, 320. In the present case appellant denied that he committed any act which would constitute the offense charged or any lesser offense. He did not present his defense on a theory that an act committed by him might be such lesser offense. In support of his argument that his requested instructions should have been given, he cites section 1159 of the Penal Code which provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." In People v. McCoy, supra, it was stated, 25 Cal.2d at page 194, 153 P.2d at page 324, that said section 1159 contemplates the conviction of a defendant for the lesser offense "when the evidence is insufficient to justify a conviction for the greater offense charged." In the present case, the evidence was sufficient to justify the conviction of violation of section 288 of the Penal Code. If the acts occurred which the girl testified did occur, the appellant was guilty of the offense charged. Appellant asserts that not all of the acts related by the girl were felonious, and in that regard he refers to such acts as feeling her chest, making her lean on him, putting his arm around her and pulling her over. It seems to be his argument that the jury might have believed that the last mentioned acts or some of them occurred and that the more serious acts related by her did not occur, and in that event he would not be guilty of a felony. The jury was instructed, at the request of appellant, that in order to justify a conviction upon the charge of violating said section 288 each of the following elements of the offense must be proven to a moral certainty and beyond a reasonable doubt: First, a lewd or lascivious act, that is, an act which is lustful, immoral, seductive, or degrading. Second, committing the act with the body or any part thereof of a child under fourteen years of age. Third, the act must have been committed with the intent of arousing or appealing to the lust or sexual desires of the accused or the child. The jury was further instructed, at appellant's request, that if the evidence fails to convince the jurors beyond a reasonable doubt that every element of the offense has been so proven then they should acquit the appellant. Under those instructions and any reasonable view of the evidence which the jury could have adopted, the appellant was either guilty of the offense charged or not guilty of any crime. It was not error to refuse to instruct the jury as requested regarding a lesser included offense. Furthermore, the said instruction last above referred to (wherein the jurors were instructed to acquit the appellant if the evidence did not convince them beyond a reasonable doubt that every element of said section 288 had been proven) was in conflict with appellant's other requested instructions to the effect that the jury might find him guilty of a lesser offense. The judge did not err in selecting that last mentioned instruction, requested by appellant, which appeared to be consistent with the evidence and appellant's theory of defense (that he should be acquitted of all offenses), and in rejecting the other instructions requested by him, regarding a lesser offense, which were in conflict therewith.

[3] Appellant contends further that the court erred in refusing to give adequate cautionary instructions as requested by him. He argues in effect that the court should have instructed the jury further on the presumption of innocence and reasonable doubt, and on examining with care and caution the testimony of the prosecuting witness and on viewing with caution testimony of the police officer relating to an oral admission. The jury was instructed properly as to the presumption of innocence, as to reasonable doubt, and the burden of proof. It was instructed further to the effect that if the evidence is susceptible of two constructions which appear to be reasonable, one of which points to the guilt of defendant and the other to his innocence, it is the duty of the jury to adopt that interpretation which will admit of defendant's innocence. The two following instructions were also given: 1. "It is not essential to a conviction in this case that the testimony of the prosecuting witness be corroborated by other evidence, provided that from all the evidence you are convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt. However, a charge such as that made against the defendant in this case is one which, generally speaking, is easily made, and, once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution." 2. "The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him." The jury was instructed adequately regarding the matters referred to in this contention of appellant.

[4] Appellant contends that the court erred in refusing to give two instructions requested by him which were to the effect that the jurors were the sole judges of the credibility of the witnesses, and that the testimony of a police officer was not entitled to any more credit than the testimony of any other witness. This contention is not sustainable. The court instructed the jury adequately in that regard by giving an instruction, requested by defendant, which read in part as follows: "The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The term 'witness' includes every person whose testimony under oath has been received as evidence, whether by examination here in court or through deposition."

[5, 6] Appellant contends further that the court erred in refusing to give his requested instruction which was to the effect that under section 1880 of the Code of Civil Procedure children cannot be witnesses if they are under 10 years of age and appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; and that the testimony of the girl herein must be viewed with the "greatest of caution" and if she appeared to be incapable of relating facts truly her testimony should be disregarded. It was not error to refuse the instruction. Whether a child under 10 years of age is a competent witness is a question for the determination of the trial judge. People v. Freeman, 24 Cal.App.2d 619, 621, 75 P.2d 640. In the present case, the judge found that the girl was a competent witness.

Appellant's contention that the court erred in refusing to give other instructions requested by him is not sustainable. The jury was instructed adequately.

In view of the above conclusions it is not necessary to discuss other contentions of appellant.

The order denying the motion for a new trial, and the order denying the motion to modify the judgment, are affirmed. The request that this court modify the judgment is denied.

SHINN, P. J., and VALLÈE, J., concur.

111 Cal.App.2d 225

MAGEE v. BRECKENRIDGE et al.

Civ. 4379.

District Court of Appeal, Fourth District, California.

May 19, 1952.

Action by Stewart Magee against B. B. Breckenridge and others for reasonable value of services and material claimed to have been furnished. Stewart Magee, as receiver for B. G. & S. Drilling Company, a copartnership, was permitted to intervene. The Superior Court of Kern County, Robert B. Lambert, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeals, Griffin, J., held that where defendant had breached original contract, and plaintiff had rescinded and treated contract as terminated, plaintiff was entitled to recover in quantum meruit for reasonable value of that which was furnished under original contract.

Judgment affirmed.

1. Mines and Minerals ⚷110

In action to recover for reasonable value of oil well drilling and reconditioning and materials furnished by plaintiff to defendant, evidence sustained judgment predicated on agreement by which defendant, after the first six days of work, had taken over drilling operations and had paid for materials, and had agreed to pay plaintiff $50 per day for use of drilling rig.

2. Mines and Minerals ⚷110

In action to recover for reasonable value of oil well drilling and reconditioning and materials furnished by plaintiff to defendant, wherein it appeared that pursuant to agreement, defendant was to give plaintiff lease to certain of his oil properties upon completion, evidence warranted finding that plaintiff had partially performed his portion of agreement, and that after such partial performance, defendant had committed breach of agreement and had not delivered lease, and that plaintiff had treated original contract as terminated and had rescinded and elected to sue for reasonable value of that which he had furnished under original contract.

3. Mines and Minerals ⚷110

Where defendant committed breach of original contract by which plaintiff was to furnish materials and recondition oil well, and plaintiff had thereupon rescinded and treated contract as terminated, plaintiff might recover under common count of quantum meruit for reasonable value of that which he had furnished under original contract.

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Mack & Bianco, Bakersfield, for appellant.

Kendall & Howell, Bakersfield, for respondent.

West, Vizzard, Howden & Baker, Bakersfield, for intervenor and respondent.

GRIFFIN, Justice.

Plaintiff brought this action against defendant to recover $3,560.81 for the reasonable value of services and material claimed to have been furnished to defendant. The court found that defendant B. B. Breckenridge was indebted to plaintiff individually for $2,514.81 and to him as intervenor and as trustee and receiver for B. G. & S. Drilling Company, a copartnership, in the sum of $600. By stipulation, Stewart Magee, as receiver, was permitted to intervene in this action.

Defendant answered, denied generally the allegations of the complaint, and alleged, as a separate defense, that defendant was the owner of a lease upon certain proven oil-producing property near Newhall; that one Harris was the agent of plaintiff; that plaintiff was the operator of a portable oil well digging rig; and that he, as principal, instructed Harris, as agent, to secure work for his rig and also secure for him leases in that district; that about December, 1949, defendant agreed with Harris, as agent, that if plaintiff would recondition a certain oil well on defendant's land and furnish his outfit, etc., before December 12, defendant would give plaintiff a lease on certain of his properties, subject to a royalty of 26⅔ per cent; that a memorandum agreement (set up in the answer) to wit:

"12/2/49.

"C. A. Harris—

"If you will have your rig on my #1 well within 5 days (& work up to six days 24 hrs per day you furnish bits, Rig men, repairs to Rig etc. I to furnish cement mud electric log, whipstock & liner,) Then I will give you a lease on all my property west of my tanks—at 26⅔ Royalty total You to drill a well within 30 days after moving off my #1 well—

"B. B. Breckenridge."

was signed by Harris and defendant; that plaintiff moved his portable rig upon defendant's land on December 11, and operated it until December 18, when his rig became unusable because of mechanical failure, and plaintiff discontinued his work and the contract; that defendant thereafter, at his own cost, repaired said rig and undertook to continue said work until January 6, 1950, at which time the work was completed; that early in December, 1949, defendant executed and delivered to Harris, as agent, a lease of defendant's property, as agreed, and that on January 17, 1950, to amplify the description of the property in the first lease, defendant executed and delivered a similar substitute lease. Defendant prayed that plaintiff take nothing by reason of his complaint.

The court found that plaintiff furnished services and material to the defendant in the amount noted; that it was not true that Harris was the agent of plaintiff and not true that plaintiff, as principal, instructed Harris, as agent, to secure work and leases for plaintiff upon proven oil properties, and that defendant was the owner of a lease upon proven oil property; that it was true that on December 2nd defendant signed an agreement with Harris, in accordance with the terms of the memo agreement pleaded; that it was true that on December 9th plaintiff moved a rig upon defendant's land and pursued said work; but that it was not true that defendant repaired, at his own cost, the rig and continued the work until it was completed; that it was not true that defendant executed and delivered to Harris, as agent of plaintiff, the lease or substitute lease mentioned. It found that the defendant did not deliver or offer to deliver to plaintiff any gas and oil lease until January 31, 1950, and that the said attempted delivery at that time was not reasonable and was not prompt delivery within the terms of the agreement of December 2, 1949. Judgment was entered accordingly, from which defendant appealed.

The evidence shows that plaintiff and Harris were together interested in an "oil deal". Plaintiff then was receiver for B. G. & S. Drilling Company and it owned a portable drilling rig which it rented to different drillers. Harris was a creditor of that company. According to plaintiff's story, Harris called plaintiff and told him he was selling drills to various companies in the different oil fields and that if he found work for this rig he would recommend it to any prospects he found; that plaintiff personally never took any drilling contracts but the usual method of renting it was $50 per day, from the time it left Bakersfield until its return, including standby time, and lessee would keep up all repairs; that Harris phoned him and stated that he had interested Breckenridge in giving an oil drilling lease on certain property; that plaintiff was to rent the rig from the B. G. & S. Drilling Company for six days at $50 per day, and furnish certain labor and material and defendant would, in turn, furnish certain materials for the purpose of rehabilitating defendant's well located near the property and that upon completion of this agreement defendant would immediately deliver a lease on defendant's land and in plaintiff's name. Thereafter, plaintiff and defendant made and discussed this transaction. Plaintiff moved the rig to defendant's well on December 11th, 1949. After several days' operation some mechanical trouble was encountered. After the sixth day plaintiff paid all workmen up to that time. It is plaintiff's claim that by some separate oral agreement then made between defendant and plaintiff, defendant agreed to take over the drilling operation, repair the machinery and pay to plaintiff $50 per day for the use of the drill thereafter until the work was completed; that the defendant then furnished the necessary material and labor until the drilling outfit was removed from the well on January 4, 1950, or about 18 days after the six day period mentioned in the original agreement. Harris worked with the driller through both periods. Defendant claims that a memo lease (omitting the legal description of the leased property) was made up and delivered to Harris about December 15, 1949, but that it was never acknowledged; that he was awaiting time to have his attorney write up a proper lease which would contain all the necessary legal requirements and description; that such a lease was never acknowledged until January 17, 1950; and that a copy thereof was delivered to Harris. It appears that the urgency for immediate drilling had subsided and as Harris described it, plaintiff said "the honeymoon is all over. * * * I have spent enough money". Shortly before January 18, plaintiff sought an attorney who wrote to defendant informing him that he had not performed the conditions of his agreement relative to the leasing of his property to plaintiff and that accordingly plaintiff terminated the oral agreement entered into about "December 3", and that plaintiff expended $2,885.45 in reconditioning defendant's well and asked immediate adjustment of the matter.

On January 31, plaintiff's attorney received a reply from defendant's attorney setting up the written agreement of December 2nd and stated that defendant had made up a penciled form of lease and had planned to reduce it to a more formal lease and that on January 7th defendant executed a more formal lease and delivered a copy to Harris. Plaintiff denied receiving the first penciled lease form and refused to accept the more formal one when presented by Harris after January 17th. The new lease was made by defendant, as sublessor, to both Harris and Magee as sublessees and apparently did not cover a small portion of the property pointed out to plaintiff as being a part of the property involved. Plaintiff claimed that Harris had no interest in that lease and accordingly he should not have been named as one of the lessees.

The only contention raised by defendant is that there has been a complete failure of proof because the pleading is based upon an implied contract for the payment of the reasonable value of services performed, whereas, the evidence shows the existence of a special contract fully performed by the plaintiff, and calling for the delivery from the defendant of something other than the payment of money, and accordingly plaintiff must bring his cause of action for breach of contract and not for value of services performed, citing Gillin v. Hopkins, 28 Cal.App. 579, 153 P. 724; Barrere v. Somps, 113 Cal. 97, 45 P. 177, 572; Moulton v. Loux, 52 Cal. 81; O'Connor v. Dingley, 26 Cal. 11; Willett & Burr v. Alpert, 181 Cal. 652, 659, 185 P. 976; Foster v. Fisher, 44 Cal.App.2d 33, 111 P.2d 935; Ward v. Stimson, 50 Cal.App. 336, 195 P. 67; and Flinn v. Mowry, 131 Cal. 481, 486, 63 P. 724, 1006.

It is defendant's position that at the trial plaintiff proceeded on a common count of quantum meruit for the very obvious reason that he did not feel there was an express contract which could be the basis of a cause of action since he denied that Harris was his agent and that since Harris was not his agent, as found by the court, it would be inescapable that there was not an express agreement between the plaintiff and the defendant, as pleaded in the answer, and accordingly such an agreement had no legal significance in the case at bar; that since the trial court concurred in the plaintiff's view of the facts Harris could not effectually contract with defendant on behalf of plaintiff under the circumstances; that therefore the only way that there could be an express arrangement between the defendant and plaintiff would be through a direct agreement between them, citing Norton v. Overholtzer, 63 Cal.App. 388, 218 P. 637.

Plaintiff argues that his evidence shows that there was an independent discussion between plaintiff and defendant concerning the proposed agreement to enter into an agreement between the parties respecting the work, but that no formal or express agreement was ever made, and that accordingly an agreement that parties will in the future make such contract as they may then agree upon amounts to nothing; that an agreement to enter into negotiations and agree upon the terms of a contract if they can, cannot be the basis of a cause of action, citing Kerr Glass Mfg. Corp. v. Elizabeth Arden Corp., 61 Cal.App.2d 55, 56, 141 P.2d 938; Spinney v. Downing, 108 Cal. 666, 41 P. 797, and Toms v. Hellman, 115 Cal.App. 74, 1 P.2d 31.

As a further defense it is argued that if it may be assumed that the parties entered into an express agreement upon which a suit in contract could be based, nevertheless, plaintiff was justified in proceeding upon assumpsit; that where "one party to a contract has not actually prevented performance but has merely committed a breach of the contract, after partial performance, the other party cannot maintain a suit upon the contract as for a full performance, although he may treat the contract as terminated and sue for the reasonable value of that which he furnished under the contract." 4 Cal.Jur. Ten Year Supp. pp. 199–200, sec. 276; Gray v. Bekins, 186 Cal. 389, 199 P. 767; Connell v. Higgins, 170 Cal. 541, 150 P. 769; Carlson v. Sheehan, 157 Cal. 692, 109 P. 29; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100.

[1] The portion of the judgment predicated upon the claimed oral agreement between the parties respecting the last 18 days' rental of the drilling rig at $50 per day is fully supported by the evidence and a recovery under the common count alleged is proper. Defendant makes no particular complaint to the allowance of this item or to the manner in which it was apportioned by the judgment.

The written instrument of December 2nd, upon which defendant relies, might well indicate that plaintiff was to receive, in return for the use of the drilling rig for six days and for the material and services furnished, an oil lease on certain real property rather than money.

The evidence is in dispute as to whether, under this agreement or in the custom of the business, defendant was chargeable with the rental value of the rig and cost of labor and materials furnished while the rig was not operating during that six-day period. The evidence shows that plaintiff claims he paid $300 for the rental of the rig and paid the workmen and other incidental expenses, totaling $2885.45 during such time. The court might well have believed that before plaintiff had an opportunity to fully perform under his original agreement, defendant interfered and took over the operation of the rig and completed the work under a new and substituted oral agreement.

[2] Accordingly, the trial court was justified in believing that plaintiff had at least partially performed his portion of the agreement entered into between plaintiff and defendant and that after such partial performance, defendant committed a breach of the contract and that plaintiff treated the original contract as terminated and rescinded and elected to sue for the reasonable value of that which he did furnish under the original contract.

[3] Under the authorities cited by plaintiff the amount found due to plaintiff was not only allowable under the common count of quantum meruit but was supported by the evidence.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

RODENBERGER v. FREDERICKSON.

Civ. 14903.

District Court of Appeal, First District,
Division 2, California.
May 16, 1952.
Rehearing Denied June 14, 1952.
Hearing Denied July 10, 1952.

Action by Rose Rodenberger against Mrs. T. H. Frederickson for injuries received when plaintiff tenant slipped on step at rear of defendant's apartment house and fell through allegedly defective lightwell board wall, which was 26 inches from lower step, into lightwell. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment on verdict, and defendant appealed. The District Court of Appeal, Jones, J., held that evidence sustained verdict.

Judgment affirmed.

1. Landlord and Tenant ⚷164(1)

Right of tenant and landlord to make common use of stairways and landings in apartment house casts upon landlord duty to maintain such areas in reasonably safe condition, and such duty requires landlord to make reasonably careful inspection at reasonable intervals to learn of dangers not apparent to the eye.

2. Landlord and Tenant ⚷168(1)

Where tenant slipped on step in rear of apartment and fell through allegedly defective lightwell board wall, which was 26 inches from lower step, into lightwell, tenant was not making misuse of premises at time of accident since lightwell wall was intended to prevent people from stumbling and falling into lightwell.

3. Appeal and Error ⚷930(1), 989

On appeal from judgment on verdict for respondent, an appellate court will view evidence in light most favorable to respondents, will not weigh evidence, will indulge in all intendments and reasonable inferences which favor sustaining findings of trier of fact, and will not disturb such findings where substantial evidence exists in support thereof.

4. Landlord and Tenant ⚷169(6)

In action by tenant against landlord for injuries received when tenant slipped on step at rear of apartment and fell through allegedly defective lightwell board wall, which was 26 inches from lower step, into lightwell, evidence sustained verdict that landlord had negligently allowed wall to deteriorate so that it was too weak to prevent tenant from falling into lightwell.

5. Trial ⚷296(9)

In action by tenant against landlord for injuries received when tenant slipped through allegedly defective lightwell board wall, where instruction was given that landlord had duty to provide safe means of entrance and exit both for tenants and their invitees, any implication that landlord was an insurer of safety of persons on premises was completely negatived by subsequent instructions.

6. Trial ⚷252(1)

Unless instructions find support in the evidence they should not be given, and, where there are no supporting facts, they may mislead the jury.

7. Trial ⚷253(9)

In action by tenant against landlord for injuries received when tenant slipped on first of two steps at rear of apartment and fell through allegedly defective lightwell board wall, which was 26 inches from lower step, into lightwell, where there was no showing of knowledge of defective condition or misuse of wall by tenant, giving of formula instructions which did not contain facts that defects in wall were plainly visible and obvious to tenant and that she acted on her own peril in relying on wall for safety when she put wall to unreasonable use by falling against it was proper.

8. New Trial ⚷76(1)

The remedy for excessive verdicts rests almost wholly in discretion of the trial court, and, only where verdict is so grossly disproportionate to reasonable limit of compensation warranted by facts, as to shock sense of justice and raise strong presumption that it is based on prejudice or passion rather than sober judgment, is judge at liberty to interpose his judgment as against that of jury.

9. Damages ⚿132(3)

Award of $20,000 to woman who suffered multiple bruises and contusions, a crushed vertebra, and four broken ribs, and whose spine injury was permanent and reasonably certain to become progressively worse was not excessive.

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Charles A. Christin, Wallace W. Scales, San Francisco, for appellant.

Joseph A. Brown, Fabian D. Brown, San Francisco, for respondent.

JONES, Justice pro tem.

In this action the plaintiff secured a verdict for $20,000 on account of injuries sustained in falling into the lightwell of an apartment house. The appeal is from the judgment on the verdict.

There were three apartments, or flats, in the building one above the other. Plaintiff rented and occupied the one on the second floor. She had lived in this apartment for about four years preceding the accident. The rear entrances of the upper apartments were reached by stairways. A lightwell was also a part of the structure and was located at the rear of the building with a concrete floor at the bottom. Landings and porches were provided on the upper floor for use of the tenants. These landings were used by the tenants for drying clothes and as places where their children could play as well as passageways from one flight of stairs to another. Two steps led up from the landing to the rear entrance of plaintiff's apartment. The lower of these steps was about ten inches wide and the upper approximately six inches in width. The distance from the outer wall of the apartment to the edge of the lightwell measured forty-two inches, with a clearance of approximately twenty-six inches between the lower step and the edge of the lightwell.

A low wall was built along the edge of the lightwell opposite the rear entrance to plaintiff's apartment. This wall was about four feet high and of tongue-and-grooved boards set upright making it solid. On the floor of the porch at the edge of and parallel to that side of the lightwell there was fastened a piece of timber in the top of which was a groove. The upright boards were set in this groove, and on the top was another timber or rail in which there was a groove into which the uprights were fitted at the top end. To replace the boards when removed as the witness Pederson testified, "* * * you spring the railing *slightly* when you put the boards back in." (Italics added.) Some of the witnesses testified that the top railing, or cap, was loose just prior to the accident, and they also testified that the boards and other timbers were old and rotten, and in this they are strongly corroborated by the photographs introduced in evidence.

When plaintiff moved into her apartment there was attached to the wall just outside the rear door an apple or orange crate which was used as a food cooler. On the morning of December 18, 1948, she went outside to this food box to secure some food for breakfast. While she was on the top step, the same being six inches in width, she tripped, or lost her balance, and fell striking the upright boards forming the lightwell wall. Eight of these boards slipped out of the grooves in which they were set precipitating her to the concrete floor of the lightwell. She sustained a fractured vertebra, broken ribs, and other injuries, and was hospitalized for several weeks.

There is no evidence that the defendant ever made an inspection of the lightwell wall, or was aware of its defective condition. Plaintiff had no knowledge of the nature of its construction, and no knowledge of its condition except that on the day previous to the accident in company of one of the witnesses, Mrs. Henshell, she noticed that the top rail, or cap, "wiggled" when touched.

[1] The right to make common use of the stairways and landings by the different tenants (and the reservation of the right to make such use thereof as well as by herself) cast upon the defendant the duty to maintain these areas in a reasonably safe condition. Harris v. Joffe, 28 Cal.2d 418, 170 P.2d 454; Turner v. Lischner, 52 Cal.App.2d 273, 126 P.2d 156. Merely

letting deteriorated premises remain without any effort on the part of the landlord to ascertain their true condition is not enough to discharge this duty. Spore v. Washington, 96 Cal.App. 345, 274 P. 407. It is not only the duty of the landlord to keep that portion of the premises reserved for common use in a safe condition, but this duty requires him "to make a reasonably careful inspection at reasonable intervals to learn of dangers, not apparent to the eye." Devens v. Goldberg, 33 Cal.2d 173, 178, 199 P.2d 943, 947. As is said in Spore v. Washington, supra, 96 Cal.App. at page 355, 274 P. at page 411, "* * * if he (the landlord) chooses to let the property look after itself, trusting to good fortune to protect those who use the premises, he must be prepared to accept the results when this good fortune abates or takes a turn for the worse."

[2,3] Appellant contends that the respondent was making a misuse of the premises at the time the accident occurred. The argument is made that the wall about the lightwell was not intended to protect against a person hurtling into it. The answer to this contention is that the wall was built to prevent people from stumbling and falling into it and that it failed to function in this respect through deterioration. If nothing more than a warning were intended, as appellant contends, a placard would have sufficed. Respondent could not have developed any considerable momentum laterally in the space of twenty-six inches between the lower step and the wall. It must have been evident to the jury that the decayed boards slipped out of their grooves on account of not being properly secured when respondent struck them in falling and that it was this failure to hold which proximately caused her injuries. The jury was free to make this deduction, and, "As has so frequently been said, it is the general rule that on appeal an appellate court (1) will view the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof." Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557, 561.

[4] There is nothing in the factual situation of the case which in the light of the settled rules would warrant a reversal of the judgment.

[5] Nor is there any greater merit in appellant's contention that the jury was improperly instructed to her prejudice. She challenges an instruction that: "It is the duty of the landlord to provide a safe means of entrance and exit both for the tenants and the latter's invitees" as stating in effect that the landlord is an insurer of the safety of persons upon the premises. Any such implication is completely negatived by the subsequent instruction given in the unmistakable language that, "The owner or landlord is not an insurer of persons on the premises, even when he has invited them to enter."

[6, 7] Two formula instructions are also challenged by appellant on the ground that they fail to embrace the facts that the defects in the lightwell wall were plainly visible and obvious to plaintiff, and that she acted at her own peril in relying upon it for safety when she put the wall to an unreasonable use by falling against it. It has been pointed out that plaintiff had no knowledge of the defects. She testified that she had no occasion to and never did go near the wall. She never observed it except in passing. Unless instructions find support in the evidence they should not be given, and where there are no supporting facts they may mislead the jury. Risdon v. Yates, 145 Cal. 210, 78 P. 641; Collins v. Jones, 131 Cal.App. 747, 22 P.2d 39; Azzaro v. O'Connell, 121 Cal.App. 617, 9 P.2d 345; Kinnear v. Martinelli, 84 Cal. App. 721, 258 P. 686. Appellant's contention that falling against the wall was misuse thereof by plaintiff borders on the fantastic. The space between the lower step to the apartment and the lightwell wall was only twenty-six inches. It is inconceivable that plaintiff developed any lateral momentum in such a space as respondent contends. As there is no proof of knowledge of the defective condition of the

lightwell wall by respondent, or misuse of it by her, there was no error in giving the challenged instructions.

[8, 9] Appellant charges that the damages awarded are excessive. This is one of the grounds urged for a new trial in the court below. The trial judge decided the issue adversely to appellant. The remedy for excessive verdicts rests almost wholly in the discretion of the trial court. Couch v. Pacific Gas & Elec. Co., 80 Cal.App.2d 857, 867, 183 P.2d 91; Brown v. Boehm, 78 Cal.App.2d 595, 178 P.2d 49. As is said in Zibbell v. Southern Pacific Co., 160 Cal. 237, 255, 116 P. 513, 521, "* * * it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury." The plaintiff suffered multiple bruises and contusions, a crushed vertebra, and four broken ribs. The testimony of her attending physician shows the injury to her spine to be permanent and reasonably certain to become progressively worse. We are in accord with the trial court in that the amount of the awarded damages is not excessive.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

L. B. LABORATORIES, Inc. v. MITCHELL.

L. A. 22214.

Supreme Court of California, in Bank.

May 23, 1952.

Rehearing Denied June 19, 1952.

Action by L. B. Laboratories, Inc., against Walter A. Mitchell to recover for damages sustained because of the defendant's failure to file plaintiff's tax returns on time. From a judgment of the Superior Court, Los Angeles County, Carl A. Stutsman, J., in favor of the plaintiff, the defendant appealed. The Supreme Court, Carter, J., held that the action was one for breach of contract, that defendant's request to amend answer to plead statute of limitations applicable to contract actions was properly denied on ground that it was not timely and that the action was not barred by limitations.

Judgment affirmed.

See also 237 P.2d 84.

1. Pleading ⚷406(7)

Complaint alleging that defendant had been employed to prepare and file specific tax returns which were due at a specified date and that he negligently failed to file them in time sufficiently indicated an action in contract as well as in tort, so that, in absence of any demurrer to have complaint clarified, there was no basis for claim that defendant was misled as to nature of action.

2. Limitation of Actions ⚷184

Where complaint indicated an action on contract and plaintiff's opening statement stated that action was one on contract, subsequent request to amend answer to plead four year limitation applicable to contract actions was properly denied on ground that it was not timely. Code Civ. Proc. § 337, subd. 1.

3. Action ⚷27(1)

A cause of action arising from a breach of promise is contractual in nature, but if it arises from a breach of duty growing out of the contract, it is delictual, and a tort or trespass is none the less such because it also involves a breach of contract.

4. Limitation of Actions ⚷24(2)

An action based upon defendant's failure to file plaintiff's tax returns in time, as he had agreed to do, was a contract action and four year limitation period for actions on written contracts was applicable thereto. Code Civ.Proc. § 337, subd. 1.

5. Limitation of Actions ⚷197(2)

In action for breach of agreement to file plaintiff's tax returns on time, evidence with respect to assurances given by defendant to plaintiff's president in connection with extensions of time for filing returns sustained finding of fraudulent concealment on part of defendant tolling the statute of limitations. Code Civ.Proc. § 337, subd. 1.

◆

Sheppard, Mullin, Richter & Balthis, Gordon F. Hampton and E. Talbot Callister, all of Los Angeles, for appellant.

Walter G. Danielson, H. Spencer St. Clair, Alva C. Baird and William A. Cruikshank, Jr., all of Los Angeles, Howard W. Campen, County Counsel, Santa Clara, Donald K. Currlin, Asst. County Counsel, and Wade H. Hover, Deputy County Counsel, San Jose, as amicus curiae, for respondent.

CARTER, Justice.

Plaintiff was awarded judgment for $17,428.43 for damages in an action the nature of which will later appear. Defendant appeals.

According to the findings of the court, plaintiff is a corporation. Defendant is a certified public accountant pursuing his vocation in Los Angeles. Prior to December, 1942, defendant represented to plaintiff that he was an expert in all tax matters, both federal and state, and fully capable of handling all plaintiff's tax and accountancy problems, and in reliance thereon plaintiff employed defendant prior to June, 1942, to handle all of such problems. Pursuant to the employment defendant prepared and filed in proper time plaintiff's tax returns for the calendar years 1940–1942. Still in reliance on defendant's representations, on February 7, 1944, plaintiff employed defendant to make an income tax review of its records for 1943 and to prepare and file on or before March 15, 1944, its federal income and excess profits tax returns for 1943 and the state franchise tax returns for the same year. Defendant accepted the employment on February 7, 1944, and reduced his acceptance to writing in the form of a letter to plaintiff, stating: "This will confirm your request that this office conduct an income tax review of the corporate books and records and as a result prepare the following tax returns for calendar year 1943; California Franchise Tax Return, Federal Income Tax Return, Federal Excess Profits Tax Return. These services will be billed on the basis of $40.00 per diem (eight hours) for all time devoted thereto (travel time included). Progress—billing invoices will be rendered as of the close of each Saturday's business." It was intended by the parties at the time the contract was made that defendant was to prepare and file all of said returns on or before their due date, March 15, 1944. Defendant breached the contract in (1) that he did not make a review of plaintiff's records until the early part of 1946; and (2) did not file any of the returns until March 23, 1946. The breach was due to defendant's negligence and carelessness. As a result of defendant's breach and negligence plaintiff had to pay penalties on the taxes due, as the filing of the returns was late.

In further reliance on defendant's representations, plaintiff entered into a written contract on January 27, 1945, for similar services for the tax returns for 1944. The breach of the contract by defendant was the same and the same type of damages followed.

In January, 1947, the U. S. Treasury Department notified defendant that certain deductions on the federal taxes were disallowed and that a 25% penalty for late filing should be assessed. Defendant notified plaintiff of the former but not the latter, which he concealed from plaintiff. Defendant without plaintiff's knowledge protested the federal officers' action. Proceedings were had and defendant's protests denied on July 18, 1947, and a further hearing was requested, all of which was concealed from plaintiff until March 15, 1948, when defendant told plaintiff that the further hearing would be had and it then learned the facts. Plaintiff thereafter arrived at a settlement with the federal officials in which plaintiff paid 50% of the penalties, all to plaintiff's damage in the amount paid.

Finally, it was found that none of plaintiff's causes of action were barred by section 339 of the Code of Civil Procedure or any other statute of limitation but if they were the statute was tolled by defendant's concealment and representations that he had done all the things required.

Judgment was accordingly entered for the damages suffered.

[1] Defendant contends that plaintiff's action, as stated in its complaint, was one in tort—malpractice of an accountant—and not in contract, and later during the trial it shifted its position to a contract theory to defendant's grave prejudice in that he did not make contract action defenses and was not prepared to meet a contract action; that judgment should be ordered entered for him because there was no evidence (expert testimony) of negligence and the action based on tort liability was barred by the statute of limitation, Code of Civil Procedure, section 339(1).

The complaint charges in the first count the representation by defendant of his ability to handle plaintiff's tax problems; it "specially employed" defendant to prepare and file its 1943 tax returns; defendant negligently failed to file them in time; as a proximate result of the negligence and failure plaintiff was damaged in a named sum. The second count contains the same allegations with regard to the state franchise tax returns, the third and fourth as to the taxes for 1944. In his answer defendant alleges that plaintiff employed him but that it was understood that the returns could not be prepared and filed because of the lack of time. He pleaded section 339(1) of the Code of Civil Procedure, which provides a two year limitation for commencing an action upon contract, obligation or liability not founded upon a written instrument which may well indicate that he was assuming that the "special employment" was an oral not a written contract as well as that the action was one for negligence, in tort, a liability not founded on a writing where the injury is to other than person or property. He also alleged that the fault for the late filing was plaintiff's not his. Defendant did not demur to the complaint to have it clarified as to whether reliance was had upon negligence or contract or if the latter, whether it was written or oral.

Contrary to defendant's contention, the complaint, for the purpose of determining whether defendant was misled, may be construed to indicate an action in contract as well as in tort. The essential factors of the former are present. A special employment was alleged which points to a contract as an employment relation is a contractual one. It is alleged that defendant was employed to prepare and file specific tax returns which were due at a specified date and that he "negligently" failed to file them in time, which would be a breach of the contract of employment. The description of the failure as negligent does not prevent the complaint from conveying to defendant the idea that he failed to do what he had promised. These allegations were sufficient to apprize him of what he had to meet, and whether or not he had made an employment contract with plaintiff and if so the terms thereof, were within his knowledge. He made no effort by demurrer to have the complaint clarified.

The indication of a contract action was carried into the trial. On the taking of the deposition before trial by defendant of plaintiff's president, Olson, its counsel said, in the course of discussion, we are proceeding under an action against defendant for alleged negligence in performing his professional services, but at the beginning of the trial defendant's counsel first made an opening statement in which he said contracts were made between plaintiff and defendant to prepare the returns. He also said that the complaint was for negligence and that section 339(1) (above mentioned) barred the action. In reply, plaintiff's counsel referred expressly to the written contracts (referred to in the findings) and said: "I might just as well dispose of the position of this defendant in this action that this comes under Section 339 of the Code of Civil Procedure, for the reason that it does not, and if counsel believes so, then he has entirely misconceived the whole theory of this action; and if he had demurred to the complaint on the ground that the complaint doesn't allege whether the contract of the employment is in writing or is oral he would then have been advised, because the contract is in writing, and our position is that this action therefore is not barred by Section 339 of the Code of Civil Procedure but comes under the provisions of Section 337, which is an action upon a contract obligation or liability founded upon an instrument in writing, and with respect thereto, the four-year period of limitation becomes applicable. * * * I believe it could be said that his breach of his written employment contract occurred on June 15, 1944." Defendant made no protest to those statements, nor did he at any time request a continuance to prepare to meet a contract action; he did not ask leave to amend his answer to meet a contract action until later, as will hereafter appear. Thereafter the first witness called was defendant under section 2055 of the Code of Civil Procedure, and the written contracts were introduced without objection. On repeated occasions during the presentation of plaintiff's case his counsel's statement that the action was for breach of contract was not challenged by defendant.

[2] Defendant moved for a nonsuit on the grounds that the action was barred by section 339(1) of the Code of Civil Procedure, asserting that the action was one for negligence and that there was no evidence of negligence because there was no expert testimony as in a malpractice case. Plaintiff opposed the motion on the ground that the action was based upon breach of a written contract. Defendant then asked leave to amend his answer to plead section 337(1) of the Code of Civil Procedure (four year limitation on actions to recover on a written contract) as a defense. The court denied the request on the ground that it was not timely. It had grounds for exercise of its discretion in making the ruling because, as seen, the complaint did indicate an action on contract and in plaintiff's opening statement, four days before, it stated the action was one on contract.

Defendant urges that the complaint has the typical aspects of an action for malpractice, see Dunn v. Dufficy, 194 Cal. 383, 228 P. 1029; Lattin v. Gillette, 95 Cal. 317, 30 P. 545; Hall v. Steele, 193 Cal. 602, 226 P. 854; Mirich v. Balsinger, 53 Cal.App.2d 103, 127 P.2d 639, but as we have seen it also has all the elements of a contract. He also states that in cases against physicians it has been stated that the allegation of the employment is a mere matter of inducement and the action is in tort, Hall v. Steele, supra, 193 Cal. 602, 226 P. 854; Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908; Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98; Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109; Estate of Pillsbury, 175 Cal. 454, 166 P. 11, 3 A.L.R. 1396, and that a passenger's injury while riding on a street car is in tort rather than the contract of carriage. Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 134 P. 993. The various holdings on whether an action is tort or contract are summarized: "Although the distinctions in forms of actions have been abolished, the obligation upon which a cause of action is founded may be either contractual or delictual in nature. This distinction is still of fundamental importance with respect to such matters as jurisdiction, venue, the availability of attachment or garnishment, and the limitation of actions. And an action commenced in contract cannot be amended so as to change the proceeding into an action in tort, nor may an action commenced in tort be changed to one in contract.

> [3] "For the designation of actions as contractual or delictual, it is to be noted that a contract is defined as an agreement to do or not to do a certain thing, and a tort as any wrong, not consisting in mere breach of contract, for which the law undertakes to give the injured party some appropriate remedy against the wrongdoer. If a cause of action arises from a breach of a promise, the action is contractual in nature; if it arises from the breach of a duty growing out of the contract, it is delictual, and a tort or trespass is none the less such because it also involves a breach of contract. There is obviously some overlapping here, and where it is not clear to which class an action belongs, it will ordinarily be construed as in contract rather than in tort. * * *

"Notwithstanding the basic distinctions between actions on contract and in tort, there are many wrongful acts that constitute a breach of duty that is not only created by contract but imposed by law as well. Thus, negligence may be conceived as being of two types: delictual negligence, which involves a breach of a duty owed to a world at large, as to the general public in driving an automobile; and contractual negligence, which consists of a breach of a primary duty owed to the injured party—a 'polarized' duty arising from some prior relationship between him and the tortfeasor, as in the case of a bailee or common carrier. The latter type of negligence ordinarily gives rise to an action either on contract or in tort, and the injured party may at his election waive the contract and sue in tort, or waive the tort and base his action on the contract alone. Thus an injury to a passenger on a common carrier, by wrongful ejectment or failure to carry him to his destination, constitutes a breach of the carrier's contract of safe carriage to a specific place, and also a breach of its legal duty arising from its position in performing a public service. Similarly, an action by a depositor against a bank for failure to honor a check arises out of contract in the sense that the injury was sustained as a result of the contractual relation, but also contains an element of tort, in that it is based on violation of the duty to exercise due care. In general, however, actions based on negligent failure to perform contractual duties, such as those owing from a hospital or physician to a patient, from an employer to an employee, and from a landlord to a tenant, although containing elements of both contract and tort, are regarded as delictual actions, since negligence is considered the gravamen of the action." 2 Cal.Jur.2d, Actions, §§ 29, 30. In regard to an accountant it has been held that an action against him for failure to perform his obligation to the person employing him may be in contract. See Smith v. London Assurance Corp., 109 App.Div. 882, 96 N.Y.S. 820; City of East Grand Forks v. Steele, 121 Minn. 296, 141 N.W. 181, 45

L.R.A.,N.S., 205; National Surety Corp. v. Lybrand, 256 App.Div. 226, 9 N.Y.S.2d 554; Board of County Com'rs of Allen County v. Baker, 152 Kan. 164, 102 P.2d 1006.

[4] In the instant case the complaint shows and the court found that defendant contracted to do a specific thing, namely, to prepare and file plaintiff's income tax returns in the time required by law. There is no equivocation or shading of the obligation. It was not limited to the exercise of ordinary care. It was a positive, specific duty which he assumed. Any justification or excuse for failure to perform it could be a matter of defense. It differs in that respect from an action against a physician who does not agree to achieve any particular result; he merely agrees to act in a non-negligent manner. Even in the physician cases it would not be doubted that if a doctor is specifically employed to remove a wart from the patient's foot but removes one from his face, there would be a breach of contract. Likewise, it is dissimilar from an accountant who is employed generally to audit the employer's books where he assumes the general obligation to exercise due care.

[5] It follows that as section 337(1), Code of Civil Procedure (four year limitation period for actions on written contracts) was not timely raised and the action being based on a written contract rather than on negligence, there is no bar of the action by reason of the statute of limitations. In addition, however, the court found that defendant wilfully and fraudulently concealed from plaintiff that the so-called "completed" returns were nullities and did not comply with the law, that the federal officers sought to enforce late filing penalties, and that plaintiff did not discover those matters until March 15, 1948. Defendant claims that finding is not supported by the evidence.

The action was commenced on December 7, 1948. Four years prior thereto was December 6, 1944. The breach of the first contract for filing of the return for the year 1943 occurred on March 15, 1944, when the return was not filed or in June or July, 1944, to which the time had been extended at defendant's request. We therefore look to the evidence between at most March 15, 1944 and December 6, 1944, to ascertain whether during that period there was a concealment which would toll the four year statute. Mr. Olson, plaintiff's president, testified that he was solely dependent on defendant and placed complete trust and confidence in him for accounting practice in his business and in preparation of tax returns. Defendant visited him shortly after February 7, 1944, the date of the first letter contract, and Olson signed the contract. There was no conversation. Defendant did not say it would take not less than six weeks to prepare the returns. Defendant came out sometime before March 15, 1944, and had him sign an application for an extension of time to file returns when defendant said he could not make out the report in time and hence had to ask for an extension, to which Olson replied that "It's unfortunate." But, defendant said: "It was nothing to worry about, just a matter of form. Q. Did you believe him? A. I did." Later, defendant presented another application for extension. About May 12, 1944, he (Olson) "again" asked defendant about the return and the latter said "I musn't worry about that because he is capable of taking care of those things; and I believed him. Q. You believed him. Now, at the time when the income tax return was due, on March 15, 1944, did you have money in the bank with which to pay your tax? A. I did." In connection with the so-called "completed returns" (they were a nullity) which defendant had Olson sign shortly before the last extension expired, defendant said "that he would take care of the whole thing and I shouldn't worry about it. Q. Did you rely upon and believe what he said to you? A. I did." From then on Olson thought the "completed returns" were sufficient by reason of what defendant told him. Henricksen, plaintiff's bookkeeper, testified that defendant told him in February, 1944, that the time was too short to prepare the returns by March 15, 1944, but as will be recalled defendant obtained extensions of time to July, 1944, and, as above seen, he assured Olson that everything was all right. Defendant's testimony is to the contrary, but nothing more than a conflict was created. It is clear that the evidence is sufficient to support the court's finding that the statute of limitation was tolled.

In view of the result reached herein other contentions of defendant, such as the lack of evidence of negligence to support a tort action, the applicability of Code of Civil Procedure section 339(1), that he was deprived of his right to raise contract action defenses, became unimportant.

Amicus curiae contend that assuming the action is one in tort, Code of Civil Procedure section 339(1) does not apply; that section 343, the residuary limitation period of four years applies; that the malpractice cases applying section 339(1) were incorrectly decided. From the foregoing discussion those questions need not be discussed.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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39 Cal.2d 33

SUTTER HOSPITAL OF SACRAMENTO v. CITY OF SACRAMENTO.

Sac. 6110.

Supreme Court of California, in Bank.
May 14, 1952.

Rehearing Denied June 11, 1952.

Action by the Sutter Hospital of Sacramento against the City of Sacramento to recover real property taxes paid under protest. The Superior Court, Sacramento County, Lowell L. Sparks, J., assigned by Chairman of Judicial Council, entered judgment for defendant and plaintiff appealed. The Supreme Court, Spence, J., held that the surplus earnings of plaintiff, though devoted to expansion and improvement and retirement of bonded indebtedness, were "profit" within statute exempting from taxation hospital property not used for profit, and that therefore plaintiff's realty was not exempt from taxation.

Affirmed.

Prior opinion, 236 P.2d 186.

1. Constitutional Law 🔑33

Constitutional amendment relating to exemption of certain property used for hospital purposes, unlike certain other provisions relating to tax exemptions, is not self-executing, and legislation is required in order to effect exemption of any property, and such amendment is purely permissive, rather than mandatory, in character, and qualifies constitutional provision requiring all property to be taxed according to its value except as otherwise provided in the Constitution. Const. art. 13, §§ 1–1c, 1½, 1½a.

2. Statutes 🔑212.6

The legislature in enacting, pursuant to express constitutional authority, statute which exempted from taxation property of hospital which was not operated for profit would be presumed to have known that word "profit" as used in constitutional provision relating to exemption of certain property from taxation had been judicially construed as meaning net earnings, the benefits of which accrued directly or indirectly to stockholders or members of organization in question. Revenue and Taxation Code, § 214(1–3); Const. art. 13, §§ 1–1c, 1½, 1½a.

3. Taxation 🔑241(2)

Although the word "profit" as contained in tax exemption laws had been judicially and legislatively defined so as to deny exemption only if purpose of making profit was to benefit private person, where subsequently enacted statute provided that property of hospital was exempt from taxation if not used for profit regardless of purposes to which profit was devoted, the most that could be said in favor of hospital which was operated with intent of producing surplus of income over expenses so as to permit periodic retirement of portion of its bonded indebtedness and to permit expansion of its facilities, was that there was grave doubt as to whether legislature intended that property so used was intended to be accorded the exemption. Revenue and Taxation Code, § 214(1–3); Const. art. 13, §§ 1–1c, 1½, 1½a.

4. Taxation ⚿204(2)

Any doubt in construction of tax exemption statute is to be resolved against right to exemption. Revenue and Taxation Code, §§ 203, 214; Const. art. 13, §§ 1–1c, 1½, 1½a.

5. Taxation ⚿241(2)

Statute providing for exemption from taxation of hospital property if not used for profit would be construed as a whole, giving meaning and effect to all terms and provisions thereof. Revenue and Taxation Code, § 214(1–3).

6. Taxation ⚿241(2)

Where hospital was operated for purpose of producing surplus of income over expenses so as to permit periodic retirement of a portion of hospital's bonded indebtedness and to permit expansion of its facilities, surplus earnings, though not inuring to benefit of any individual, were "profit" within statutory provision that property used exclusively for hospital purposes is exempt from taxation if property is not used or operated by owner or by any other person for profit regardless of purposes to which profit is devoted, and therefore hospital's realty was not exempt from taxation. Revenue and Taxation Code, § 214(1–3).

See publication Words and Phrases, for other judicial constructions and definitions of "Profit".

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Musick & Burrell, Howard Burrell and James E. Ludlam, Los Angeles, amici curiæ on behalf of appellant.

Everett M. Glenn, Ralph H. Lewis and Fred R. Pierce, all of Sacramento, for respondent.

Harold W. Kennedy, County Counsel (Los Angeles), and Arvo Van Alstyne, Deputy County Counsel, Ray L. Chesebro, City Atty. (Los Angeles), and Louis A. Babior, Deputy County Counsel, all of Los Angeles, amici curiæ on behalf of respondent.

SPENCE, Justice.

Plaintiff brought this action to recover real property taxes paid under protest for the fiscal year 1946–1947. The underlying question is whether the tax assessments were properly made in view of the welfare exemption law. Cal.Const art. XIII, § 1c; Rev. & Tax. Code, § 214. The trial court found that plaintiff did not meet certain conditions for exemption; and from the judgment accordingly entered in favor of defendant, plaintiff appeals.

One of the conditions which the trial court found that plaintiff had failed to meet is that embodied in subdivision (3) of section 214 of the Revenue and Taxation Code, which reads: "The property is not used or operated * * * for profit regardless of the purposes to which the profit is devoted". Plaintiff contends that the evidence is insufficient to sustain the trial court's findings relative to plaintiff's failure to meet this condition. As there is no dispute concerning the facts, the question becomes essentially one of statutory construction. We have concluded that plaintiff's position with respect to this phase of the controversy cannot be sustained, and that the judgment must be affirmed. It is therefore unnecessary to discuss certain other questions raised concerning plaintiff's qualification for exemption.

[1] In 1944 a constitutional amendment was adopted relating to the exemption of certain property used for hospital purposes. Art. XIII, § 1c. The relevant portions provide that the "Legislature may exempt from taxation all or any portion of property used exclusively for * * * hospital * * * purposes and owned by * * * corporations organized and operated for * * * hospital * * * purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." Unlike certain other provisions relating to tax exemptions, see art. XIII, §§ 1a, 1b, 1½ and 1½a, this amendment is not self-executing, and legislation is required in order to effect the exemption of any property. The amendment is purely permissive rather than mandatory in character, and it qualifies section 1 of article XIII, which re-

quires that all property be taxed according to its value "except as otherwise in this Constitution provided". In other words, the Legislature could refrain from exempting any of the property referred to in the amendment or it could exempt only such property as might meet the conditions specified in the amendment and such further conditions as the Legislature might see fit to impose. The Legislature followed the latter course and enacted section 214 of the Revenue and Taxation Code, which imposes conditions in addition to those found in the constitutional amendment. It is therefore a question of the construction to be placed on the conditions set forth in said section 214 which is presented by this appeal.

Said section 214 contains six numbered subdivisions of general application, but only the pertinent provisions of the main paragraph and three of the subdivisions need be considered here. It is provided that "Property used exclusively for * * * hospital * * * purposes owned and operated by * * * corporations organized and operated for * * * hospital * * * purposes is exempt from taxation if: (1) The owner is not organized or operated for profit; (2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual; (3) The property is not used or operated by the owner or by any other person for profit regardless of the purposes to which the profit is devoted; * * *."

Plaintiff was organized as a nonprofit corporation in 1935. It acquired the physical assets of its predecessor by giving in exchange its bonds. In 1945 plaintiff's physical assets for accounting purposes had a value of $764,895.39 and its then bonded indebtedness was some $292,000. For 1945 the surplus of income over current expenses, which expenses included interest payments and depreciation on the buildings, machinery and equipment, amounted to $86,609.24; for 1946, the surplus was $106,603.12. Reduced to percentages, the surplus for each year was slightly in excess of eight per cent of gross income. The surplus was mingled with other cash on hand and was used for debt retirement and for expansion. Instance of this latter use was the building and equipping of an X-ray room in 1947 at a cost of $60,000.

It is conceded that plaintiff operated its hospital properties with the intent of producing, if possible, a surplus of income over expenses so as to permit the periodic retirement of a portion of its bonded indebtedness and to permit the expansion of its facilities. It is further conceded that it had succeeded and was succeeding in accomplishing this purpose. Defendant argues that by reason of plaintiff's profit-making intent and purpose, the allowance of the claimed exemption would run counter to the statutory condition that such property be "not used or operated by the owner * * for profit regardless of the purposes to which the profit is devoted". Rev. & Tax. Code, § 214, subd. (3). Under a strict but reasonable construction of the tax exemption law, Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 734–735, 221 P.2d 31, 15 A.L.R.2d 1045, defendant's contention must be sustained.

The word "profit" has been defined in various ways, as appears by reference to any standard dictionary. In dealings between parties to a commercial venture, it has been defined as "acquisition beyond expenditure" or "excess of value received over cost." Prince v. Lamb, 128 Cal. 120, 126, 60 P. 689, 691. In relation to tax laws, the phrase "conducted for profit," which appears to be the equivalent of "operated for profit", has presented some difficulty but has been generally held to convey the meaning of operated or conducted for the *purpose* of making a profit. See Mayor and Common Council of Borough of Princeton v. State Board of Taxes & Assessments, 96 N.J.L. 334, 115 A. 342, 344; Buxton Country Day School, Inc., v. Millburn Tp., 14 A.2d 269, 270, 18 N.J.Misc. 443. Accordingly, the test indicated by such phrases, as so construed, is not necessarily whether there is or may be a profit but whether the claimant is operated or conducted for the purpose of making a profit; that is, whether the charges are fixed with the intention of yielding a surplus over and above operating expenses. See Rider College v. City of Trenton, 19 A.2d 22, 23, 19

N.J.Misc. 304; College of Paterson v. City of Paterson, 29 A.2d 402, 403, 21 N.J.Misc. 13. It thus appears that plaintiff can find little comfort in the ordinary meaning of the word "profit" or in the construction which has been given to the phrase "conducted for profit" in the above cited authorities. Plaintiff relies heavily, however, on the construction of the phrase "used or held for profit" as found in San Gabriel Cemetery Ass'n v. County of Los Angeles, 1947, 49 Cal.App.2d 624, 122 P.2d 330, 332.

In the San Gabriel case it was held that net earnings derived from the cemetery's sale of burial lots in excess of their cost did not constitute "profit" within the ban of the constitutional exemption disqualifying property "used or held for profit", where such excess was used for the purchase of more land and other cemetery purposes. Art. XIII, § 1b. It was there said, 49 Cal.App.2d at page 626, 122 P.2d at page 332: "The word 'profit' does not mean financial benefit that accrues to the association through the sale of burial space at a price in excess of its cost where such gain is used for the upkeep of the cemetery property. The word 'profit' in article XIII, section 1b, means net earnings the benefits of which accrue directly or indirectly to the stockholders or members of the association."

[2] The Legislature presumably had knowledge of the quoted judicial construction of the word "profit" when it subsequently enacted the section now under consideration. Rev. & Tax. Code, § 214; see 23 Cal.Jur. § 159, p. 782; Miller v. McColgan, 17 Cal.2d 432, 439, 110 P.2d 419, 134 A.L.R. 1424. Furthermore, the Legislature had previously sought to place a similar legislative construction on the phrase "not conducted for profit" appearing in article XIII, section 1a, relating to the exemption of certain educational institutions. Section 203 of the Revenue and Taxation Code provided: "An educational institution of collegiate grade is not conducted for profit when it is conducted exclusively for scientific or educational purposes and no part of its net income inures to the benefit of any private person." It thus appears that at the time section 214 of the Revenue and Taxation Code was enacted in 1945, the meaning of the word "profit," as used in tax exemption laws, had been construed in such manner that the nonprofit requirements were deemed to be satisfied so long as none of the "net earnings" accrued "directly or indirectly to the stockholders or members of the association", as stated in the San Gabriel case, or so long as no part of the "net income inures to the benefit of any private person", as stated in section 203 of the Revenue and Taxation Code. In other words, the profit concept had been defined in terms relating solely to the purpose for which "net income" or "net earnings" might be used and only the use thereof for the purpose of benefiting a private person was prohibited

[3, 4] In the light of these prior definitions, judicial and legislative, we turn now to a consideration of the terms employed in the first three subdivisions of section 214 of the Revenue and Taxation Code. These subdivisions contain separately stated but interrelated conditions. Property used exclusively for hospital purposes is thereby declared exempt only "if: (1) The owner is *not organized or operated for profit*; (2) No part of the *net earnings* of the owner inures to the benefit of any private shareholder or individual; (3) The property is *not used or operated* by the owner or by any other person *for profit regardless of the purposes to which the profit is devoted*; * * *." (Emphasis added.) If subdivision three had been omitted, it might well be argued that the Legislature intended that the nonprofit conditions of subdivision one would be satisfied so long as none of the "net earnings" inured to the benefit of any private individual. But subdivision three cannot be declared to have been inserted without reason, and it seems clear that it was intended thereby to broaden the profit concept so as to deny exemption whenever the property is operated for the purpose of profit "regardless of the purposes to which the profit is devoted". Thus it appears that the Legislature adopted a different concept of "profit" for the purposes of section 214 by providing that the nonprofit requirements could not

be satisfied merely by devoting the net earnings to exempt (hospital) purposes. In any event, the most that can be said is that there is grave doubt as to whether the Legislature intended that the property used as is plaintiff's property, by an owner operating for the admitted purpose of producing net earnings, was intended to be accorded the exemption. In such circumstances, settled principles of statutory construction require that any doubt be resolved against the right to the exemption. Helping Hand Home for Children v. San Diego County, 26 Cal.App.2d 452, 458–459, 79 P.2d 778.

[5] In reaching the foregoing conclusion, we are not unmindful of the fact that both the constitutional amendment and the legislative enactment under discussion contain provisions prohibiting the inurement of "net earnings" to the benefit of any individual, thereby apparently recognizing that net earnings might accrue in a given case without necessarily defeating the exemption. But, as above indicated, it is the statute which is under construction here, and it must be construed as a whole, giving meaning and effect to all the terms and provisions thereof. Weber v. County of Santa Barbara, 15 Cal.2d 82, 86, 98 P.2d 492; County of Los Angeles v. Frisbie, 19 Cal.2d 634, 641–642, 122 P.2d 526. Under the well established rule, we cannot ignore the provisions of the above-quoted subdivision three of said section 214.

Whether the accrual of "net earnings" will defeat the right to the exemption depends upon the particular facts involved. The case of Y. M. C. A. v. County of Los Angeles, 35 Cal.2d 760, 221 P.2d 47, concerned the tax exempt status of the dormitory portions of Y. M. C. A. buildings where accommodations were furnished to members at a moderate rental. It there appeared that such accommodations were offered at "a minimum charge," that there was no "real profit motive" in such undertaking, and that at each of the branches the total revenues were less than the expenditures, with the difference being met by voluntary contributions and a Community Chest allowance. 35 Cal.2d at page 771, 221 P.2d 54. While it was stated in the Y. M. C. A. case that it was contemplated by the statute that the exempt institution migh have "income and even 'net earnings' without losing the benefit of its exemption, provided such earnings are derived from the normal pursuit of its exempt purposes and provided further that all other conditions, enumerated in § 214 of the Revenue and Taxation Code, are met", 35 Cal.2d at page 771, 221 P.2d at page 54, all that was said in that opinion must be read in the light of the facts which were presented there. The question here involved was not presented there, and we did not intend to imply that property which was designedly and consistently operated for profit, even though the profit was used for exempt (hospital) purposes and not for the purpose of benefiting any individual, would be exempt. The distinction between the facts involved in the Y. M. C. A. case and those found in the present record is readily apparent.

[6] Here the determinative factor is the operation of plaintiff's property for the admitted purpose of producing a profit in the sense that the operation was one deliberately designed to produce income in excess of all operating costs. The fact that plaintiff has succeeded in producing net earnings is not accidental or allocable to a fortuitous error in judgment in determining the charges made for its services. On the contrary, plaintiff functioned on a sound financial basis in a manner akin to any modern commercial enterprise intent upon producing a profit from its operations. It is argued that the above-indicated construction of the welfare exemption, denying exemption because of the adoption of sound financial practices, will make it difficult, if not impossible, for modern hospitals to plan for expansion and the improvement of facilities for the better service of the public without losing the benefit of the exemption. This argument may merit serious consideration, but it should be addressed to the Legislature rather than to the courts. This court's function begins and ends with construing the statute as enacted. The present form of the statute compels the conclusion that plaintiff's claim for exemption must be denied because of its failure to meet the

condition that its property be "not used or operated * * * for profit regardless of the purposes to which the profit is devoted". Rev. & Tax.Code, § 214, subd. (3).

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

39 Cal.2d 12

PFINGSTEN v. WESTENHAVER et al.

L. A. 22263.

Supreme Court of California, in Bank.

May 13, 1952.

Action by Lyman D. Pfingsten against Robert E. Westenhaver, administrator, etc., sued and named erroneously as Robert E. Westenhauer, etc., for property damage sustained by owner of tractor-trailer combination in collision with automobile. The Superior Court, Los Angeles County, Harold B. Jeffery, J., entered judgment on a verdict in favor of plaintiff and defendant appealed. The Supreme Court, Edmonds, J., held that the evidence was sufficient to take case to jury on questions of whether driver of automobile was negligent and whether such negligence was the cause of collision.

Judgment affirmed.

Prior opinion, 238 P.2d 1051.

1. Action 🔑66

The law of the forum controls the rules of evidence, including the question of its sufficiency.

2. Automobiles 🔑229½

In action in California for property damage sustained in collision of automobile and tractor-trailer in Iowa, the sufficiency of the evidence to support verdict for plaintiff must be determined in accordance with the law of California.

3. Appeal and Error 🔑1001(1)

Jury's determination is final, if there is any evidence which sustains implied finding of jury.

4. Appeal and Error 🔑996

Where different conclusions may reasonably be drawn from the evidence by different minds, trial court's findings are not to be disturbed on appeal.

5. Automobiles 🔑245(42, 59)

Evidence that automobile was traveling at speed of 40 to 50 miles per hour on icy highway, that brakes were applied under conditions conducive to skidding and that beam of automobile headlights suddenly swung to the left after which automobile collided with tractor-trailer approaching from opposite direction was sufficient to take action for damage to tractor-trailer to jury on questions of whether driver of automobile was negligent and whether such negligence was the cause of collision.

6. Evidence 🔑324(3)

Testimony of witness, testifying from his own knowledge as to ownership of automobile involved in collision, was not incompetent as hearsay, where record did not indicate that it was such, though source of witness' knowledge was not shown. Code Civ.Proc. § 1845.

7. Appeal and Error 🔑1051(1)

Admitting testimony as to ownership of automobile involved in collision was not prejudicial, even if such testimony was hearsay, where ownership was shown by other evidence.

8. Appeal and Error 🔑994(2), 1003

The credibility of and the weight to be given testimony were questions for jury.

9. Automobiles 🔑244(32)

Uncontroverted testimony as to name on registration certificate found on steering column of automobile involved in collision was sufficient to establish ownership of automobile.

10. Evidence 🔑543(2)

Testimony as to witness' experiences with tractors and trailers during the eight years that witness had been in the oil trucking business showed sufficient knowledge to qualify witness to testify concerning reasonable charges for towing and repairing his trailer and the reasonable rental value of tractor-trailers.

11. Appeal and Error ⇨971(2)
Evidence ⇨546

The qualification of witness to testify as an expert is a matter within the sound discretion of trial court, whose ruling will not be disturbed on appeal, unless manifest abuse of such discretion is shown.

12. Evidence ⇨568(1)

If witness discloses an ample knowledge of the subject to entitle his opinion to go to jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility.

13. Evidence ⇨474(20)

Where owner of tractor-trailer combination sought to recover damages for loss of use of such combination, damaged in collision with automobile, and not for loss of use of trailer alone, owner's testimony as to such element of damages was competent and properly admitted over objection that owner could not testify as to rental value of a trailer because he had never rented a trailer without a tractor and driver.

14. Evidence ⇨67(3)

Testimony that trailer was traveling upon highway immediately prior to collision and that immediately after collision it contained 4800 gallons of fuel oil warranted presumption that trailer was carrying a cargo at time of collision. Code Civ.Proc. § 1963, subds. 28, 32.

15. Damages ⇨191

Evidence as to collision between tractor-trailer and automobile, damage to tractor-trailer, and necessity of repairs to restore trailer to the condition it was in prior to collision supported the inference that such repairs were made necessary by the collision.

16. Damages ⇨105, 106

Under Iowa law, recovery cannot be had for both total loss of automotive equipment and loss of use of the same equipment.

17. Damages ⇨188(1)

In action for property damage sustained in collision of tractor-trailer combination and automobile, resulting in total loss of tractor and damage to trailer, evidence established that tractor-trailer combination constituted a single vehicle of value only when used in combination, and hence under Iowa law, cost of new tractor must be treated as a part of the cost of repair and owner was also entitled to recover the value of loss of use of tractor-trailer combination as one unit.

18. Damages ⇨174(1)

Where tractor-trailer combination involved in collision with automobile constituted a single vehicle the component parts of which had no separate rental values, and collision resulted in total loss of tractor and damage to trailer, evidence as to rental value of the combination was admissible to determine damages recoverable for loss of use of the combination.

19. Damages ⇨174(1)

In computing damages for loss of use of a vehicle, necessary delay in procuring parts may be considered as bearing upon a reasonable time for making repairs.

20. Damages ⇨188(1)

In action for property damage sustained by owner of tractor-trailer combination in collision with automobile resulting in total loss of tractor and damage to trailer, evidence showed that owner used due diligence in attempting to replace tractor and hence expenditure of 89 days in making repairs, including replacement of tractor, was not unreasonable.

21. Appeal and Error ⇨1064(1)

Where collision resulted in total loss of tractor and damage to trailer, which together constituted a single vehicle of value only when used in combination, the measure of damages was the reasonable cost of repairs to restore tractor-trailer combination to its former condition, plus reasonable value of its loss of use while being repaired with due diligence, and any error in separately stating in instructions the measure of damages for tractor and trailer was not prejudicial to defendant.

22. Appeal and Error ⇨1064(1)

Defendant could not complain on appeal of instructions as to measure of damages which were not prejudicial to him.

23. Damages ⚷163(4)

The court may not assume that diminution in value of injured personalty was of lesser amount than the proved reasonable cost of necessary repairs, if there is a complete lack of evidence tending to show a diminution in value of the personalty.

24. Damages ⚷163(2)

Defendant has the burden of showing matters in reduction or mitigation of damages.

25. Damages ⚷116

The reasonable cost of making necessary repairs is a proper element in establishing a prima facie measure of damages for injury to personalty, subject to reduction to an amount equal to the difference between value of the personalty before and after injury, if diminution in its value was less than reasonable costs of repairs.

26. Trial ⚷252(20)

Instruction that measure of damages for injury to trailer was the reasonable cost of repairs to restore trailer to its former condition plus reasonable value of use of trailer, while being repaired with due diligence, was not erroneous for failure to incorporate qualification that total damages could not exceed value of trailer before injury, in absence of any evidence as to such value.

27. Damages ⚷217

In action for damage sustained by owner of tractor-trailer combination in collision with automobile, record justified instruction as to presumption that condition of plaintiff's vehicle prior to collision continued to exist so long as was usual with things of such nature. Code Civ.Proc. § 1963, subd. 32.

28. Damages ⚷139

Award of $7,200 for total loss of tractor, valued at $3,700 at time of accident, and other damages was not excessive in view of evidence that plaintiff paid more than $335 for fuel oil lost from trailer and $262 for towing tractor and trailer from scene of collision and that reasonable rental value of tractor-trailer combination was 20 to 25 cents per mile and that plaintiff averaged 300 miles per day, 6 days per week and was deprived of use of tractor-trailer for 89 days following collision.

29. Appeal and Error ⚷932(1)

That verdict differs from actual damages shown by uncontroverted evidence is not of itself a basis for assuming that verdict was the result of surmise and conjecture, at least where the damages awarded are substantial.

30. Appeal and Error ⚷1070(1)

Where verdict for property damage sustained by owner of tractor-trailer combination was substantially less than the total of the amounts testified to as damages, defendant was not aggrieved by verdict.

◆

Early, Maslach, Foran & Tyler, George Maslach, Donald J. Pierr and John B. Connolly, all of Los Angeles, for appellant.

Daniel E. Farr, W. T. Stockman and Richard P. Roe, all of Los Angeles, for respondent.

EDMONDS, Justice.

The appeal of the administrator is from a judgment entered upon the verdict of a jury in an action for damages to property occasioned by the collision of an automobile and a tractor pulling a trailer. The principal questions presented for decision concern the asserted negligence of the driver of the automobile, its ownership, and the amount of damages recoverable by Pfingsten if the liability of the estate of Mrs. Adams is established.

The only evidence as to the manner in which the collision occurred was presented by the deposition of John De Groote, who testified as a witness for Pfingsten. On the evening of the accident, De Groote said, he was driving south at 38 miles per hour on a highway in Iowa. The road was covered with ice. The automobile in which Mrs. Adams and her son were riding passed his approximately three-fourths of a mile north of a bridge. It was then traveling about 40 to 50 miles per hour. After the Adams car passed, De Groote slowed down somewhat because the road was icy.

Pfingsten's tractor-trailer combination, traveling north on the same highway, was then approaching the southern end of the bridge. Pfingsten dimmed his headlights for the on-coming automobiles. Shortly before the collision, De Groote observed the Adams automobile on its right side of the highway "until they used their brake lights." From the position of its headlights, the Pfingsten tractor-trailer also appeared to be on its right side of the road.

At the moment of impact, De Groote was about 400 to 500 feet north of the point of collision. He saw the brake lights of the Adams car go on. Immediately thereafter, its headlight beam "went up towards the southeast" and "shone or hit the east side of the bridge." This was "just a few seconds before" the accident occurred. After that, all he saw was "just a dark cloud." He did not see the vehicles come together. "There was no light at all there for a second." The headlights of the tractor-trailer were not visible to him "because the car was in front of it."

The collision occurred at the north end of the bridge. After the "cloud of dust", De Groote saw "a truck and car coming towards me." His automobile passed between the still moving vehicles, through the debris and stopped on the bridge. He did not apply his brakes "because there was just a little bit of a ridge on the ice there" and he "would have hit the bridge." This ridge of ice "threw a lot" of automobiles as they attempted to stop for the accident. After De Groote stopped, the Adams automobile was on the shoulder on the east side of the highway and the tractor-trailer was in the ditch to the west of the road. The wreckage had come to rest about 70 or 75 feet north of the bridge.

According to De Groote, the automobile was struck on its right side, just behind the motor. Pfingsten said it had been hit "almost directly in the middle" of the right side, and was demolished. The impact upon the tractor was from the front, with slightly more damage to the right side than to the left. Pfingsten testified that after the collision his tractor had no value.

As to the ownership of the automobile, De Groote testified, "I learned with the inquest we had that it was Mrs. Adams'." Pfingsten told the jury that he examined the automobile after the accident and removed from the steering column a registration certificate bearing the name "Mrs. Maidie Blanche Adams". He did not remember whether the certificate was of white or pink color, nor did he recall whether there were one or two documents on the steering column. Westenhaver's counsel showed him a purported automobile registration certificate which bore the name of someone other than Mrs. Adams. Pfingsten said it could have been the certificate he saw in the automobile. This slip was admitted into evidence for the purposes of impeachment, but not "for the truth of the matters contained on it." There was no other evidence concerning ownership of the automobile.

Al Livak, from whom Pfingsten bought the tractor, testified by deposition. Besides selling trucks and automobiles, Livak conducted a mechanical and body repair service garage. He had seen Pfingsten's tractor "within two weeks" prior to the date of the collision. In his opinion, at the time of the accident the tractor was worth "about $3,700"; thereafter it had only salvage value.

Following the collision, Pfingsten was able to shut off the two rear compartments of his trailer, minimizing the loss of cargo through leakage. Of the 4,800 gallons of fuel oil in the tank at the time of the collision, he recovered 1,541 gallons by using another tractor-trailer unit at a cost of $50. He stated that he had to pay $335.60 for the oil which was lost.

The cost of towing the trailer to Omaha for repairs was $182. In addition, Pfingsten testified that the reasonable value of towing the tractor from the point of collision was $80.

As soon as he learned that his tractor was useless, Pfingsten placed three orders for a new tractor of the same make and attempted unsuccessfully to secure a tractor of another make. He was unable to obtain delivery of a new tractor until 89 days after the date of the collision. During this period he was not able to lease a tractor. He testified that the reasonable rental value of a tractor-trailer unit such as his was 20 to 25 cents per mile, which included approximately five cents per mile for fuel and depreciation. The rental was the same whether or not a driver was provided for the vehicle. Pfingsten averaged 300 miles per day, six days a week, with his equipment.

Upon this and other evidence, the jury returned a verdict for Pfingsten and assessed damages in the amount of $7,200. The appeal is from the judgment subsequently entered.

Westenhaver contends that the evidence is not sufficient to support the verdict, in that there is no substantial evidence of either negligence on the part of the driver of the automobile or of ownership of the automobile. Pfingsten's testimony as to the reasonable value of repairs to his trailer and other items of damage claimed by him was erroneously admitted, Westenhaver says, because Pfingsten did not qualify as an expert. Westenhaver also contends that evidence of damage to the trailer should not have been received because the condition of the trailer before the accident was not shown and there is nothing in the record upon which to base the jury's implied finding that the damages were caused by the accident. Evidence of loss of use of the tractor was improperly admitted, it is said, because under Iowa law a plaintiff may not recover for loss of use of property totally destroyed. He also takes the position that evidence of the rental value of a tractor-trailer combination will not support an award for loss of use of the trailer alone. Other grounds relied upon are that certain instructions constituted reversible error.

Pfingsten, on the other hand, contends that the evidence is sufficient to support the verdict. He asserts that there was no error either in the admission of evidence or the instructions to the jury.

[1, 2] The law of the forum controls the rules of evidence, including the question of its sufficiency. Rest., Conflict of Laws, § 595; 15 C.J.S., Conflict of Laws, § 22, p. 955; cf. Estate of Winder, 98 Cal.App.2d 78, 84, 219 P.2d 18; see Sayles v. Peters, 11 Cal.App.2d 401, 407, 54 P.2d 94. Applying that principle, the sufficiency of the evidence to support the verdict must be determined in accordance with the law of California.

[3, 4] If there is any evidence which sustains the implied finding of the jury, its determination is final. Skulte v. Ahern, 22 Cal.App.2d 460, 463, 71 P.2d 340; Kleem v. Chapot, 112 Cal.App. 553, 556, 297 P. 574. "Where different conclusions may reasonably be drawn from the evidence by different minds the trial court's findings are not to be disturbed on appeal." Connor v. Owen, 28 Cal.App.2d 591, 592–593, 82 P.2d 1114; Morris v. Fortier, 59 Cal.App.2d 132, 141, 138 P.2d 368.

[5] The record in the present case includes undisputed evidence showing that the Adams automobile was traveling at a high rate of speed upon a treacherously icy highway. Brakes were applied under conditions conducive to skidding. The headlight beam of the automobile suddenly swung at an angle to the previous line of travel and the collision occurred. From such evidence, the jury reasonably could have concluded that the driver of the Adams automobile was negligent and that his negligence was the cause of the collision.

[6, 7] Upon the issue of liability, Westenhaver argues that the "only uncontroverted evidence" of ownership was improperly admitted hearsay testimony by De Groote. But the record does not indicate that it was hearsay. De Groote testified from his own knowledge. Sec. 1845, Code Civ.Proc. How he acquired his knowledge does not appear. Under the circumstances, the trial court properly overruled Westenhaver's motion to strike the testimony. Even if it might be said to be hearsay, its admission was not prejudicial. Sanguinetti v. Pelligrini, 2 Cal.App. 294, 299, 83 P. 293.

[8, 9] Pfingsten's testimony concerning the registration slip which he saw in the automobile is said to have been impeached upon cross-examination. However, his credibility, and the weight to be given his testimony, was a question for the determination of the jury. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Stromerson v. Averill, 22 Cal.2d 808, 814–815, 141 P.2d

732; Hershey v. Laswell, 63 Cal.App.2d 219, 222, 146 P.2d 509. His uncontroverted testimony was sufficient to establish the ownership of the automobile. Westenhaver presented no evidence upon the issue of ownership. His offer in evidence of an automobile registration certificate was not made to prove the truth of its statements.

Because Pfingsten did not qualify as an expert, Westenhaver argues, the admission of his testimony concerning the reasonable value of repairs to his trailer and other charges, including the value of loss of use, was prejudicially erroneous. According to Westenhaver, Pfingsten did not have sufficient knowledge of the various subjects to entitle his opinion to go to the jury. He was not shown to be engaged in the business of repairing or towing damaged vehicles, nor did he have any experience in renting his trailer as a separate unit.

[10] Pfingsten testified that he had been in the oil trucking business for eight years, five of them in the vicinity of this collision. Before going into business for himself, he had worked for two oil companies. For "two or three years" prior to the collision he had been working for himself. His recital of experience with tractors and trailers during this time shows knowledge of the reasonable charges for towing and repairing tractors and trailers and the reasonable rental value of such equipment.

[11, 12] "The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and where there is no showing of a manifest abuse of such discretion the ruling of that court will not be disturbed upon appeal." Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 714, 242 P. 703, 709; Hutter v. Hommel, 213 Cal. 677, 681, 3 P.2d 554; Humiston v. Hook, 86 Cal.App.2d 101, 105, 194 P.2d 122; Valdez v. Percy, 35 Cal.App.2d 485, 492, 96 P.2d 142. "If the witness disclosed an ample knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility." Darling v. Pacific Electric Ry. Co., supra; Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 522, 42 P. 983.

[13] Westenhaver argues that Pfingsten could not testify to the rental value of a trailer alone because he had never rented a trailer without a tractor and driver. This argument overlooks the fact that Pfingsten's damaged vehicle was a tractor-trailer combination and not two separate vehicles. Pfingsten stated that a trailer could not be rented separately without a tractor. He is seeking damages for loss of use of his vehicle, a tractor-trailer combination, not for loss of use of a portion of it which without motive power is useless. His testimony upon this element of damages was competent and properly admitted.

Evidence of damage to the trailer was erroneously admitted, Westenhaver says, because no facts tending to prove its condition before the accident or the cause of injury to it were presented. However, De Groote's testimony shows that the tractor-trailer combination was traveling upon the highway prior to the collision. Although he did not see the collision, he saw the wreckage of the two vehicles as they parted, and the trailer sliding down into the ditch. Pfingsten's testimony was to the effect that immediately after the collision the trailer contained 4,800 gallons of fuel oil. It was then punctured and leaking. He also testified that he saw the repairs made to his trailer and that they were necessary to put it back on the road.

[14] Section 1963 of the Code of Civil Procedure states the presumptions that "things have happened according to the ordinary course of nature and the ordinary habits of life", subdiv. 28, and that "a thing once proved to exist continues as long as is usual with things of that nature". Subdiv. 32. The trailer was traveling upon the highway immediately prior to the collision. It may be presumed that it was carrying a cargo at that moment, because in the ordinary course of nature it would not have been empty an instant before the impact and immediately thereafter full of fuel oil.

[15] When, as here, the evidence shows that there has been a collision, damage, and the necessity of repairs to restore the vehicle to the condition it was in prior to the collision, the evidence supports the inference that the repairs were made necessary by the accident. Menefee v. Raisch Improvement Co., 78 Cal.App. 785, 789, 248 P. 1031. Moore v. Levy, 128 Cal.App. 687, 18 P.2d 362, upon which Westenhaver relies, is distinguishable from the present situation upon its facts. In that case, there was no evidence to show what repairs were made. Moreover, the testimony as to the necessity for the repairs was improperly admitted because the witness did not establish his qualifications.

Westenhaver argues that evidence of loss of use of the tractor was improperly admitted because, under the law of Iowa, a plaintiff may not recover for loss of use of property totally destroyed. He concedes that Pfingsten's tractor was a total loss. Here again, Westenhaver bases his contention upon the erroneous premise that two vehicles belonging to Pfingsten, rather than one, were damaged.

[16] Pfingsten does not dispute the general legal proposition that there cannot be recovery for both total loss of automotive equipment and loss of use of the same equipment. However, he argues that his tractor-trailer combination was a single vehicle which was not totally destroyed, but was damaged. The undisputed evidence supports his argument. Clearly, from his testimony a trailer is virtually useless without a tractor and the equipment is of value only when used in combination.

In Kohl v. Arp, 236 Iowa 31, 17 N.W.2d 824, 169 A.L.R. 1067, Kohl brought an action for damages to his truck. It consisted of a truck frame with a "lime box" bolted thereto. His complaint alleged damages for total loss of the lime box, less salvage, damages to the truck frame, and damages for loss of use of the combined unit. The court stated the general rule that loss of use cannot be included as damages where recovery for total destruction is allowed. It then held that the rule could not be applied to a separate part of a combined unit. It held that, "the rule of damages must be applied here to the combined unit and that the net cost of the new lime box must be treated as a part of the cost of repair. It then logically follows that the value of the loss of use of the truck and lime box as one unit was proper to be considered." 236 Iowa at page 34, 17 N.W.2d 824, 826.

[17] Kohl's lime box and truck could not be used separately; neither could Pfingsten's tractor and trailer. For all practical purposes, Pfingsten's combination constituted one truck as much as did Kohl's. Therefore, adopting the rule of damages applied by the Iowa Supreme Court, the net cost of the new tractor must be treated as a part of the cost of repair and Pfingsten is entitled to the value of the loss of use of his tractor-trailer combination as one unit.

[18] Westenhaver repeats his preceding argument in different form by contending that evidence of the rental value of the tractor-trailer combination cannot support an award for loss of use of the trailer alone. Here, again, he misconceives the theory of Pfingsten's action, which is for loss of use of a tractor-trailer combination. The evidence shows that the component parts of the single vehicle had no separate rental values. Evidence upon the rental value of the combination was proper to determine damages for loss of use of the combination.

[19, 20] In computing damages for loss of use of the vehicle, the court may take into consideration necessary delay in procuring parts as bearing upon the reasonable time for making repairs. Kohl v. Arp, supra, 236 Iowa at page 39, 17 N.W.2d 824. The evidence here is sufficient to show that Pfingsten used due diligence in attempting to replace his tractor. Under the circumstances, it cannot be said that the time expended in making repairs, including replacement of the tractor, the essential propelling part of the combination, was not reasonable.

The trial court instructed the jury that: "If you find under the evidence in this case that plaintiff is entitled to recover for the total destruction of his truck, you are instructed that the measure of damages is the reasonable market value of the truck immediately before its destruction, plus the reasonable value of the use of the truck while being replaced with ordinary diligence."

The jury also was told "that the measure of damages is the reasonable cost of repairs to restore the trailer to its former condition, plus the reasonable value of the use of the trailer while being repaired with due diligence."

[21, 22] Westenhaver contends that these instructions constituted reversible error. Essentially, his objections repeat the arguments which have been considered. Any error in the instructions was not prejudicial. Pfingsten was entitled to recover the reasonable cost of repairs to restore his tractor-trailer combination to its former condition, plus the reasonable value of its loss of use while being repaired with due diligence. The tractor was an essential part which had to be replaced to restore the combination to service. Instead of instructing the jury upon the measure of damages for the injury to the tractor-trailer combination, the court separately stated the measure of damages for the tractor and the trailer. The error, if any, in thus splitting the measure of damages for an indivisible vehicle was prejudicial to Pfingsten, rather than to Westenhaver. Not being aggrieved, Westenhaver may not complain of the instruction.

Westenhaver contends that the instruction on the measure of damages for injury to the trailer was erroneous because it failed to incorporate the qualification that the total damages could not exceed the value of the trailer before the collision. He correctly states that the record is devoid of any evidence of the value of the trailer before the accident.

[23–26] When there is a complete lack of evidence tending to show a diminution in value of injured personalty, the court may not assume that the diminution in value was of lesser amount than the proved reasonable cost of necessary repairs. Santos v. Scharz, 87 Cal.App. 758, 762, 262 P. 764. "If the diminution in value of the injured truck was less than the repair bill, the defendant should have shown that fact in reduction of the damages claimed by the plaintiff, for the burden of showing matters in reduction or mitigation of damages rested upon the defendant. The reasonable cost of making necessary repairs in such cases as this has been accepted as a proper element in determining the amount recoverable as damages * * * and we think it proper to accept it as such in the establishment of a *prima facie* admeasurement of damages, subject to the right of the adverse party to apply to it the test as to whether or not the diminution in value by reason of the injury was less than the repair bill, and if so, to reduce the damages recoverable to equal the sum representing such difference in value.

"The defendant, having failed to make any showing in reduction of damages, cannot now be heard to complain." Rhodes v. Firestone Tire Etc. Co., 51 Cal.App. 569, 574, 197 P. 392, 395. The instruction of which Westenhaver complains was based upon the evidence. If it contained any error, it was in improperly splitting the measure of damages for the tractor and the trailer with no prejudice to Westenhaver.

[27] The court also instructed the jury that: "The law presumes that a thing once proved to exist continues as long as is usual with things of that nature; therefore, if you find under the facts of this case that plaintiff's vehicle was in a certain condition prior to the occurrence on which plaintiff has based his claim against the estate of decedent, then you are to presume that this condition of the vehicle continued to exist so long as is usual with things of that nature." For reasons which have been stated, the record fully justifies this instruction.

[28–30] The final contention made by Westenhaver is that the verdict is in excess of proven damages and was the result of surmise and conjecture. The record does not support this contention. The verdict is substantially less than either the prayer or the total of the amounts testified to as damages. That the verdict of the jury differs from the total damages shown by uncontradicted evidence is not, by itself, a basis for assuming that it was the result of surmise and conjecture, at least where the damages awarded are substantial. In any event, Westenhaver cannot be aggrieved by a verdict which is considerably below the amount which might have been awarded under the evidence.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

39 Cal.2d 41

Ex parte LEVI.

Cr. 5282.

Supreme Court of California, in Bank.

May 19, 1952.

As Modified June 10, 1952.

Habeas corpus proceeding to test the validity of a prisoner's detention under a judgment and sentence pronounced after revocation of probation. The Supreme Court, Traynor, J., held that a judgment pronounced in the absence of council was vulnerable to attack by habeas corpus.

Order in accordance with opinion.

1. Criminal Law 🔑982
Habeas Corpus 🔑30(3)

There is no constitutional or statutory right to hearing preceding revocation of probation, and if such hearing is held, it is not governed by rules concerning formal criminal trials, but on contrary court may revoke probation solely on basis of probation officer's report, there being no right to present witnesses; and constitutional right to have counsel in criminal prosecutions is likewise not applicable, since the probation proceeding is not part of a "prosecution"; and therefore habeas corpus petitioner did not show grounds for issuance of habeas corpus when he contended that his confinement was illegal because of failure to receive notice of hearing preceding revocation of probation, because he was not represented by counsel at such hearing, and because he was not given opportunity to summon witnesses on his behalf. Const. art. 1, § 3.

2. Criminal Law 🔑987

With certain exceptions, judgment and sentence in felony cases may be imposed only in presence of accused, and if judgment is pronounced in his absence, without justifying circumstances, judgment must be set aside. Const. art. 1, § 3.

3. Criminal Law 🔑912

Fact that defendant had made motion for new trial following his conviction would deprive trial court of jurisdiction to entertain second motion for new trial at time of revocation of probation and pronouncement of judgment. Pen.Code, §§ 1181, 1185, 1200, 1201, subds. 1, 2.

4. Habeas Corpus 🔑25(1)

A judgment pronounced in absence of counsel was vulnerable to attack by habeas corpus. Const. art. 1, § 3.

5. Appeal and Error 🔑171(1)

Where trial court did not inform defendant that he had right to counsel, at hearing preceeding revocation of probation and pronouncement of judgment in criminal prosecution, and report of probation officer showed that defendant had only fifth grade education and was of dull mentality, defendant's failure to request counsel could not be amplified into waiver of his right to counsel. Pen.Code, § 1237.

6. Habeas Corpus 🔑109, 111(1)

Where nothing in habeas corpus petition or record showed any defect in adjudication of guilt in criminal prosecution, error in pronouncement of judgment did not require petitioner's release or a new trial. Pen.Code, § 245.

7. Criminal Law 🔑977(3)

Where probation was revoked during probationary period, delay following revocation of probation would not cause trial court to lose jurisdiction to pronounce valid judgment. Rules on Appeal, rule 31; Pen.Code, §§ 1200, 1201, 2900.1.

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David A. Fall, San Pedro, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Winslow Christian, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Troy Levi seeks a writ of habeas corpus on behalf of his brother, Eddie Levi, an inmate of the California Institution for Men at Chino. Eddie Levi, hereinafter referred to as petitioner, was committed for the offense of assault by means of force likely to produce great bodily harm. Pen. Code, § 245. He contends that his detention is unauthorized because his constitutional rights were violated in proceedings leading to his confinement.

He was arrested in June, 1950, after inflicting severe wounds on one Everett Sykes with a pocket knife. The cause was submitted on the transcript of the preliminary hearing and the trial court, sitting without a jury, found him guilty of assault with intent to commit murder. On September 27, 1950, after hearing his application for probation and motion for a new trial, the court denied his motion for a new trial, reduced the offense to assault by means of force likely to produce great bodily harm, ordered that proceedings be suspended, and placed him on probation for five years on condition that he serve one year in the county jail "with good time allowed." Approximately five days after his release from the county jail, he was arrested for intoxication and sentenced to four days in jail. The probation officer filed a report that he was not a suitable subject for probation and should be sentenced to prison. On September 5, 1951, the court revoked probation and pronounced judgment. Petitioner was sentenced to the state prison for the term prescribed by law for the offense of an assault by means of force likely to produce great bodily harm. The entire transcript of the proceedings on September 5th is set out in the footnote.[1]

[1] Petitioner contends that his confinement is illegal on the grounds that he did not receive notice of the hearing preceding revocation of probation, that he was not represented by counsel at the hearing, and that he was not given the opportunity to summon witnesses in his behalf. Petitioner does not thereby show grounds for issuance of habeas corpus. There is neither a constitutional nor a statutory right to a hearing preceding revocation of probation. In re Davis, 37 Cal.2d 872, 873–874, 236 P.2d 579. If a hearing is held, it is not governed by the rules concerning formal criminal trials. The court may revoke probation solely on the basis of the probation officer's report. In re Dearo, 96 Cal.App.2d 141, 143, 214 P.2d 585. There is no right to present witnesses. People v. Hayden, 99 Cal.App.2d 97, 99, 221 P.2d 221. The constitutional right to have counsel in "criminal prosecutions" Art. I, § 13, is not applicable since a probation proceeding is not part of a "prosecution." In re Dearo, supra, 96 Cal.App.2d 141, 143, 214 P.2d 585; People v. Fields, 88 Cal.App.2d 30, 33, 198 P.2d 104.

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[1] Los Angeles, California, Wednesday, September 5, 1951, 10:52 A.M.

On the above date the defendant appeared in court In Propria Persona; the People being represented by William O. Russell, Deputy District Attorney of Los Angeles County; and also present, B. E. McEveety, Deputy Probation Officer; the following proceedings were had, to wit:

(August J. Goebel, Reporter.)

"The Court: People v. Eddie D. Levi.

"Mr. Levi, they tell me you have had some more trouble since you were out.

"The Defendant: I went to Pedro to my brother's—

"The Court: You got into some sort of a drunken brawl?

"The Defendant: No. They say I was drunk.

"The Court: Yes. Your wife has never come out here and your children are still back in Chicago, is that correct?

"The Defendant: Sure.

"The Court: Well, because of the serious nature of your offense and because the Court specifically admonished you that you were not under any circumstances to use intoxicating liquor and because you rewarded the consideration that was given you by going out and getting drunk within five days after your release, your probation is revoked.

"It is the judgment and sentence of the Court that for the offense of Assault By Means of Force Likely To Produce Great Bodily Harm, that you be now confined in the state prison for the term prescribed by law.

"You are remanded into the custody of the Sheriff to be by him delivered into the custody of the Department of Corrections to serve the sentence.

"You are remanded to custody."

Although the foregoing contentions are without merit, the record discloses a serious defect in the proceedings in the trial court. It will be recalled that this case is not one in which judgment was pronounced and execution of sentence suspended during probation. Cf. In re Davis, supra; People v. Blankenship, 16 Cal.App.2d 606, 61 P.2d 352. Instead, sentence and judgment were never imposed until the date of revocation of probation. The record shows that petitioner was not represented by counsel at that time, although the Constitution provides that "in criminal prosecutions, in any court whatever, the party accused shall have the right * * * to appear and defend, in person and with counsel." Art. I, § 13. The question thus arises whether the fact that petitioner was not represented by counsel at the time of pronouncement of judgment requires that the judgment be set aside on habeas corpus.

[2] With certain exceptions not applicable here, see In re Ralph, 27 Cal.2d 866, 872, 168 P.2d 1 [sentence following decision on appeal]; People v. Brown, 102 Cal.App.2d 60, 62–63, 226 P.2d 609 [sentence after exercising reasonable diligence to procure missing defendant and finding that it is in interest of justice to pronounce judgment in his absence]; People v. Weinstein, 298 Ill. 264, 268, 131 N.E. 631 [accused absconded after verdict], judgment and sentence in felony cases may be imposed only in the presence of the accused. If judgment is pronounced in his absence, and no justifying circumstances are shown, the judgment must be set aside. People v. Brown, supra; People v. Fields, 88 Cal.App.2d 30, 33, 198 P.2d 104; In re Klein, 75 Cal.App.2d 600, 603, 171 P.2d 471; People v. Hawthorne, 63 Cal.App.2d 262, 264, 146 P.2d 517 see People v. Williams, 24 Cal.2d 848, 853, 151 P.2d 244; Staples v. Commonwealth, 140 Va. 583, 587, 125 S.E. 319; Siegel v. State, 201 Wis. 12, 17, 229 N.W. 44; cases collected in 24 C.J.S., Criminal Law, § 1574.

[3] A defendant has substantial rights at the time he is arraigned for judgment, because he may be able to show good cause why the judgment should not be pronounced against him. Pen.Code, §§ 1200, 1201; see People v. Sarazzawski, 27 Cal.2d 7, 18, 161 P.2d 934; People v. Hawthorne, 63 Cal.App.2d 262, 264, 146 P.2d 517; People v. Megladdery, 40 Cal.App.2d 748, 106 P.2d 84; People v. Prudencio, 93 Cal.App. 241, 246, 269 P. 698. He may be able to show that there is good cause to believe that he is insane, Pen.Code, § 1201(1); see People v. Jackson, 105 Cal.App.2d 811, 814–815, 234 P.2d 261, or that there is good cause to order a new trial, Pen.Code, §§ 1201(2), 1181,[2] or that there is good cause to grant a motion in arrest of judgment. Pen.Code, §§ 1201(2), 1185. If judgment is pronounced in his absence, he is deprived of these rights.

[4] Some states hold that the right of an accused to be present in court when judgment is pronounced against him does not include the right to have counsel present at that time. See 24 C.J.S., Criminal Law, § 1574a. In this state, however, it has been held that an arraignment for judgment is a "criminal prosecution" within the meaning of Article One, section 13, and that an accused therefore has the right to counsel at the time of pronouncement of judgment. People v. Fields, 88 Cal.App.2d 30, 33, 198 P.2d 104. The Fields case involved an appeal and is thus not directly in point, but we have concluded that a judgment pronounced in the absence of counsel is also vulnerable to attack by habeas corpus. It would be anomalous to hold that a defendant's personal presence is so important that he may set aside the judgment on collateral attack and yet to hold that the constitutional right to counsel is not of equal importance. A defendant's presence gives him an opportunity to show legal cause why judgment should not be pronounced against him. The average defendant, however, would be helpless to es-

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[2] In the present case, however, the fact that petitioner made a motion for a new trial following his conviction in 1950 would deprive the trial court of jurisdiction to entertain a second motion for a new trial at the time of pronouncement of judgment. People v. Martin, 199 Cal. 240, 242, 248 P. 908; People v. Collins, 97 Cal.App.2d 552, 554, 218 P.2d 87.

tablish such cause without the aid of counsel. See In re James, 38 Cal.2d 302, 240 P.2d 596, and cases cited therein. Moreover, a defendant has the right to appeal from the judgment. Pen.Code, § 1237; In re Davis, 37 Cal.2d 872, 875, 236 P.2d 579. When judgment is pronounced in the absence of counsel, there is danger that the defendant might allow the time for notice of appeal to run in ignorance of his rights, and thus lose his opportunity to obtain review of the judgment. Rules on Appeal, rule 31; see People v. Slobodion, 30 Cal.2d 362, 365, 181 P.2d 868; People v. Lewis, 219 Cal. 410, 413–414, 27 P.2d 73.

The attorney general contends that the Fields case is in conflict with three earlier cases. People v. Henry, 86 Cal.App.2d 785, 790, 195 P.2d 478; People v. Hawthorne, 63 Cal.App.2d 262, 266, 146 P.2d 517; People v. Swift, 140 Cal.App. 7, 34 P.2d 1041. In the Swift case the defendant was represented by counsel at the time of pronouncement of judgment. In the Henry and Hawthorne cases the defendants were personally present at the time judgment was entered, but it cannot be ascertained from the opinions whether they were represented by counsel. The only question presented to the courts in those cases, however, was the effect of the failure of the trial court to arraign the defendants for judgment pursuant to Penal Code section 1200, a question not raised by petitioner in the present case.

[5] The trial court did not inform petitioner that he had a right to counsel. It did not ask him if he had any legal cause to show why judgment should not be pronounced against him. It made no attempt to ascertain if he understood the pleas and defenses available under section 1201 of the Penal Code. The report of the probation officer is in the record and shows that petitioner has only a fifth grade education and is of "dull mentality." His failure to request counsel cannot therefore be amplified into a waiver of his right to counsel. In re James, supra, 38 Cal.2d 302, 240 P.2d 596; People v. Chesser, 29 Cal.2d 815, 824, 178 P.2d 761; cf. In re Tedford, 31 Cal.2d 693, 695, 192 P.2d 3; In re Jingles, 27 Cal.2d 496, 498, 165 P.2d 12.

[6, 7] Petitioner has requested that he be "restored to liberty" if the writ is granted. Nothing in his petition or the record, however, shows that there is any defect in the adjudication of guilt. The error in the pronouncement of judgment does not require either his release or a new trial. In re McCoy, 32 Cal.2d 73, 77, 194 P.2d 531; In re Mize, 11 Cal.2d 22, 26–27, 77 P.2d 472; People v. Fields, 88 Cal.App.2d 30, 33, 198 P.2d 104; State ex rel. Shetsky v. Utecht, 228 Minn. 44, 54, 36 N.W.2d 126, 6 A.L.R.2d 988; Staples v. Commonwealth, 140 Va. 583, 587, 125 S.E. 319. The delay since revocation of probation has not caused the trial court to lose jurisdiction to pronounce a valid judgment. See People v. Williams, 24 Cal.2d 848, 854, 151 P.2d 244. If petitioner should again be sentenced to prison, his confinement based upon the invalid judgment will be credited upon the new commitment. Pen.Code, § 2900.1.

The petitioner is discharged from the custody of the authorities at the California Institution for Men at Chino and committed to the custody of the sheriff of Los Angeles County with directions that petitioner be arraigned for pronouncement of judgment in accord with this opinion.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached but since the holding of the majority is based in part upon In re Davis, 37 Cal.2d 872, 236 P.2d 579, in which I dissented, I withhold my approval from the portion of the decision of the court in this case which is supported by what I believe to be an erroneous holding in In re Davis, supra.

PEOPLE v. ROBARGE.

Cr. 4735.

District Court of Appeal, Second District,
Division 1, California.

May 14, 1952.

Rehearing Denied May 28, 1952.

Hearing Denied June 11, 1952.

Defendant was convicted of robbery in first degree. During trial, the district attorney caused defendant's brother to be brought into courtroom from county jail and identified as participant in robbery for which defendant alone was on trial. The Superior Court of Los Angeles County, Philip H. Richards, J., entered judgment on verdict and order denying motion for new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that the district attorney's conduct was improper and prejudicial to defendant.

Judgment and order reversed and cause remanded for new trial.

1. Criminal Law 🔑359

If in prosecution for robbery there is any materiality in showing that another man produced in court was one of robbers, then fact that such other man is not on trial would not foreclose showing of his participation.

2. Criminal Law 🔑633(1)

Defendant in criminal proceeding is entitled to a fair and impartial trial whether he is innocent or guilty.

3. Criminal Law 🔑706

In robbery prosecution, bringing defendant's brother into courtroom from county jail and identifying brother as participant in robbery for which defendant alone was on trial was improper conduct and denied defendant a fair and impartial trial.

4. Criminal Law 🔑1186(4)

In robbery prosecution, where testimony identifying defendant as one of participants in crime was not clear and convincing, and defendant's alibi evidence was strong and impressive, error in causing defendant's brother to be brought into courtroom from county jail and identified as participant in robbery for which defendant alone was on trial was not harmless. Const. art. 6, § 4½.

5. Criminal Law 🔑1186(4)

Constitutional provision that judgment in criminal action should not be set aside unless error complained of results in miscarriage of justice does not mean that fact that evidence stands up under weight of judgment is sufficient reason for refusing to set aside judgment. Const. art. 6, § 4½.

6. Criminal Law 🔑1186(4)

Under constitutional provision that judgment in criminal proceeding shall not be set aside unless error complained of results in "miscarriage of justice", quoted words do not simply refer to situation where guilty man escapes or innocent is convicted but equally apply to cases where acquittal or conviction results from some form of trial in which essential rights of the people or defendant were disregarded or denied. Const. art. 6, § 4½.

See publication Words and Phrases, for other judicial constructions and definitions of "Miscarriage of Justice".

7. Constitutional Law 🔑268

Where defendant in criminal proceeding is denied that fair and impartial trial guaranteed by law, such procedure amounts to denial of due process of law.

8. Criminal Law 🔑317

In criminal cases, failure of defendant to explain or deny by his testimony any evidence in case against him may be considered by trier of fact, but such rule does not impair or deprive accused of his constitutional right not to be compelled to be witness against himself and to remain mute, relying upon legal insufficiency of testimony produced by prosecution to establish his guilt beyond a reasonable doubt. Code Civ. Proc. § 2051; Const. art. 1, § 13.

9. Criminal Law 🔑1134(2)

Defendant's failure to testify should not, in an appellate tribunal, militate against his right to a fair and impartial trial, nor be considered, where defendant has prior convictions for same type of crime, in determining whether he received such trial. Code Civ.Proc. § 2051.

10. Criminal Law 🔑1037(2), 1043(1)

In robbery prosecution, alleged inadequacy of defendant's objection to district attorney's conduct in causing defendant's brother to be brought into courtroom from jail and identified as participant in robbery for which defendant alone was on trial and defendant's failure thereafter to request court to instruct jury to disregard such testimony, did not preclude defendant from raising point of such misconduct in the District Court of Appeal, since effect of such conduct probably could not have been obviated by any instruction.

11. Criminal Law ⚷1159(4)

Function of passing upon credibility of witnesses is that of jury in the first instance and that of trial court upon motion for new trial in second instance.

12. Criminal Law ⚷1159(2)

Appellate tribunal may consider the evidence in determining whether, as a matter of law, it lacks required substantiality, but it may not weigh evidence or refuse to give credence to witnesses it does not see unless it can reasonably be said that testimony in question is so inherently improbable as to amount to no evidence at all, and, in such case, question is one of law.

13. Criminal Law ⚷566

In criminal proceeding, fact that witness is not positive does not destroy value of identification made by him, and identification of defendant need not be made in positive terms by any of witnesses.

14. Criminal Law ⚷566

Fact that witness may to some extent qualify his testimony as to identification of defendant, goes to weight of such testimony and is addressed to sound discretion of the triers of fact.

15. Robbery ⚷26

In prosecution for armed robbery, evidence was sufficient for jury.

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Phil H. Curry, Albert S. Friedlander, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of robbery. Three prior convictions on felony charges were alleged. It was also charged that at the time of the commission of the offense charged against him defendant was armed with a deadly weapon, to-wit, a .32 automatic pistol.

Defendant was duly arraigned and entered his plea of not guilty to the charge against him and denied the prior convictions pleaded in the information. However, when the cause was called for trial defendant admitted the aforesaid prior convictions.

Following trial the jury returned a verdict finding defendant guilty of the crime of robbery, and it was found to be robbery of the first degree. It was further found by the jury that at the time of the commission of the offense, defendant was armed as alleged in the information.

A motion for a new trial was denied and sentence pronounced. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

Since one of the grounds urged for a reversal is that the evidence is insufficient to sustain the judgment of conviction it becomes necessary to set forth an epitome of the facts which gave rise to this prosecution. The record reflects that about 3 o'clock on the morning of March 5, 1951, Wendell Burton, the night manager of the Clock Drive-In Cafe located in the county of Los Angeles, was completing his duties preparatory to closing the establishment. The witness was in his office with the cook, George Schoonover, counting the day's receipts and preparing a deposit slip which indicated the total receipts for the day was the sum of $1,630, which reposed in a paper bag on the office desk. A further sum of between $1,600 and $1,700, representing the receipts for the preceding day, was in the office safe.

While the two men were engaged as aforesaid, a stranger was observed approaching the office door. Mr. Burton said, "What do you want?" to which the stranger replied, "This is a stickup", or "This is a holdup", and at the same time displayed a revolver.

Being in fear of the weapon in the hands of the intruder, Mr. Burton pointed to the money in the paper bag on the desk, saying, "There it is". The stranger then said, "Open the safe" and Burton replied that he did not have the keys. Thereupon the stranger replied in a harsher tone, "Open the safe" and Burton complied with the order. The cook, George Schoonover, was told to lie on the floor, which he did, lying on his stomach. Mr. Burton was then told to lie on the floor on his stomach beside the cook with his hands over his head. Then someone opened the door and two other employees of the drive-in, namely, the janitor Dock Muldrow, and the dishwasher, Henry Manus, were ushered into the office and also told to lie on the floor. Mr. Burton and the other employees heard conversation between two persons in a mumbling tone. The telephone was then removed from the desk, the cord pulled from the wall, and the lights went off.

After a time, the victims got up from the floor in the office and called the police. It was discovered that both the $1,630 on the desk and the $1,600 or $1,700 that had been in the safe had been taken from the office.

Concerning identification of the parties participating in the robbery, Mr. Burton identified the stranger who first came into the office as a person who was brought into the court room during the trial and later identified as Arlow James Robearge. Mr. Burton testified that he did not see the defendant. The above named Arlow James Robearge was also identified as the stranger who entered the office by the cook, George Schoonover. This witness, however, did not see the defendant.

The witness Dock Muldrow testified that he saw the defendant when he entered the drive-in after the first participant had entered. The witness testified that he saw the first man go into the drive-in and that later the second man who he identified as the defendant, came in and thrust a gun at him. That the defendant told the witness to fall in line, whereupon he followed behind the dishwasher, George Manus, who was also being ushered into the office by the defendant, according to the witness.

The witness Dock Muldrow testified he had a "good look" at the defendant, who, he testified, was wearing dark glasses. The witnesses Manus and Muldrow were also brought to the cafe office and forced to lie on the floor. Muldrow testified that the defendant Robearge was the man that had the gun "on me". This witness also testified that Arlow James Robearge, the other man, identified in the court room as aforesaid, resembled the first man that came into the drive-in.

The dishwasher, George Manus, testified that the man who ushered Dock Muldrow and himself into the office first "put a gun on him" when he was in the dishwashing room. The witness Manus testified that as to the defendant, "the only thing that resembles to me is right in his cheek right here". The witness indicated the lower portion of the cheek and the front of the upper and lower jaws and around the nose, stating that it resembled him "right in here". The witness Manus further testified that the defendant was about the same size as the man that ushered them into the office and that the latter's shoulder compared with that of the defendant. On cross-examination, the witness Manus stated that the defendant was about the same build as the man who ushered him into the office.

The defendant did not take the witness stand in his own behalf but rested his defense upon testimony by which he sought to establish an alibi. In this attempt he offered the testimony of his wife that on the morning here in question, her husband, the defendant, from whom she had been separated for several months, called upon her at about 1 o'clock at the restaurant where she was employed, located at 155th Street and Western Avenue in Los Angeles. That he left her about 1:50 a. m. and that at about 2:30 a. m. defendant returned, drove her to her home near 168th Street on Western Avenue, and remained with her in the automobile talking until about 4 a. m. when the defendant drove away.

Jack Buttrey, a taxicab dispatcher, testified that on the morning of the robbery, just prior to 2 o'clock, he saw the defendant in a cafe at Gardena in Los Angeles County, from which place defendant departed at about 2:15 a. m. That this cafe is located approximately 10 miles from the scene of the robbery. A sister of the defendant corroborated the testimony of the preceding witness that defendant was in the Gardena cafe at the time stated by the taxicab driver. Defendant's sister was employed as a waitress in the cafe. The mother of the defendant also testified in support of his alibi defense.

In an effort to impeach the foregoing testimony given by defendant's wife, the prosecution called police officer Coons who testified that he called on defendant's wife on or about April 16, 1951 and questioned her concerning the robbery at the Clock Drive-In. His testimony was that he stated to her (referring to her husband) that defendant claimed he was not present at the time of the robbery here in question, but could not refer the officer to anyone who would substantiate that statement. That he (Officer Coons) asked her, "Do you know of anybody to whom I might talk who could put him some place away from that job?" He testified that defendant's wife replied, "I do not know of anyone but I will inquire around and try to find if anyone can." The officer further testified that on April 25, 1951, he again went to the home of the defendant's wife and (referring to defendant) asked her, "Have you located anybody to testify for Sonny?" to which she replied, "No. I haven't."

In urging a reversal, appellant earnestly insists that the District Attorney was guilty of prejudicial misconduct when, during the course of the trial, he caused appellant's brother to be brought into the court room from the County Jail and identified as a participant in the robbery for which appellant alone was on trial. It should here be noted that, according to the record, at no time did the District Attorney or anyone else refer to the man brought into the court room as the "brother" of the appellant. In connection with the appearance of this man in the court room the record shows that during the direct examination of the witness Wendell Burton, night manager of the Clock Drive-In, and one of the victims, the witness was testifying concerning the activity of one of the robbers (not appellant) and as to his ability to identify that person if he should again see him. Thereupon the following occurred:

> "Q. Now, when you went back into the office did you turn your back on him or did you back into the office? A. No. I backed into the office.
>
> "Q. You kept your face towards him? A. Right.
>
> "Q. Could you see his features? A. Yes, sir.
>
> "Q. Would you know him again if you saw him now? A. Yes, sir.
>
> "Q. Let us find out.
>
> "Mr. Bailiff—will the Court ask the bailiff, please, to bring in Mr. Arlow—what is that name—Arlow Robearge.
>
> "The Bailiff: I am sorry; he was returned to Department 39.
>
> "Mr. Veitch (Deputy District Attorney): May we have him ordered here?
>
> "The Court: Yes. You make your arrangement to have him brought over.
>
> "Mr. Veitch: Thank you."

It then appears that subsequently, and during the examination of the witness Burton, the following occurred:

> "The Court: Mr. Veitch, I believe the party that you requested to be brought over here has been—somebody has been brought from the County Jail.
>
> "Mr. Veitch: Will the bailiff indicate him, please?
>
> "Q. By Mr. Veitch: I call your attention to this man who has just been brought into the court room by the bailiff. A. Yes, sir.
>
> "Q. Look upon him, and do you recognize him or not? A. Yes, sir.
>
> "Q. Tell us where you first saw him; was he one of these men? A. He was the only man that I saw.
>
> "Q. The only man that you saw? A. Yes, sir.
>
> "Q. Now, do you mean by that that is the man whom you met at the

door who had the gun in his hand and who stood behind the door in the position that you have told us about heretofore in your evidence; is this the man now before you? A. Will you take his glasses off, please?

"Q. Yes. A. Yes, sir.

"Q. That is the man."

It will be observed that up to the present time no reference whatsoever was made as to the name of the man just identified by the witness Burton. Thereafter, however, Deputy Sheriff Whaley was called by the prosecution and interrogated in part as follows:

"Q. Are you one of the investigating officers in this case? A. I am.

"Q. Were you present in the court room yesterday when upon request of the District Attorney the bailiff produced a person from the prisoners' room and stood him here at the bar? A. I was.

"Q. That is while the witness Wendell Burton was on the stand? A. Yes.

"Q. And certain questions and answers occurred as between the District Attorney and Mr. Burton, the witness? A. Yes, sir.

"Q. Are you personally acquainted with that individual? A. I am.

"Q. Do you know his name? A. I do.

"Q. What is his name? A. His name is Arlow James Robearge.

"Q. Spell it. A. (Spelling) R-o-b-e-a-r-g-e."

[1] While it is true, as contended by the Attorney General, that at no time was the man brought into the court room from the County Jail referred to as appellant's "brother", and that the man's surname was spelled "R-o-b-e-a-r-g-e" while appellant's name is spelled "R-o-b-a-r-g-e", we can not follow the reasoning of respondent that the jury caught that slight nuance and delicate change in the spelling of the two names when in sound and pronunciation they were identical. Judged by legal standards we fail to see the purpose of this procedure indulged in by the District Attorney. Certainly it was not incumbent upon the prosecution to show that the man from the County Jail was one of the perpetrators of the crime in order to make out a case against the appellant. If there was any materiality in so far as the case against appellant was concerned, in showing that the man produced in court was one of the robbers, then the fact that the latter was not on trial would not foreclose the prosecution from showing his participation in the crime, but such is not the case. The record is barren of any purpose for producing the man in question unless it was to create the impression upon the jury that there was a relationship of brother between them and that the positive identification of the man in jail as a participant would serve to strengthen the somewhat uncertain testimony given by the only witness for the People who identified appellant as being present on the morning of the robbery, and to which testimony we shall hereinafter refer.

[2, 3] From a reading of the record we are constrained to say that it would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the aforesaid procedure was improper, and peculiarly calculated to prejudice the substantial rights of the accused. Such procedure not only prevents the defendant from having that fair and impartial trial to which, whether innocent or guilty, he is entitled, but it may defeat the punishment of crime by jeopardizing a conviction when an accused is clearly guilty.

[4–7] Respondent contends that the procedure above referred to did not prejudice the substantial rights of defendant in view of the conclusiveness of the evidence against him. We are convinced that the saving grace of section 4½ of Article VI of the State Constitution should not come to the rescue of this conviction. As was stated by this court in People v. Duvernay, 43 Cal.App.2d 823, 829, 111 P.2d 659, 662, " 'We do not understand section 4½ of article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. People v. Davis, 210 Cal. 540, 556, 293 P. 32.' There is creditable authority for the statement that the phrase 'miscarriage of justice', as used in the constitutional provision, 'does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected."' People v. Wilson, 23 Cal.App. 513, 138 P. 971, 975. In the instant case we do not regard the evidence as sufficient to put into operation the provisions of section 4½ of article VI of the Constitution, because even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice. People v. Mahoney, 201 Cal. 618, 258 P. 607; People v. Patubo, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527."

In the instant case the testimony identifying appellant as one of the participants in the crime cannot be characterized as clear and convincing. Several of the witnesses confessed their inability to identify him. True, the witness Dock Muldrow identified appellant but the verity of his testimony was diminished by contradictory statements and the conflict between testimony given by him at the preliminary examination and that given at the trial with reference to the height and appearance of the appellant. Another witness for the people, when testifying concerning the location of a door at the scene of the robbery, stated, with reference to testimony regarding the door as given by the aforesaid witness Muldrow, "That is where Dock got messed up". The testimony of the other witness who identified appellant is thus characterized by the Attorney General in his brief, "not positive or free from doubt".

As will be seen from the evidence hereinbefore set forth, appellant produced unusually strong and impressive testimony in support of his defense of alibi.

It is true appellant did not take the witness stand in his own behalf. In making a decision in that regard his trial counsel was confronted with the fact that his client had theretofore been convicted of three felonies including the crime of robbery, an offense for which he was on trial; that under the provisions of section 2051 of the Code of Civil Procedure such convictions could be made a ground for impeachment; while if he remained off the witness stand these prior convictions would not be revealed to the jury.

[8, 9] While it is true that in criminal cases, the failure of a defendant to explain or deny by his testimony any evidence or facts in the case against him may be considered by the trier of fact, nevertheless, that does not impair or deprive an accused of his long recognized constitutional right not to be compelled to be a witness against himself. Const. Calif, Art. I, sec. 13. An accused, therefore, has a legal right, which was exercised in the instant case, under the circumstances hereinbefore narrated, to remain mute and rely upon the legal insufficiency of the testimony produced by the prosecution to establish his guilt beyond a reasonable doubt. And certainly his failure to testify should not, in an appellate tribunal, militate against his right to a fair and impartial trial, nor be considered, under the facts here present, in determining whether he received such a trial.

In venturing these observations as to the evidence, we speak, of course, only from the showing made by the record. It is true that the jury had an opportunity to observe the demeanor of the witnesses, their appearance upon the stand, and may have had reason to return the verdict which was found irrespective of the erroneous procedure indulged in during the trial. As to this, of course, we can say nothing. From the mere record, as we read it, however, the erroneous procedure indulged in may have turned the scale in favor of the prosecution. And the fact that the evidence may point rather conclusively to the guilt of an accused does not take from the latter his right to a fair and impartial trial.

We deem it pertinent to here set forth the admonition to trial judges and district attorneys in People v. Black, 73 Cal.App. 13, 43, 238 P. 374, 387, as follows: "we feel impelled to direct the attention of district attorneys and trial judges to the frequent occasion which is thrust upon us to save judgments of conviction by means of the provisions of section 4½ of article 6 of the Constitution. It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the section. It should be manifest that such a course is improper. In the performance of their respective duties incident to trials, the existence of the section is of no concern to those officers. That part of the organic law of the state is of interest, so far as its application is concerned, if we except proceedings on motion for a new trial (see People v. Tomsky, 20 Cal.App. 672, 130 P. 184) only to the courts of review. District attorneys and trial judges should conduct the trial of criminal cases exactly as if the section did not exist. Such a course, if faithfully and diligently pursued, will lessen the number of appeals, will shorten the time necessary for the consideration of appeals which are taken, will lessen the number of retrials by superior courts, and will conduce to the general dispatch of business in both trial and appellate courts."

[10] Concerning respondent's contention as to the claimed inadequacy of appellant's objection to the course pursued and his failure thereafter to request the court to instruct the jury to disregard the testimony in question, we are of the opinion from an examination of the entire record that it shows the actions complained of to be of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, and that the absence of an assignment and request in the trial court does not therefore preclude appellant from raising the point in this court. People v. Stafford, 108 Cal.App. 26, 29, 290 P. 920.

Attorneys representing appellant on this appeal did not appear for him at the trial, but, upon his request, were appointed by this court from the Los Angeles Bar Association Committee on Criminal Appeals, the members of which have volunteered to assist the court when an indigent appellant requests appointment by the court of counsel to represent him in a criminal appeal.

[11–15] We come now to a consideration of appellant's final contention that the evidence is insufficient to sustain the judgment of conviction. In this regard, appellant's attack is mainly directed to the testimony relating to his identification as one of the perpetrators of the crime. It is the function of the jury, in the first instance, to pass upon the credibility of the witnesses, and, in the second instance, for the trial court on the motion for a new trial. While an appellate tribunal may consider the evidence in determining whether, as a matter of law it lacks the required substantiality, we may not weigh the evidence or refuse to give credence to witnesses we have never seen, unless it can reasonably be said that the testimony in question is so inherently improbable as to amount to no evidence at all, in which case the question is one of law. The fact that a witness was not positive does not destroy the value of the identification. It is not necessary that the identification be made in positive terms by any of the witnesses. People v. Waller, 14 Cal.2d 693, 700, 96 P.2d 344. The fact that a witness may to some extent qualify his testimony as to identification, goes to the weight of such testimony and is addressed to the sound discretion of the triers of fact. It may therefore be said that the evidence in the record before us is sufficient to support the verdict rendered, but whether guilty or innocent, appellant was entitled to have the case fairly tried according to the established rules of law. The doctrine that respect for the law cannot be inspired by withholding the protection of the law is one which recognizes no exceptions.

The judgment and the order denying defendant's motion for a new trial are, and each is reversed, and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SHENK, EDMONDS and SPENCE, JJ., dissenting.

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111 Cal.App.2d 288

STAUDINGER v. WHITLOCK et al.

Civ. 14829.

District Court of Appeal, First District, Division 2, California.

May 26, 1952.

Action by Jeanette A. Staudinger against Catherine Whitlock and another for injuries sustained when she fell on stairway of defendants' guest house in which she was a guest. From a judgment of the Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., for plaintiff, defendants appealed. The District Court of Appeal, Goodell, J., held that evidence sustained trial court's findings that defendants were negligent in failing to have stairway properly lighted and that plaintiff was not contributorily negligent.

Affirmed.

1. Innkeepers 🔑10.4

An innkeeper has a duty to exercise ordinary and reasonable care to keep hallways, passageways, and stairways reasonably well lighted and free of obstructions or hazards.

2. Innkeepers 🔑10.12

In action by guest in guest house for injuries sustained when she fell near bottom of stairway, evidence relating to lighting of stairway, color and arrangement of stairs and of bottom landing, and duration of plaintiff's stay at the house warranted findings of trial court that plaintiff was not contributorily negligent, and that defendant owners were negligent in respect to lighting.

3. Appeal and Error 🔑989

Power of an appellate court ends with respect to the facts when it determines that there is substantial evidence which supports the trial court's findings.

4. Innkeepers 🔑10.11

In action by guest in guest house for injuries sustained when she fell near bottom of stairway, testimony of witness who moved into guest house some twenty seven months after accident was inadmissible, on issue of lighting of stairway, to prove custom of leaving dining room door at bottom of stairs open.

5. Appeal and Error 🔑1071(5)

In action by guest in guest house for injuries sustained when she fell near bottom of stairway, where complaint alleged that there was no handrail on stairway and court found all allegations in complaint, excepting those relating to damages, to be true, and photographs in evidence showed beyond question that there was banister, court's finding was too broad, but such error did not require reversal in view of a finding, supported by evidence, that lighting on stairway was insufficient, which finding, standing alone, supported judgment for guest.

6. Innkeepers 🔑10.13

In action by guest in guest house for injuries sustained when she fell on stairway, evidence whether plaintiff had made any admissions as to her fault was for jury.

◆

Martin J. Jarvis, Elmer P. Delany, and Delany, Jarvis, Fishgold & Werchick, all of San Francisco, for appellants.

George D. Collins, Jr., San Francisco, for respondent.

GOODELL, Justice.

In a trial without a jury the plaintiff was awarded $3,700 damages for personal injuries. A new trial was denied and the defendants appealed from the judgment.

Appellants, mother and son, owned and operated a guest house on Chestnut Street in San Francisco, and on April 29, 1946 respondent became a guest therein at a monthly compensation. On May 17, 1946 at about 6:15 p. m. while descending the stairway on her way from her room to the dining room on the main floor respondent missed her footing on the second or third step from the bottom and fell to the floor of the lobby, sustaining a serious injury to her right arm.

The principal question on appeal is whether the evidence is sufficient to sustain the finding that appellants were negligent and that respondent was free from contributory negligence.

The negligence is alleged to have consisted in the "failure to install and keep burning artificial light sufficient in volume to illuminate properly said stairway and to have a handrail on said stairway, and in defendant's maintaining the steps of said stairway so similar in color to the floor at the bottom thereof and adjacent thereto, as to make them indistinguishable from each other in the light available at the time hereinabove mentioned;" and that as a result of such negligence "plaintiff was unable to see the last step of said stairway, missed the same and fell * * *." The court found all the allegations of the amended complaint to be true except as to damages, which were found to be $3,700. All the allegations and denials of the answer were found to be untrue.

A comment made by the judge during the trial helps to simplify the discussion on this appeal. He said: "It is a question of veracity as to the amount of light at the time of the accident. The house could have 100 windows—the important thing for the court to determine is how much light existed at the time of the accident. That is the whole thing in the case."

At the time of the accident the other guests seem to have been in the dining room. At any rate nobody witnessed the fall excepting respondent.

Several photographs in evidence show the stairway (and part of the lobby) of what is apparently a substantial and well appointed dwelling house (other evidence in the case shows it was formerly a private residence.) The stairs are of oak. The photographs show a landing (where the stairway makes a right-angle turn) and a flight of eight wide, uncarpeted steps descending from the landing to the lobby. On the right side of the stairs (descending) is a wide banister which parallels the path of the stairs down to and including the second step from the bottom. It ends on the bottom step, where it circles away to the right at a newel post. On the floor of the lobby there was an orange or yellow Chinese rug with a 12-inch black border. The floor at the bottom of the stairs appears to be of the same color as the stairs, but the black border of the rug rested against the bottom step. Respondent testified that there was no artificial light burning at the time of the accident, that there was a wall bracket light high on the wall of the landing (eight steps up from the lobby) but that it was not turned on and she did not know how to turn it on. Because of the black border of the rug and the darkness at the foot of the stairs, respondent, according to her testimony, thought she had reached the bottom when in fact she was on the second or third step from the bottom. She let go the banister, stepped off and fell. Although appellants testified that there were large windows near the stairway, respondent testified that vines hung over them on the outside. The drawing room, which has a large window, adjoins the lobby and its doors into the lobby are permanently open. Respondent testified that it was a dark, cloudy day, but appellant Wendell Whitlock testified that it was clear later that evening when he took respondent to the hospital and his mother testified that it had been a bright day because the sun was shining in the dining room windows that evening.

Appellants admitted that there was no artificial light burning, but contended that the stairway was adequately lighted. Respondent testified that the dining room door opposite the foot of the stairs was closed. Appellant Wendell Whitlock testified that the maids had orders to leave the dining room doors open from 6:00 to 6:30 p. m. but he could not state positively that they were always open. He testified that light from the dining room aided in sufficiently lighting the stairs at that time of day. As stated above, respondent testified that the door was closed.

Respondent admitted that she had congenitally weak eyes but that she was wearing her glasses at the time of the accident, and that with glasses her eyesight was good; her occupation for some years had been that of a bookkeeping machine operator. She testified that it was always dark on that stairway, and that she descended the stairs that evening "just as I naturally would."

A doctor who arrived at about 7:30 p. m. testified that the stairway was certainly not well lighted. A guest who had come to live there some two years after the accident, testified that a person could read a newspaper on the stairway and in the hallway without artificial light between sunrise and sunset. On the day of the accident the sun set at 7:06 p. m., or about 51 minutes after the accident.

From the foregoing summary it is clear that there was conflicting testimony respecting the lighting conditions at the time in question.

Appellants contend, first, that the record does not show that they violated any legal duty owed by them to respondent. They say that it is well established that an innkeeper owes no duty to an invitee in cases where the injury is due to a patent defect in the premises or equipment, and there is no liability for injury from dangers that are as obvious to the person injured as to the owner or occupant, citing Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 561, 296 P. 76; Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793 and Morton v. Manhattan Lunch Co., 41 Cal.App.2d 70, 72, 106 P.2d 212. They argue that the condition of the stairway was known to respondent prior to the injury, and that there is no showing that they had any knowledge of the particular condition superior to that of respondent.

Respondent had lived there for almost three weeks and knew the stairway, but her case is not based on any defect either latent or patent in the stairway itself, hence the cases relied on have no bearing. Had the steps been kept in a highly polished and slippery condition the case would bear a resemblance to the Mautino case but no such condition appears. The respondent's case is grounded, as her complaint shows, on the insufficient lighting of what was otherwise a safe stairway, as in the case of Hall v. Bakersfield Community Hotel Corp., 52 Cal.App.2d 158, 125 P.2d 889, and the court's comment quoted earlier shows that that was the controlling consideration.

[1] The duty of innkeepers with respect to adequate lighting is stated at 43 C.J.S. Innkeepers, § 22, p. 1179 as follows: "there is a duty to exercise ordinary or reasonable care to keep the hallways, passageways, and stairways reasonably well lighted and free of obstructions or hazards." In 28 Am.Jur. p. 580, § 58, in discussing the duty of an innkeeper as to stairways it is stated that "Liability may also be predicated upon a failure to provide proper lights * *."

[2] This case is essentially the same as Hall v. Bakersfield Community Hotel Corp., supra, cited by respondent. There the plaintiff, a woman guest of defendant's hotel, fell while going from a hallway to a banquet room the floor of which was about a foot below the hallway. There was but one step leading down from the hallway to the banquet room; the lighting was poor; and the color of the floor was the same as that of the step. The defendant there conceded that the evidence supported the implied finding of the jury that the hallway, the banquet room and the steps leading down into it were not sufficiently lighted. The appellants here make no such concession, but whether the stairs in the instant case were or were not sufficiently lighted was a question of fact. The first question in the Bakersfield case was whether the jury could draw the reasonable inference that the negligence of the de-

fendant was the proximate cause of the injury. That question of course was also present here. Another question in that case was that of contributory negligence. It was contended, as it is here, that the plaintiff was guilty of contributory negligence as a matter of law. The court said 52 Cal.App.2d at page 163, 125 P.2d at page 893, "Under the evidence her contributory negligence was a question of fact addressed to and settled by the jury in her favor. We cannot disturb that implied finding on appeal." The same may be said here. See, also, McStay v. Citizens Nat. T. & S. Bank, 5 Cal.App.2d 595, 600, 43 P.2d 560.

In the Bakersfield case the court points out, 52 Cal.App.2d at page 162, 125 P.2d at page 892, that "It is not shown that plaintiff had been through the doorway before." In this case the evidence shows that respondent had been a guest for 18 days and had been up and down the stairway a number of times in that interval, but the court's statement that "the important thing for the court to determine is how much light existed *at the time of the accident*" indicates that the trier of fact had in mind, naturally, that there must have been varying lighting conditions at the different times when respondent used the stairs.

The evidence is sharply conflicting on the crucial question as to lighting conditions at the time of the injury. The trier of fact found in favor of respondent and the evidence on her side is sufficient to support the findings. If the findings had been in favor of appellants, either as to their negligence or respondent's contributory negligence, we would have to hold the evidence sufficient to support them. In Toms v. Mercantile Arcade Realty Corp., 24 Cal.App.2d 700, 76 P.2d 153, 154, cited by appellants (a dimly lighted stairway case) the court found for the defendant. The only question on appeal was whether there was "substantial evidence to sustain the trial court's finding that plaintiff was contributorily negligent". In answering it in the affirmative the court said: "The law is settled in this jurisdiction that, where different conclusions may reasonably be drawn by different minds from the evidence, the trial court's finding of fact will not be disturbed on appeal. Meindersee v. Meyers, 188 Cal. 498, 502, 205 P. 1078." The Toms case serves to illustrate what was said a moment ago respecting findings in favor of the appellants, had they been made in this case.

[3] As said in DeYoung v. DeYoung, 27 Cal.2d 521, 526, 165 P.2d 457, 459, "The power of an appellate court ends with respect to the facts when it determines that there is substantial evidence which supports the trial court's findings. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478."

Appellants' second contention, that "the evidence affirmatively shows that respondent was guilty of contributory negligence as a matter of law" has been answered in our discussion of Hall v. Bakersfield Community Hotel Corp., supra, where, in a case substantially similar, the court held the question to be one of fact.

[4] Appellants' third contention is that there was prejudicial error "in the exclusion of evidence on custom and habit with regard to the available illumination in the premises", the precise question being whether the dining room door was habitually left open between 6 and 6:30 p. m. so that the dining room's "artificial illumination was available to sufficiently light the situs of the accident."

The difficulty is that the witness by whom appellants sought to prove custom did not take up residence in the house until August of 1948. Obviously she could not testify as to a custom, if any, prevailing at the time of the accident, some 27 months before she moved there.

Moreover, if any such custom existed one of the proprietors should have been able to prove it. Appellant Wendell Whitlock when asked by his counsel the leading question "Between the hours of 6 and 6:30 it is open?" frankly answered: "I can't say it is always open, but those are the orders the waitresses have, and that is the way it is supposed to be. The guests would leave it open any way."

Respondent in her brief cites § 17819, Health and Safety Code, which sets up certain lighting standards. That section was touched on during the trial, but not stressed. Respondent's counsel read it, whereupon the court remarked "Well, that is just practically a codification of what the law already is. If there isn't sufficient light, then you have to illuminate it. All right, next witness." There the matter ended. We agree with appellants' counsel that the court did not rely on that provision in reaching its decision and since respondent's counsel did not press the point at the trial we see no need to discuss it now.

[5] Under the heading "The evidence is insufficient to support the findings" appellants point to one of the allegations of the amended complaint that there was no handrail on the stairway, while the photographs show beyond question that there was a banister. The court found *all* the allegations (save those respecting damages) to be true. That such finding was incorrect in that it took in too much territory, is apparent. Such error, however, does not require a reversal since the omnibus finding which affirms as true the allegation respecting insufficient lighting is as we have said, amply supported by the evidence and, standing alone, supports the judgment. 2 Cal.Jur. pp. 1028–1029, § 612.

[6] Finally, appellants point to Mrs. Whitlock's testimony that shortly after the accident respondent said to her "Mrs. Whitlock, * * * I don't blame you for this at all. I know it is my own fault." She testified also that on several later occasions respondent "repeatedly told me she didn't blame me for it." Respondent testified that she did not "converse with Mrs. Whitlock at all about the accident." This conflict the trier of fact resolved in respondent's favor.

We find no error in the record.

The judgment is affirmed.

NOURSE, P. J., and JONES, J. pro tem., concur.

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111 Cal.App.2d 204

PEOPLE v. KENDALL.

Cr. 4750.

District Court of Appeal, Second District,
Division 2, California.
May 19, 1952.

Rehearing Denied May 27, 1952.
Hearing Denied June 16, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Ellsworth Meyer, J., on two counts of abortion, and he appealed from judgment and order denying motion for new trial. The District Court of Appeal, Fox, J., held that evidence corroborating testimony of women upon whom abortions had been performed was sufficient to sustain conviction.

Judgment and order affirmed.

1. Abortion 🔑11

Evidence to corroborate testimony of woman upon whom abortion has been performed is sufficient, though slight when standing by itself, if it creates more than suspicion of guilt and may consist of inferences from circumstances surrounding criminal transaction and need not establish precise facts testified to by witness whose testimony it supports, but it must connect defendant with commission of crime in such way as to reasonably satisfy trier of fact that witness whose testimony is supported thereby is telling truth. Pen.Code, § 1108.

2. Abortion 🔑11

In abortion prosecution, testimony of woman upon whom abortion was performed as to her good health does not require special corroboration. Pen.Code, § 1108.

3. Criminal Law 🔑741(5)

Whether corroborating evidence by itself is as compatible with innocence as it is with guilt is question for trier of fact.

4. Abortion 🔑11

In prosecution on two counts of abortion, testimony of two women upon whom abortions were committed was mutually corroborative. Pen.Code, § 1108.

5. Abortion 🔑11

In prosecution for abortion, testimony of women upon whom abortions were committed as to use of instruments and medicine, did not need special corroboration. Pen.Code, § 1108.

6. Abortion 🔑11

Evidence corroborating testimony of women upon whom abortions were committed was sufficient to sustain conviction of crime of abortion. Pen.Code, § 1108.

7. Criminal Law 🔑404(3)

In abortion prosecution, instruments and oil allegedly used in performing abortions were admissible though found in defendant's home directly behind and immediately adjacent to his office, rather than in office, and though discovered 2½ months after crimes charged.

8. Criminal Law 🔑404(4)

In abortion prosecution, bottle of pine oil, allegedly a common cleaning and disinfectant substance, was properly admitted in evidence in view of expert testimony that pine oil can be employed to terminate a pregnancy.

9. Abortion 🔑12

In abortion prosecution, question of whether defendant had possession of bottle of pine oil, which can be used to terminate a pregnancy, for a criminal purpose or for innocent use was for jury.

10. Criminal Law 🔑386

In abortion prosecution, testimony by husband of woman upon whom abortion was committed as to defendant's telephone call to witness saying that defendant could not have him and his wife testifying before grand jury, was admissible, where foundation was laid by showing that witness had talked to defendant on previous occasions on telephone and that he recognized defendant's voice on particular occasion, and where record showed it to be relevant by fact that telephone conversation took place a few days before grand jury hearing which resulted in defendant's indictment for abortion performed on witness' wife.

11. Criminal Law 🔑741(6)

In prosecution for abortion, whether telephone call by defendant to husband of woman upon whom abortion had been committed, saying that defendant could not have husband and wife testifying before grand jury, was as consistent with innocence as it was with guilt was for jury.

12. Criminal Law 🔑1159(1)

Determination of jury as to whether particular transaction is as consistent with innocence as it is with guilt is binding on appeal.

13. Criminal Law 🔑351(10)

Efforts to suppress testimony against himself indicates consciousness of guilt on part of defendant and evidence thereof is admissible against him.

14. Criminal Law 🔑351(10)

Generally, evidence of attempt of person to suppress testimony is inadmissible against defendant where effort did not occur in his presence, but if defendant authorized attempt of third person, evidence of conduct is admissible against defendant.

15. Criminal Law 🔑351(10)

Circumstantial evidence is admissible to prove that third person, who approached prosecuting witness in attempt to suppress testimony, was acting on behalf of defendant in so doing and was authorized by him to do so.

16. Criminal Law 🔑351(10)

In abortion prosecution, evidence that defendant's wife had been with defendant on one occasion when he sought to have one prosecuting witness change her story authorized inference that wife was acting on behalf of defendant and was authorized to do so in offering to pay expenses of two witnesses if they would leave state and would not testify, and hence evidence of wife's conduct was admissible against defendant.

17. Witnesses 🔑372(2)

Where defendant in abortion prosecution did not take stand but relied upon alibi evidence which was reinforced by defendant's wife, it was proper on cross-examination of wife to show she had contacted witnesses to persuade them to change testimony or absent themselves from state, as bearing upon wife's bias and interest and affecting her credibility.

18. Abortion 🔑8

Where women upon whom abortions were committed had made no complaint about their physical condition except their pregnancy, and defendant was not engaged in practice of his profession as an osteopath, there was no inference that women were going to defendant for any treatment other than abortions about which they testified.

19. Witnesses ⚿372(2)

Where, in abortion prosecution, direct examination of inspector of state board of osteopathic examiners related solely to failure of records of board to reveal that defendant held license to practice for years 1950 and 1951, questions on cross-examination to show that witness was biased or prejudiced against defendant were wholly immaterial and properly excluded.

20. Abortion ⚿8

If defendant in abortion prosecution desired to predicate defense on fact that he had license to practice osteopathy, he had burden of showing he had such license.

21. Criminal Law ⚿395, 429(2)

Where search warrant authorized officers to search defendant's office but not premises of his adjacent home, and in home officers found items used in abortion, such evidence, though illegally obtained, was not inadmissible in abortion prosecution, and would not lay foundation for attack upon judgment in United States Supreme Court, and hence search warrant was wholly immaterial and properly excluded from evidence.

22. Criminal Law ⚿316, 327

Defendant in criminal trial cannot be compelled to testify, and though jury may take failure of defendant to explain evidence defendant could reasonably be expected to deny or explain because of facts within his knowledge, as tending to indicate truth of such evidence and as indicating that inferences therefrom unfavorable for defendant may be reasonably more probable, such failure to deny or explain evidence does not create presumption of guilt or warrant inference of guilt nor does it relieve prosecution of burden of proving every essential element and guilt beyond reasonable doubt, and defendant can rely on state of evidence and failure of people to prove every essential element of charge against him, and no lack of testimony on defendant's part will supply failure of proof by people.

23. Criminal Law ⚿822(1)

Instructions must be read together.

24. Criminal Law ⚿822(13)

In abortion prosecution, instruction which defendant contended standing alone might have suggested to jury that failure to testify might be used to corroborate testimony of complaining witnesses, was not erroneous when read with following instruction that defendant can rely on state of evidence and upon failure of people to prove every essential element of charge and that no lack of testimony on defendant's part will supply failure of proof by people so as to support by itself a finding against defendant on any such essential element. Pen.Code, § 1108.

25. Criminal Law ⚿824(1)

Generally, it is duty of court in criminal case to give, on its own motion, instructions on general principals of law applicable to such case where they are not proposed by parties.

26. Criminal Law ⚿824(1)

In abortion prosecution, court was not required to give instruction upon specific point developed thru evidence or procedure at trial in absence of request for same by defendant.

27. Abortion ⚿13

In abortion prosecution, instructions on corroboration were sufficiently comprehensive to furnish accurate guide to jury on general subject.

28. Criminal Law ⚿822(13)

In abortion prosecution, instructions on direct and circumstantial evidence, when considered in their entirety and in view of cautionary instructions that were given concerning burden of proof and jury's duty to weigh evidence, were not prejudicially erroneous.

29. Criminal Law ⚿810

In abortion prosecution, concededly correct instruction on defense of alibi was not nullified by following instruction that it is wholly immaterial on what day or night offense charged in any count in indictment was committed provided jury believes from evidence it was committed, and that same was committed within three years prior to filing of indictment in case, where latter instruction merely purported to be on statute of limitations and was substantially in language of penal code. Pen. Code, § 955.

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William W. Larsen and John Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was indicted on five counts of abortion. At the first trial one count was dismissed and the jury failed to agree on the others, hence a mistrial was ordered. At the second trial the jury brought in verdicts of not guilty as to two counts, but found the defendant guilty on the remaining two (counts II and III). Defendant appeals from the ensuing judgment and the order denying his motion for a new trial.

In July, 1950, having missed her regular menstrual periods, Jo Anne, accompanied by a friend, visited defendant's office. Defendant examined her and told her she was pregnant. Arrangements were then made for her to return in two weeks at which time defendant would perform an operation. She returned at the appointed time in August. She was in good health. At defendant's request she assumed a reclining position on a table. While in this position defendant again examined her with the aid of an instrument known as a vaginal speculum, commonly called a "duck bill." He then inserted a tube into her vagina, removing it shortly thereafter. There was no nurse present. When the procedure, which had taken fifteen or twenty minutes, was concluded, Jo Anne dressed, paid defendant $100 and departed for home. Feeling ill, she went to bed. During the ensuing period she experienced pain. About three or four o'clock the next morning she passed a fetus. When this took place she noticed the odor of pine oil which she described as similar to the odor of a liquid contained in a bottle found in defendant's home.

On February 1, 1951, Norma Jean, a married woman with three children, telephoned defendant stating she would like to speak to him about a personal matter. Thereafter, accompanied by her husband and a friend, she went to defendant's office and had a personal interview with him. When he was advised she had missed two periods and that her next period was due about the middle of February, defendant told her it would be better to treat her at that time. An appointment was made for February 12. On that date she appeared at defendant's office around 9:00 A.M. She was in good health. After waiting a brief period, defendant came in and asked her to undress from the waist down in an adjoining room. She took a position on a table in this room and defendant examined her. He left the room, shortly returning with some instruments. He first inserted a duck bill in her vagina, then a tube, and she felt a cramp. Defendant gave her a shot in the hip which he said was penicillin. There was no nurse present during the operation. Before she left, her husband, who had been waiting in the other room, paid defendant $100.

While in defendant's office Norma Jean had smelled nothing unusual, but when she arrived home she noticed a strong odor of pine, the same odor given off by the contents of the bottle found in defendant's bathroom. She passed a fetus in the bathroom of her home about 9:30 that evening.

These operations were performed at defendant's office on South Adams Street, in Glendale, on the front door of which appears "Dr. J. Lane Kendall, Osteopath." The records, however, of the State Board of Osteopathic Examiners failed to show that any license had been issued to defendant for the years 1950 and 1951. Defendant's residence was located directly behind the office. Officers searched defendant's home and found one bottle of pine oil in the bathroom cupboard, a vaginal speculum in a hall linen closet, and a soft rubber catheter and a Luer syringe. Jo Anne and Norma Jean recalled seeing such articles in defendant's possession at the time of their respective operations.

About a week before the Grand Jury indicted defendant he went to Jo Anne's place of employment and told her he had been arrested; that if anyone came to see her to be careful. After the indictment defendant, accompanied by his wife, again contacted her and asked her to change the story she had told the Grand Jury. He explained "there was a way to do it without its being perjury."

A few days before the Grand Jury hearing defendant called the husband of Norma Jean on the telephone and told him he could not have him and his wife testify before the Grand Jury.

Defendant's wife contacted two witnesses in the case concerning their testimony. She visited Jo Anne at her place of employment and Gayle (who was the alleged victim in count I on which defendant was acquitted) at her home. Mrs. Kendall's version of these meetings was that she merely told the woman she and defendant had heard there was a man in the abortion business who was holding himself out as Dr. Lane Kendall; that telephone calls had been received at defendant's office from this man's patients who were not known to defendant; that they had had the matter investigated; that the women were making a mistake in connecting defendant with their abortions; and that they had gone to the alleged impostor.

According to Gayle's mother, who was present at the conversation between Mrs. Kendall and Gayle, Mrs. Kendall stated she would pay all expenses of a month or six weeks if Gayle would leave the state. Jo Anne's version of her conversation with defendant's wife was that if she would leave the state and stay away until after the trial, Mrs. Kendall would pay her expenses. Also, she told Jo Anne she wanted her to testify that another Dr. Kendall committed the abortion rather than defendant.

According to the People's medical expert, pine oil may be introduced into a female's womb with the aid of the instruments found in defendant's possession, thereby terminating a pregnancy.

Defendant sought to establish an alibi. He did not, however, testify.

As grounds for reversal defendant contends the testimony of the abortees was not corroborated; the court erred in the admission and rejection of evidence; the instructions were incorrect; the court unduly restricted the cross-examination of the Inspector of the State Board of Osteopathic Examiners; and too much latitude was allowed in the cross-examination of Mrs. Kendall. None of these grounds is well founded.

[1–3] In order to sustain a conviction of the crime of abortion the testimony of the woman upon whom the abortion has been performed must be corroborated by other evidence. Pen.Code, sec. 1108. In determining the sufficiency of such other evidence there are certain established legal principles that serve as guides. It must "tend to connect the defendant with the offense," but "So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it 'be slight and, when standing by itself' entitled to but little consideration." People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720; People v. Collins, 80 Cal.App.2d 526, 527, 534, 182 P.2d 585; People v. Malone, 82 Cal.App.2d 54, 61, 185 P.2d 870; People v. Allen, 104 Cal.App.2d 402, 411, 231 P.2d 896. The necessary corroboration may consist of inferences from the circumstances surrounding the criminal transaction. People v. Wilson, supra. It need not establish the precise facts testified to by the witness whose testimony it supports. (Ibid.) It is not necessary that the corroborative evidence prove the defendant is guilty of the offense. People v. Allen, supra, 104 Cal.App.2d at page 413, 231 P.2d 896. Such evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the trier of fact that the witness whose testimony it supports is telling the truth. People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681; People v. Henderson, 34 Cal.2d 340, 342–343, 209 P.2d 785; People v. Griffin, 98 Cal.App.2d 1, 26, 219 P.2d 519. The testimony of the woman upon whom the abortion is performed as to her good health does not require special corroboration. People v. Malone, supra, 82 Cal.App.2d at page 61, 185 P.2d 870. "*Whether the corroborating evidence by itself is as compatible with innocence as it is with guilt, is a question for the trier of fact, not for the reviewing court.*" (Emphasis added.) People v. Estes, 99 Cal.App.2d 745, 747, 222 P.2d 454; People v. Allen, supra.

[4–6] Applying these principles, it cannot be said as a matter of law that the corroborative evidence in this case is insufficient. It is established that the "Testimony relating to one count may be considered by the jury in corroboration of the testimony of the woman upon whom an abortion was alleged to have been performed in another count." People v. Malone, supra, 82 Cal.App.2d at page 63, 185 P.2d at page 876; People v. Collins, supra; People v. Allen, supra. Thus the testimony of Jo Anne and Norma Jean was mutually corroborative. One of the reasons for this is that the testimony of two people who independently went through the same procedure tends to establish the credence of both. The testimony of these women described in detail the same premises, the same instruments, and the same liquid abortifacient. The evidence of these women was further corroborated by the testimony of the officer relative to finding, in defendant's living quarters, equipment and a drug which could be used in performing an abortion. They testified to seeing such instruments in defendant's possession and described his use of them. The possession of such items by defendant served to corroborate their story. People v. Raffington, 98 Cal.App.2d 455, 461, 220 P.2d 967. Their testimony as to the use of the instruments and medicine "does not need special corroboration." People v. Wilson, supra, 25 Cal.2d at page 347, 153 P.2d at page 724. In this connection it must be remembered each woman testified that defendant used a liquid in the operation on her, and that the odor of pine was noticeable when the desired result was produced. A bottle of pine oil was found in defendant's premises. This is a corroborating circumstance. It points not only to the truth of the witnesses' testimony, but tends to establish by independent evidence one of the vital ingredients of defendant's method.

[7] Defendant, however, contends the court erred in admitting in evidence the bottle of pine oil, the speculum, catheter, and syringe because (1) they were not found "on the premises where the alleged acts took place, but in a house next door," and (2) the discovery of these items was "too remote from the time of the alleged acts." Neither objection is well founded. The fact that such items were found in defendant's home rather than in his office does not affect their efficacy as evidence since they were actually in his possession and since his home is directly behind and immediately adjacent to his office. Since defendant did not have a license to practice his profession he may well have considered it a desirable precaution to remove such items from his office to his near-by residence after each operation. As to the pine oil, a sufficient foundation was laid to establish that this was the same bottle of pine oil which was found in defendant's home. The fact that this bottle was found some time after the commission of the alleged offense is immaterial for defendant either used pine oil from this particular bottle or he used it from a similar bottle. The presence of a bottle of pine oil in defendant's possession connected him with the crimes charged and corroborated the testimony of the women that defendant used pine oil in committing the abortions. The fact that some two and a half months intervened between the operation on Norma Jean and the discovery of the instruments and pine oil in defendant's possession does not render them inadmissible in evidence on the ground of remoteness. In People v. Pollum, 97 Cal.App.2d 173, 217 P.2d 463, which is an abortion case, the surgical instruments in question were found in defendant's office "more than a year after the times of the alleged offenses". 97 Cal. App.2d at page 178, 217 P.2d 466. In commenting on their competency, the court said 97 Cal.App.2d at page 179, 217 P.2d at page 466: "They were suitable for use in the operations described by the witness·

es and this was sufficient to justify their admission." (Citing cases.)

[8, 9] Defendant suggests that the bottle of pine oil should not have been admitted in evidence because it "is a common cleaning and disinfectant substance." The answer to this is that the People's expert testified pine oil could be employed to terminate a pregnancy. He further suggests "Its possession is as consistent with innocence as it is with guilt." The answer to this proposition is that whether such evidence is as compatible with innocence as with guilt was a question for the jury and not for this court, People v. Allen, supra, 104 Cal.App.2d at page 412, 231 P.2d 896, and apparently the jury impliedly found against defendant on this issue. Defendant further challenges the admissibility of the pine oil in evidence on the ground that "None of the complaining witnesses in any way connected" him "with the use of Pine Oil." He bases this upon the testimony that they did not smell the odor of such a substance when the operation was in process. Both Jo Anne and Norma Jean testified he inserted a tube in their vagina. This may well account for their failure to detect the odor at that time. They did, however, smell it after the fetus had passed. Defendant's final challenge to the admissibility of the pine oil is that it was not in any way connected with the commission of any of the charges against him. The simple answer to this is that the jury, on substantial evidence, found to the contrary.

[10–12] Additional corroboration is furnished by defendant's telephone call to the husband of Norma Jean, saying he could not have him and his wife testifying before the Grand Jury. Defendant, however, argues this evidence was not admissible because (1) no foundation was laid to show the witness could recognize defendant's voice over the telephone; (2) the statement attributed to defendant was not relevant to the issues in this case for the reason there was no showing the conversation involved the Grand Jury action in this case, and (3) the statement attributed to defendant is as consistent with innocence as it is with guilt. There is no merit in any of these arguments. On the question of foundation, the record is clear that Norma Jean's husband talked to defendant on previous occasions on the telephone and that he recognized defendant's voice on this occasion. The record is likewise clear that the conversation was about his wife, on whom defendant is charged with having committed an abortion. The conversation took place "a few days before" the Grand Jury hearing, which resulted in defendant's indictment and at which defendant did not want him and his wife to testify. There can be no doubt about the relevancy of this telephone conversation. Whether it was as consistent with innocence as it was with guilt was for the jury's determination, which is binding on appeal. People v. Ramsey, 83 Cal. App.2d 707, 718, 189 P.2d 802. The jury could reasonably have inferred that such statement to Norma Jean's husband served to connect him with the abortion which she testified defendant committed on her, and that it showed a consciousness of guilt.

[13–16] Efforts to suppress testimony against himself indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. People v. Moore, 70 Cal.App.2d 158, 163, 160 P.2d 857. Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. (Ibid.) However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant. (Ibid.) Of course it may be, and ordinarily must be, proved by circumstantial evidence that the third person who approached the prosecuting witness in an attempt to suppress his testimony was acting on behalf of the defendant in so doing, and was authorized by him to do so. (Ibid; People v. Burke, 18 Cal.App. 72, 91–93, 122 P. 435). In the case at bar the jury could reasonably infer from the fact that Mrs. Kendall had been with her husband on one occasion when he sought to have one of the witnesses change her story, that she was acting on behalf of defendant, and was authorized to do so, in offering to pay the expenses of two witnesses if they would leave the state and not testify.

[17] Defendant claims, however, the court permitted too much latitude in the cross-examination of Mrs. Kendall because she was questioned about contacting those witnesses. Defendant did not take the stand but relied upon his alibi witnesses, whose testimony was reinforced by that of his wife, to establish his defense. Mrs. Kendall testified to defendant's being elsewhere at the various times in question, and, as bearing upon her bias and interest and affecting her credibility, it was proper to show she had contacted the witnesses to persuade them to change their testimony or absent themselves from the state. She admitted seeing the witnesses but claimed she merely told them they were making a mistake; that some other person posing as defendant had committed the abortions. No other evidence was offered by defendant to prove this latter claim, and in rebuttal these two witnesses told of Mrs. Kendall's efforts to suppress their testimony.

[18] The testimony of each prosecutrix with respect to the condition of her health was sufficiently corroborated from the surrounding circumstances. Neither of these women appear to have made any complaint about their physical condition except their pregnancy. Jo Anne had been working and was still at work when defendant and his wife contacted her regarding her testimony. Defendant was not engaged in the practice of his profession, see Kendall v. Board of Osteopathic Examiners, 105 Cal.App.2d 239, 233 P.2d 107, hence there is no inference these women were going to him for any treatment other than that about which they testified.

[19, 20] Defendant's contention that the cross-examination of the Inspector of the State Board of Osteopathic Examiners was unduly restricted, is not supported by the facts. His testimony related solely to the failure of the records of the board to reveal that defendant held a license to practice for the years 1950 and 1951. Questions intended to show that the witness was biased or prejudiced against defendant were wholly immaterial in the light of the nature and limitation of the inquiry on direct examination. The truth of his testimony was not disputed. Furthermore, defendant had the burden of showing he had such a license if he desired to predicate a defense on such fact. People v. Dean, 131 Cal.App. 228, 21 P.2d 126; People v. Goscinsky, 52 Cal.App. 62, 198 P. 40; People v. Saunders, 61 Cal.App. 341, 215 P. 120.

[21] A search warrant was issued on April 24, 1951, authorizing the police officers to search defendant's office. It did not, however, include the premises of his adjacent home. It was in the latter place that the officers found the pine oil and other items. Defendant contends the search warrant should have been received in evidence. The court correctly excluded it. The fact that this evidence was illegally obtained does not, however, render it inadmissible in the state courts. People v. Kelley, 22 Cal.2d 169, 137 P.2d 1; People v. Channell, 107 Cal.App.2d 192, 236 P.2d 654. The fact that it was so obtained does not lay a foundation for attack upon the judgment in the United States Supreme Court because in Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, the court declined to interfere with the conviction of a defendant in a state court on an abortion charge where some of the evidence had been obtained in violation of the guaranty against unlawful search and seizure in Article IV of the United States Constitution. The recent case of Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. —, does not detract from the holding in the Wolf case. The rationale of the Rochin case was placed squarely upon the ground that the evidence supporting defendant's conviction was secured by methods so brutally shocking as to offend the due process clause of the Fourteenth Amendment. Therefore the search warrant in this case was wholly immaterial.

[22–26] Defendant urges that the court erred in instructing the jury regarding his failure to testify. On this subject the court gave the instructions in the footnote.[1] They present a correct statement of the law. People v. Adamson, 27 Cal.2d 478, 486–492, 165 P.2d 3. Defendant, however, says the first instruction standing alone might have suggested to the jury that his failure to testify might be used to corroborate the testimony of the complaining witnesses, and therefore the court should have, *sua sponte,* instructed the jury that failure to testify does not constitute corroborative evidence. The answer to the first portion of defendant's contention is that the instructions must be read together. People v. Mohammed, 189 Cal. 429, 208 P. 963. When these instructions are thus read defendant has no justifiable complaint. If, however, he desired a special instruction he should have requested it. The general rule is that it is the duty of the court in criminal cases to give, on its own motion, instructions on the general principles of law applicable to such case where they are not proposed by the parties. But the court is not required to give such instructions upon specific points developed through the evidence or procedure at the trial, unless they are requested by the party desiring them. People v. Malone, supra, 82 Cal.App.2d at page 69, 185 P.2d 870.

[27] The instructions on corroboration were in accordance with the law as herein stated and were sufficiently comprehensive to furnish an accurate guide to the jury on the general subject.

[28] There is no prejudicial error in the instructions on direct and circumstantial evidence when the instructions are considered in their entirety, particularly in view of the cautionary instructions that were given concerning the burden of proof and the jury's duty to weigh the evidence.

Defendant contends the court erred in instructing the jury regarding the defense of alibi. The jury were told that "When one who was not at the place where a crime was committed at the time of its commission is later charged with having been present and having committed or taken part in committing such crime, his absence from the scene of the crime, if proved, is a complete defense that we call an alibi. The defendant in this case has introduced evidence tending to prove that he was not present at the time and place of the commission of the alleged offenses for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt whether the defendant was present at the time the crime charged in one or more counts in the indictment was committed, he is entitled to an acquittal on that count, or counts, as to which you have such reasonable doubt."

[29] Defendant, however, argues that the effect of this instruction, which he concedes to be proper, was nullified by the following instruction: "Each count of the indictment alleges that the offense covered by the count was committed 'on or about' a certain date specified in the count. It is wholly immaterial on what day or night the offense charged in any count in the indictment was committed, provided you believe from the evidence it was committed,

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[1] "51

"Failure of Defendant to Testify

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"51–B

"In deciding whether or not to testify, a defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on a defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element."

and that the same was committed within three years prior to the filing of the indictment in this case, which was on May 22, 1951." He argues that since his defense was an alibi the jury should have been given only the first of the quoted instructions. There is no merit in this contention since the latter instruction merely purports to be on the statute of limitations and is substantially in the language of section 955 of the Penal Code. It was not misleading, particularly when considered in connection with the alibi instruction. The latter sufficiently meets defendant's objection as to the time element since witnesses testified to specific dates and periods of time which were the same as those for which defendant sought to establish alibis. People v. Shannon, 28 Cal.App.2d 677, 681, 83 P.2d 302.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

111 Cal.App.2d 180

GENERAL ELECTRIC CO. et al. v. STATE BOARD OF EQUALIZATION.

Civ. 15115.

District Court of Appeal, First District, Division 1, California.

May 19, 1952.

As Corrected on Denial of Rehearing June 18, 1952.

Hearing Denied July 17, 1952.

The General Electric Company and the Pacific Gas and Electric Company brought action against the State Board of Equalization to recover alleged overpayment of sales tax. The Superior Court of the State of California, in and for the City and County of San Francisco, Thomas M. Foley, J., entered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Peters, P. J., held sale of a turbine generator for electric plant would be deemed a sale subject to the Sales and Use Tax Law and tax was not limited to an excise tax on the cost of the materials only.

Judgment affirmed.

1. Taxation 🔑65

Electric generator, which weighed about 521 tons, and which was attached to concrete foundation with large bolts and cement, became an improvement to realty and a fixture and was taxable as such. Revenue and Taxation Code, §§ 104, 105; Civil Code, § 660.

2. Licenses 🔑32(2)

Sales tax is imposed on seller and not on buyer by the Sales and Use Tax Law. Revenue and Taxation Code, §§ 6001–7176.

3. Licenses 🔑29

Where materials are combined with other materials so as to lose their identity and become part of completed structure, contractor is deemed to be the consumer of such materials and is required to pay only that tax imposed by that section of the Sales and Use Tax Law imposing an excise tax at fixed rate on storage, use, or other consumption of tangible personalty purchased from any retailer for storage, use, or other consumption in the state, but when contractor, whether or not he is the manufacturer, furnishes a fixture that does not lose its identity on annexation, the transaction is deemed a sale and the tax is measured by section imposing a tax on gross receipts of any retailer from sale of all tangible personalty sold at retail. Revenue and Taxation Code, §§ 6051, 6201.

4. Licenses 🔑7(3)

The State Board of Equalization has a wide discretion in exercising its power to classify for taxation under the Sales and Use Tax Law, and as long as the rule works uniformly on all persons in a class, and classification is based on some natural or reasonable distinction, classification is not invalid. Revenue and Taxation Code, §§ 6001–7176.

5. Licenses 🔑7(2)

Classifications by the State Board of Equalization for tax purposes under the Sales and Use Tax Law will not be overthrown unless plainly arbitrary. Revenue and Taxation Code, §§ 6051, 6201.

6. Licenses 🔑29

Where New York corporation engaged in manufacture of electrical equipment entered into contract with California corporation for the construcion and installation of a turbine generator for electric plant, for price of $1,164,797.85, and New York corporation using materials which cost it $263,990.17 assembled and tested the turbine in New York, and turbine was then dismantled and shipped to California where it was installed by attaching it to concrete foundation with large bolts and cement, transaction would be deemed a sale subject to the Sales and Use Tax Law and tax was not limited to an excise tax on the cost to New York corporation of the materials only. Revenue and Taxation Code, §§ 6051, 6201.

7. Licenses ⚷7(3)

Rule of the State Board of Equalization providing that for sales tax purposes contractors are retailers of fixtures which they furnish and install and tax applies to retail selling price thereof and not merely to cost of the materials used is reasonable and not discriminatory. Revenue and Taxation Code, §§ 6001–7176.

◆

Cooley, Crowley & Gaither, William W. Godward, Edwin E. Huddleson, Jr., San Francisco, for appellant General Electric Co.

Robert H. Gerdes, Richard H. Peterson, William B. Kuder, San Francisco, for appellant Pacific Gas & Electric Co.

Edmund G. Brown, Atty. Gen., James E. Sabine, Irving H. Perluss, Ernest P. Goodman, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

The question involved in this case is whether the manufacturer-installer of a 521 ton turbine generator unit, which upon installation became an improvement to the real property of the buyer, is taxable under the Sales and Use Tax Law, §§ 6001–7176, Rev. & Tax.Code, as a seller at retail, or as a consumer of the parts and materials of which the generator was composed. The State Board of Equalization ruled that such manufacturer-installer sold the generator as tangible personal property at retail, and taxed the transaction as such. It denied a claim for refund. This action was then instituted to recover the claimed overpayment of the tax. The trial court held that the State Board had imposed the proper tax, denied the claim for refund, and entered its judgment accordingly. The manufacturer-installer and its purchaser, who in fact paid the tax, appeal.

There is no dispute as to the facts. On December 31, 1947, General Electric Company (hereafter referred to as General), a New York corporation that is qualified to do business in California and which is primarily a manufacturer of electrical equipment, entered into a contract with Pacific Gas and Electric Company (hereafter referred to as Pacific), a California company, under which General agreed to fabricate and install a turbine generator for Pacific as an integral part of Pacific's steam electric plant in Kern County. The full contract price was $1,164, 797.85, including the cost of installation, which turned out to be $36,500. The contract provided that General "agrees to construct the turbine generator described herein at Pacific's Kern Steam Plant." It contains certain warranties, an agreement by General to defend and protect against any patent suits, and provided for progress payments, eighty per cent of the full purchase price being payable during fabrication, ten per cent more upon shipment, and the balance upon installation. The contract required General to furnish the cost of labor and materials in fabricating the generator and in installing it, except that Pacific was to provide the foundation and bolts and grouting necessary to install, a suitable crane with operator, a spur track, etc. Although the contract is silent as to risk of loss, the evidence indicates that General considered such risk to be on it until installation. Title remained in General until installation, when it passed to Pacific.

Each generator of the general type of the one here involved is specially designed by General to fit the needs of its customer. General is not engaged in the general construction business for the utility industry, but, because of the complexity of this type of machinery, insists on installing it. There are only two other concerns engaged in this business in the United States, and they too follow the practice of installing such equipment. Pacific always buys such equipment installed.

The generator here involved is a very large, very precise, and a very complex piece of machinery. It is designed to generate steam, which passes into a turbine, where it causes a rotary motion, which turns a generator that generates electric energy. It is the key piece of equipment in the steam plant, all other equipment being related to it. The building housing the generator, which building was constructed by Pacific, was specially designed to fit this particular piece of equipment, and has no other purpose or utility. The generator weighs about 521 tons, and is roughly 70 feet long, 22 feet wide and 19 feet high. It is attached to a concrete foundation with large bolts and cement. In spite of its size, it is a precision instrument.

The generator was manufactured by General at its factory in New York. The cost of the materials used in its manufacture was $263,990.17. It was completely assembled and tested in New York by General. Then, because of its size, it was dismantled and shipped to Kern County in fourteen freight cars. There it was installed by General, under the supervision of General's engineers, on a foundation constructed by Pacific. Installation took from January, 1948, to May, 1948. The equipment is expected to last indefinitely and to remain in place until obsolescence requires the plant to be scrapped or rebuilt.

Pacific has the fee title to the site where the steam plant is located. On the first Monday of March, 1948, when the generator was about half installed, Pacific reported to the State Board, for real property tax purposes, its entire plant, including the generator, as "construction work in progress." In 1949 the entire plant, including the generator, was taxed as realty to Pacific. No part of the assembled portion of the generator was ever taxed to General as personal property.

General, in compliance with Rule 11 of the State Board, paid a sales tax of $28,207.45, which was calculated on the full contract price of $1,164,797.85 less a credit of $36,500 for installation. General contends it should have paid a tax computed solely on $263,990.17, the cost of the materials to it, or a tax of $6,750.70. It paid all in excess of this amount under protest, contending that it has been subjected to a $21,456.75 overpayment. Pursuant to the terms of the contract Pacific has reimbursed General for the total tax paid, and is the beneficial owner of the claim for refund.

On these facts the trial court concluded that, as to General, the generator was tangible personal property and the transaction constituted a sale of tangible personal property in California by General to Pacific within the meaning of the Sales and Use Tax. Rule 11 was upheld as reasonable and non-discriminatory. It was therefore concluded that the transaction was properly subject to the sales tax in the full amount paid.

General's basic contention is that the State Board should have imposed a use tax under section 6201 of the Revenue and Taxation Code upon this transaction, and not a sales tax. Section 6201 imposes an excise tax at a fixed rate "on the storage, use, or other consumption in this State of tangible personal property purchased from any retailer * * * for storage, use, or other consumption in this State". If General is subject only to this tax, admittedly such tax, under the above section and section 6011 of the same code, would be measured by the cost to General of the raw materials which it fabricated into the generator.

The State Board contends that the transaction is subject to a tax on the theory that General sold to Pacific tangible personal property in this state, that is, sold the completed generator to Pacific, and hence General was a retailer of tangible personal property under the provisions of the Revenue and Taxation Code. Section 6015(a) of that code defines a retailer as "Every seller who makes any retail sale or sales of tangible personal property * * *." Section 6006 provides that:

> "'Sale' means and includes:
>
> "(a) Any transfer of title or possession, * * * in any manner or any means whatsoever, of tangible personal

> property for a consideration. * * *
>
> "(g) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer * * *."

Section 6051 provides: "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers [at a fixed rate] of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State".

[1] In developing their argument that General was a consumer of the materials that went into the completed generator, and not a retailer of tangible personal property, appellants first argue that the property involved never was personal property in the hands of Pacific, so that no sale of personal property could have taken place. It is pointed out that title did not pass to Pacific until the generator was affixed in place, at which moment it became real property and taxable as such. It is undoubtedly true that upon annexation the generator became an improvement to real property, a fixture, and taxable as such. §§ 104 and 105, Rev. & Tax.Code; § 660, Civ.Code; San Diego T. & S. Bank v. San Diego, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416; Trabue Pittman Corp. v. County of L. A., 29 Cal.2d 385, 175 P.2d 512.

[2] However, the argument that, because the generator became taxable as real property in the hands of Pacific, the transaction by which title was transferred to Pacific by General is conclusively determined to be not a sale, is unsound. The generator in place was clearly real property and taxable as such. But we are not interested in the nature of the property in the hands of the buyer, but in its nature in the hands of the seller—General. The sales tax is imposed on the seller, not upon the buyer. Section 6006 of the Revenue and Taxation Code defines a sale as "Any transfer of title * * * in any manner or any means whatsoever". Clearly, title passed from General to Pacific. In General's hands the title it possessed was title to personal property. General never had title as real property. What it had it passed to Pacific, and that was title to tangible personal property. That is all that is required by the act. This argument of appellants lacks substance.

The much more interesting and complex argument of appellants is that General constructed the generator for Pacific and primarily furnished services in fabricating it and did not sell the completed article as personal property. The statute imposes no tax on services. § 6011 of the Rev. & Tax. Code. There are many articles manufactured by the seller where some portion of the sales price is represented by the cost of assembling or manufacturing, but, nevertheless the transaction is treated as a sale of tangible personal property. Thus the optometrist, although a great proportion of the total cost of eyeglasses is the service in grinding the lens, is deemed in this state to be a retailer and not a consumer, and so subject to section 6051 and not to section 6201 of the Revenue and Taxation Code. Kamp v. Johnson, 15 Cal.2d 187, 99 P.2d 274.[1]

This problem arises, in varying degrees, in many fields. When we come to structures and fixtures attached to realty, the statute does not define, with minute precision, the division line between the sale of tangible personal property, and the sale of services. Close questions are bound to occur. The Legislature has seen fit to leave the determination of these questions to the State Board under its rule-making power. In adopting rules that are intended to apply generally it is obvious that borderline cases will occur where it will be very difficult to ascertain whether the sale is primarily of property or of services. So far as contractors are concerned, the State Board has attempted to solve the problem by the adoption of Ruling No. 11. 18 Cal. Adm.Code, § 1921. So far as pertinent here, that rule provides:

> "(1) The term 'contractor' as used herein includes both general contractors and subcontractors and includes contractors engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, sheet metal work, roofing, tile and terrazzo

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1. (In 1947 the rule of this case was changed by statute—Revenue and Taxation Code, Sec. 6018, Statutes of 1947, page 656, chap. 139).

work, electrical work, plumbing, heating, air conditioning, painting and interior decorating.

"(2) The term 'construction contract' as used herein means a contract for erecting, remodeling, or repairing a building or other structures on land and includes lump-sum, cost-plus, and time-and-material contracts. The term 'construction contract' does not include a contract for the sale and installation of machinery or equipment.

"(3) The term 'materials' as used herein means tangible personal property which when combined with other tangible personal property loses its identity to become an integral and inseparable part of the completed structure. * * *

"(4) The term 'fixtures' as used herein means things which are accessory to a building and which do not lose their identity as accessories when placed or installed. * * *

"(b) (1) Contractors are consumers of materials used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors. * * *

"(c) Contractors are retailers of 'fixtures' which they furnish and install and tax applies to the retail selling price thereof; which, in the case of lump-sum construction contracts, is regarded as the cost price of the fixtures to the contractors. If the contractor is the manufacturer of the fixtures, the retail selling price thereof is the prevailing price at which similar fixtures in similar quantities ready for installation would be sold to contractors."

[3] By this rule the State Board has attempted to distinguish between "structures" and "fixtures." Where the materials are combined with other materials so as to lose their identity and become part of the completed structure the contractor is deemed to be the consumer of such materials and is required to pay a tax measured by section 6201 of the Revenue and Taxation Code. But when the contractor, whether or not he is the manufacturer, furnishes a fixture that does not lose its identity upon annexation, the transaction is deemed a sale and is measured by section 6051. Thus, in the construction of a structure the contractor is deemed to be engaged primarily in the sale of services, and is deemed to be a "consumer" of the materials used. But in the construction, installation and sale of a fixture, the contractor is deemed to be a retailer of tangible personal property.

It was under this rule that the State Board acted in treating the transaction here involved as the sale of a generator and not the sale of services. There can be no doubt that under this rule the transaction was a sale of tangible personal property and taxable as such. But appellants argue that the constructor of an improvement to real property, whether he constructs a "structure" or a "fixture," is necessarily engaged in the business of selling services, and that the classification contained in Rule 11 is not predicated on any reasonable basis, is discriminatory, and is invalid.

[4, 5] Rule 11, or a rule substantially similar to it, has been in effect for many years. It is an attempt to distinguish between contractors primarily selling service and those primarily selling property. Considered as an original proposition, the classification between the construction of those structures where the individual materials lose their identity in the completed structure, and the construction of fixtures that, although attached to realty, do no lose their idenity upon annexation, treating the first as a sale of services and the second as a sale of property, is reasonable and fair. Rule-making bodies have a wide discretion in exercising the power to classify. As long as the rule works uniformly upon all persons in a class and the classification is based upon some natural or reasonable distinction, the classification is not invalid. Martin v. Superior Court, 194 Cal. 93, 227 P. 762. Classifications will not be overthrown unless plainly arbitrary. In re Schmolke, 199 Cal. 42, 248 P. 244; County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 111 P.2d 963.

[6] In the instant case the statute involved does not define, with precision, what

shall constitute a sale of services and what shall be deemed a sale of property. The Legislature has provided that in the sale of services the contractor shall be deemed a consumer of materials and taxed as such, but in the sale of property he is a retailer of property and taxed as such. The enforcing agency, acting under its rule-making power, has seen fit to classify between materials that lose their identity and those that do not, between structures and fixtures. This seems to us a reasonable and sound classification.

The appellants, however, contend that the problem is no longer an open one, and that the case of Chicago Bridge & Iron Co. v. Johnson, 19 Cal.2d 162, 119 P.2d 945, determines that General was subject only to the consumer's tax and not to the retailer's tax. It is upon this decision that appellants pin their main hope for a reversal. In that case the contractor was engaged in the manufacture and installing of large steel tanks. These were manufactured at the company's plant outside of California to the purchaser's specifications. They were so large that they could not be shipped to California in a single unit, but were prefabricated and the component parts shipped to this state. The parts were then assembled by the manufacturer and installed by it on the purchaser's property. The State Board held that the manufacturer was a consumer of materials and imposed a use tax measured by the cost of these materials to the manufacturer. Rule 11 was not mentioned. No attempt was made to impose a sales tax measured by the selling price of the completed unit. The manufacturer claimed that it was not subject to any tax at all. It urged that when goods are purchased in a foreign state, prefabricated and shipped to California in interstate commerce, to tax the manufacturer on the cost of the materials is to impose an invalid burden on interstate commerce. That was the main point involved. The court held that the use tax did not constitute an unconstitutional burden on interstate commerce. The only points decided were that the State Board had imposed a use tax on the transaction and that such tax was valid.

There are undoubtedly similarities between the Bridge case and the instant one. In both cases the articles involved were prefabricated by the manufacturers, shipped in sections to California, and here assembled and installed on foundations constructed by the purchasers. In both cases the articles involved became improvements to real property and became taxable as such. Neither the generator nor the steel tank functions as a building. Many of the provisions of the two contracts are substantially similar. But the Bridge case is not controlling here for at least two reasons:

First, Rule 11 was not mentioned by the court. The State Board had seen fit to treat the manufacturer of the tanks as the consumer of materials and, since such materials were purchased outside of California, imposed a use tax measured by the cost of the materials, on such manufacturer. No question was ever raised that the manufacturer might have been a retailer of the steel tanks, and therefore subject to the sales tax. The court did not pass on that point at all, because that point was not raised. The case stands for the proposition that such a manufacturer at least is subject to the use tax, and that such imposition is valid. It does not necessarily stand for the proposition that the manufacturer might not have been subject to the sales tax instead of the use tax. That alternative was not presented to the court. The case, at most, is merely an argumentative authority on that subject. The two taxes are, of course, mutually exclusive, and it can be and is argued that a decision that a manufacturer is subject to the use tax necessarily decides that it is not liable to a sales tax. But it is perfectly clear that the Supreme Court did not decide upon the validity of the classification contained in Rule 11, nor upon the application of that rule to the facts, because that rule was not mentioned nor discussed.

Secondly, while there are many similarities in the facts of the two cases, some of which have been mentioned, there are also some differences, differences of such a nature that it would have justified the State Board in applying the first part of Rule 11 to the manufacturer in the Bridge case and the second part of that rule to the manufacturer here involved. As we have seen, Rule 11 classifies between structures and fixtures. The steel tank, with its walls, floor and a roof might well be classified as a "structure," while a generator is undoubtedly a "fixture" as that term is used in the rule. That distinction may be a tenuous one, but, as already pointed out, in determining whether a contractor is selling property or services there are bound to be many close cases. The State Board has seen fit to draw that line between structures and fixtures. That classification is reasonable. In most cases, the differences between the two will be obvious. But cases are bound to arise where it will be difficult to ascertain whether the completed unit is a "structure" or a "fixture" as those terms are used in the rule. That difficulty is inherent in the application of any classification, and does not render the classification invalid. The State Board might well have determined that the steel tank was a structure, and that the generator a fixture, and such determinations would not necessarily be inconsistent. The California Supreme Court stated the proper rule in Ferrante v. Fish & Game Commission, 29 Cal.2d 365, 374, 175 P.2d 222, 227, where it stated:

> "Similar apparent hardships are inherent in every classification made for the purpose of regulation. Some close cases must always fall just inside and others just outside of the line delimiting the class, wherever drawn, and the regulation will appear to operate with especial harshness upon those which happen to fall just inside. But the line must be drawn somewhere or there can be no classification and the courts have recognized that if the classification is reasonable in its overall operation it is not to be stricken down because of its application to a particular case that may lie just inside its borders. Chief Justice Hughes said tersely in Continental Baking Co. v. Woodring, 286 U.S. 352, 370, 371, 52 S.Ct. 595, 601, 76 L.Ed. 1155: 'It is obvious that the Legislature in setting up such a zone would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn.'
>
> "Justice Holmes in Dominion Hotel v. Arizona, 249 U.S. 265, 269, 39 S.Ct. 273, 274, 63 L.Ed. 597, elaborated the same idea: 'If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines. "Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things." Louisville & Nashville R. R. Co. v. Barber Asphalt Co., 197 U.S. 430, 434, 25 S.Ct. 466, 49 L.Ed. 819.' "

Appellants next urge that the majority of cases outside California draw no distinction between the construction of structures and the construction of fixtures, and urge that in those states, in both situations, the manufacturer is treated as a consumer. It is true that, with the exception of Illinois, no state, except California, seems to have attempted to distinguish between structures and fixtures. However, as respondent correctly points out, the cases cited by appellants to support their argument are all concerned with what under Rule 11 would be building materials and structures, and would, therefore, fall within the first part of Rule 11. In other words, those cases would have been decided in California as they were in the foreign states.

The state of Illinois had a regulation somewhat similar to Rule 11 that attempted to draw a distinction between contractors, and sellers of fixtures. The Supreme Court of that state in Material Service Corporation v. McKibbin, 380 Ill. 226, 43 N.E.2d 939, declared the administrative regulation invalid. The classification was declared not to be reasonable.

The case undoubtedly supports the position of appellants, but in our opinion it is not controlling and should not be followed. Illinois is a state that has gone quite far in holding various transactions not taxable. It was held that neither the contractors, nor the materialmen selling property to them, are retailers, which is clearly contrary to California law. It has held that optometrists are neither retailers nor consumers. American Optical Co. v. Nudelman, 370 Ill. 627, 19 N.E.2d 582. California specifically refused to follow the Illinois rule in Kamp v. Johnson, 15 Cal.2d 187, 190, 99 P.2d 274. For reasons already stated, we believe that the classification in Rule 11 is valid. Thus, even if the Illinois statute and rule were identical with those here involved, which they are not, the reasoning of the Illinois court is not convincing.

The next contention of appellants is that Rule 11 is inconsistent with Rule 12. Cal. Adm.Code, § 1922. Rule 12 deals exclusively with contractors with the United States government and, in effect, treats such contractors as "consumers" of "fixtures" sold to the government. Such contractors are thus treated differently than contractors generally under Rule 11. This, it is claimed, is unlawful discrimination against appellants.

Rule 12 was made necessary by the specific provisions of the tax statute. Section 6381 of the Revenue and Taxation Code exempts from the sales tax gross receipts derived from the sale of tangible personal property to the United States. Section 6384 of that code, in order that the state shall collect some tax, requires that contractors shall be regarded as consumers. Unless they were so treated, contractors with the United States would pay no tax at all. This appears to be a reasonable basis for this classification between contractors.

[7] This opinion has held that the classification in Rule 11 is reasonable and nondiscriminatory. That is the basic point involved—is it reasonable to tax fixtures differently from structures? As we have pointed out, the nature of the business of constructing structures is primarily the rendition of service and the consumption of materials. The constructors use or consume the materials that go into the completed structure. But the fabricator or constructor of a fixture is primarily selling that completed fixture. This is a real, basic and reasonable difference that justifies the classification.

The last contention of appellants is that the trial court erroneously refused to grant it a declaratory judgment as to the validity of Rule 11. The appellants prayed, in a second cause of action, for such relief, alleging that they had petitioned the State Board under section 11426 of the Government Code to repeal or amend Rule 11 on the ground that, as written, it was invalid, but the Board refused to decide such petition until this case was finally decided. It is urged that under section 11440 of the Government Code and section 1060 of the Code of Civil Procedure appellants are entitled to a declaratory judgment. The trial court concluded that declaratory relief is not necessary or proper at this time under the circumstances.

We do not find it necessary to determine whether declaratory relief is applicable in tax cases. It is obvious that appellants have had a complete and adequate remedy under their first cause of action. The action for declaratory relief seeks a determination that Rule 11 is invalid. That is precisely their contention under the first cause of action. Every point of claimed invalidity under the declaratory relief cause of action was raised in the cause of action for the refund. We have determined that as against such attacks Rule 11 is valid. It is reasonable and is not discriminatory. Thus, no need exists for a further declaration of rights. Appellants have had their declaration in the holding of the trial court and of this court in this opinion.

The judgment appealed from is affirmed.

BRAY and DOOLING, JJ., concur.

111 Cal.App.2d 415

**SMPARDOS v. PIOMBO CONST.
CO., Inc. et al.**

Civ. 8008.

District Court of Appeal,
Third District, California.

May 28, 1952.

Hearing Denied July 24, 1952.

Action by John F. Smpardos against Piombo Construction Company, Inc., and another, to recover possession of an unpatented mining claim and damages for wrongful possession. The Superior Court, Plumas County, Dudley G. McGregor, J., rendered a judgment for plaintiff, and defendant appealed. The District Court of Appeal, Schottky, J. pro tem., held that the evidence supported a finding implied in a verdict granting exemplary damages that defendants were guilty of oppression and malice.

Judgment and order denying motion for new trial affirmed.

1. Appeal and Error 🔑931(1)

On appeal attacking sufficiency of evidence, conflicting evidence must be construed in light most favorable to respondent.

2. Mines and Minerals 🔑51(5)

Where highway contractors wrongfully took possession of unpatented mining claim, as between claimant and contractors, claimant's use of claim including use of surface was not limited to mining operations and activities incidental thereto for purpose of determining damages.

3. Mines and Minerals 🔑29(1)

While paramount fee remains in government until it has issued its patent, yet as to everyone else, estate acquired by perfected mining location possesses all attributes of title in fee, and so long as requirements of law with reference to continued development are satisfied, character of tenure remains that of a fee.

4. Mines and Minerals 🔑51(5)

Locator of mining claim has right to exclusive use of surface of claim, and if someone else dispossesses him and makes use of surface, trespasser is liable for reasonable value of use of property, together with any other damage that trespasser may have caused to locator.

5. Mines and Minerals 🔑51(3)

In action to recover possession of unpatented mining claim and for damages for wrongful possession by highway construction companies, testimony of rental income could be used as basis for damages notwithstanding claimant testified he intended to use claim for mining purposes and absence of evidence that particular property could be or was available for rental.

6. Mines and Minerals 🔑51(3)

In action to recover damages for wrongful possession of unpatented mining claim, evidence supported finding implied in verdict granting exemplary damages that highway construction companies were guilty of oppression and malice.

7. Ejectment 🔑9(4)

Prior peaceful possession is sufficient to maintain action of ejectment against one who enters as trespasser.

8. Trespass 🔑20(1), 27

Proper party plaintiff in action for trespass to realty is person in actual possession, and defendant who was mere stranger to title cannot question title of plaintiff in possession.

9. Ejectment 🔑9(4), 10

Title by adverse possession will support ejectment, and generally prior possession alone is sufficient as against defendant who has no better right or title.

10. Appeal and Error 🔑1056(1)

In action for damages for wrongful possession of unpatented mining claim, court did not commit prejudicial error in excluding record of transactions showing change of ownership which occurred long after defendants entered upon the property.

11. Appeal and Error 🔑1056(1)

Mines and Minerals 🔑51(3)

In action for damages for wrongful possession of unpatented mining claim by highway construction companies, exclusion of testimony of abstractor that no proof of labor had been recorded to show that assessment work had been performed on unpatented premises for continuous period of 34 years, and of testimony that prior to time plaintiff received deeds Federal Power Commission issued permit granting another right to enter on unpatented land for power purposes, all offered to show abandonment of property was neither error nor prejudicial since proof of no assessment work was insufficient alone to show abandonment.

12. Mines and Minerals ⚿23(7)

An original location of mining claim may remain valid and not subject to forfeiture or relocation, although locator fails to perform annual assessment work where he, his heirs, assigns, or legal representatives enter and resume necessary work before third person makes relocation.

◆

Frank H. McAuliffe, Sacramento, Loyd E. Hewitt, Yuba City, for appellants.

Goldstein, Barceloux & Goldstein, Chico, (F. R. Crable, Chico, of counsel), for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff brought this action to recover possession of real property and for damages. It was alleged that plaintiff was the owner and entitled to possession of certain mining property located in Plumas County; and that on or about May 1, 1948, defendants entered upon the premises and ousted the plaintiff therefrom. Damages were asked as follows: $100 per day during the wrongful possession; $50,000 for waste; $100,000 exemplary damages. The jury returned a verdict for plaintiff in the sum of $25,600 actual damages, and $17,400 exemplary damages.

Defendants made a motion for a new trial, and the court ordered that a new trial be granted unless plaintiff consented that the amount of compensatory damages be reduced to $15,000 and the amount of exemplary damages be reduced to $12,000. Plaintiff filed his consent to such reduction and the motion for a new trial was denied. Defendants have appealed from the judgment and from the order denying their motion for a new trial.

Defendants and appellants attack the judgment upon two main grounds: (1) That the evidence is insufficient to sustain the damages awarded; and (2) that the court committed prejudicial error in excluding certain evidence offered by them.

[1] Before discussing these contentions we shall summarize briefly the factual situation as shown by the record, bearing in mind the familiar rule that conflicting evidence must be construed in the light most favorable to the respondent.

Respondent acquired the mining claim consisting of approximately 10 acres of patented land and 50 acres of unpatented land on November 14, 1947, by quitclaim deeds executed by W. M. Cleaveland and Lena Cleaveland, his wife. Plaintiff thereafter paid taxes on the property and filed proof of labor on the unpatented land. The plaintiff performed considerable work on the claim. He used a bulldozer to dig a trench across the lower bar in order to pick up the old channel and to remove overburden. A road was built into this trench. Other work consisted of a roadway into the premises, construction of a cabin at a cost of $1000, and construction of a sediment basin and sluice box.

The appellants were engaged in reconstructing a portion of the Feather River Highway. They moved upon a portion of the premises in question early in May, 1948, during the absence of respondent, using some six acres of the unpatented land for a construction and maintenance yard and office. Respondent first learned that appellants had occupied the premises upon his return on May 15, 1948.

The appellants leveled a portion of the premises, constructed a powder magazine, and used the premises for general construction purposes. Appellants occupied the premises for sixteen months.

There is evidence that appellants' operations injured the land. Considerable debris remained on the premises after appellants vacated. Oil spots were on the property which hamper mining operations. The leveling increased the overburden on portions of the property. Witness Grime, a civil engineer, testified that approximately 3000 yards of dirt had been placed on the upper bar, and that the removal cost would be $1750. However, the issue of waste or permanent damages is of little importance upon this appeal as the only issue as to compensatory damages submitted to the jury was the reasonable value of the use of the land during the period of hostile occupancy.

Two licensed real estate brokers testified that the rental value of the premises was $1600 per month during the period appellants were in possession. This figure was based upon the rental of the premises for trailer space. During the period involved there was a great demand for trailer space and cabin sites due to construction activities in the Feather River region.

Appellants contend that the testimony of rental income could not be used as a basis for damages for two reasons. First, the respondent testified that he intended to use the property for mining purposes, and therefore he could not mine the land and use it for trailer space at the same time. Secondly, appellants objected to the testimony on rental value upon the ground that there was "no showing that this particular property can be, or is, available for rental." In this connection, it is argued that the locator of an unpatented mining claim is only entitled to the use of the land for mining purposes. Appellants cite Note 86 to Title 30 U.S.C.A. § 26: "Possession of a mining claim in accordance with the provisions of this section confers the right on a locator to work such claim for precious metal, but confers no right to take timber or otherwise make use of the surface except as may be necessary for mining purposes." Also cited is United States v. Rizzinelli, D.C., 182 F. 675. In that case the defendants were convicted of operating a saloon within the limits of a national forest without a use permit. The court stated, 182 F. at page 682: "* * * [C]onsiderations pertinent to the construction of private grants and contracts clearly lead to the conclusion that the right of enjoyment which Congress intended to grant extends only to mining uses. The general purpose of the mineral laws is well understood; it was to encourage citizens to assume the hazards of searching for and extracting the valuable minerals deposited in our public lands"; and 182 F. at page 684: "Holding, therefore, that the right of a locator of a mining claim to the 'enjoyment' of the surface thereof is limited to uses incident to mining operations, no serious difficulty is encountered in reaching the further conclusion that forest reserve lands embraced in a mining claim continue to constitute a part of the reserve, notwithstanding the mineral location, subject, of course, to all the legal rights and privileges of the locator. * * *"

Respondent distinguishes the Rizzinelli case upon the ground that it was a criminal action, and that a trespasser on a mining claim is not in the same position as the sovereign and holder of the paramount title. The precise holding of the Rizzinelli case was that a mining claim within forest reserve lands was subject to regulations and laws pertaining to the reserve in general, and that no exemption could be claimed by the locator or holder of the claim. Respondent also cites Note 85 to Title 30 U.S.C.A. § 26, which provides: "The exclusive right of possession given the locator by this section carries the right to possession of the timber, soil, country rock, percolating waters, natural springs, * * * and every appurtenant belonging to the realty, and does not mean the right to use the surface for mining purposes only, but means an absolute sale when the terms and conditions are complied with." 58 C.J.S., Mines and Minerals, § 60, p. 113, provides: "Generally speaking the ground included within the boundaries of a valid location is withdrawn from the public domain and the right to its possession is vested exclusively in the locator during the period of his compliance with governing regulations."

[2, 3] We believe that as between the parties to this action respondent's use of the claim, including the use of the surface, was not limited to mining operations and the activities incidental thereto. As was said in Watterson v. Cruse, 179 Cal. 379, at page 382, 176 P. 870, at page 872: "While the paramount fee remains in the government until it has issued its patent, yet as to everyone else—'the estate acquired by a

perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee.' 2 Lindley on Mines, 3d Ed., § 539; Merritt v. Judd, 14 Cal. 59; Hughes v. Devlin, 23 Cal. 501; Buchner v. Malloy, 155 Cal. 253, 100 P. 687." See, also, Chittim v. Belle Fourche Bentonite Products Co., 60 Wyo. 235, 149 P.2d 142, 148.

[4, 5] We are not here concerned with a controversy between the holder of the paramount title, the United States Government, and the respondent, the locator of the mining claim, as to the extent of the respondent's right to the use of the said property. Under the authorities cited, the locator of a mining claim has the right to the exclusive use of the surface of said mining claim, and if someone else dispossesses him and makes use of the surface of said claim we see no escape from the conclusion that the trespasser is liable for the reasonable value of the use of said property, together with any other damage that said trespasser may have caused to the locator. If this were not so the locator's right to the possession of his claim would indeed be a precarious one.

Appellants next contend that they were guilty of no acts which would entitle respondent to an award for exemplary damages. Under the provisions of section 3294 of the Civil Code, exemplary damages may be awarded where a defendant has been guilty of "oppression, fraud, or malice, express of implied". Respondent did not contend at the trial, and does not now contend, that appellants were guilty of fraud, but respondent does contend that the actions and conduct of appellants toward respondent were both oppressive and malicious.

Appellants do not argue that the sum of $12,000, as modified by the court, is too high or that it is disproportionate to the compensatory damages, but only that no exemplary damages whatsoever should have been allowed.

Appellants argue that the evidence shows good faith on their part in that, when they selected the site for their yard and office, there was nothing to show the identity of respondent or the extent of his claims. They assert that the record shows that before entering the premises and leveling a portion of it, their superintendent consulted the U. S. Forest Service and the resident engineer of P. G. & E. and were assured by the Forest Service that P. G. & E., from whom appellants had already secured permission to enter, had control of the area. They state further that when respondent returned to the property on May 15, 1948, and asserted his claims, they suggested that he submit a lease to them for their consideration, but that after respondent had submitted a lease to them they refused to execute it because they were acting upon information which reasonably assured them that respondent had no rights in the premises. There is, however, evidence in the record to justify the conclusion that appellants entered the premises before they consulted the Forest Service, and it also appears from the record that there were three no-trespassing signs posted on the property with respondent's name and address written thereon; that respondent's deed to the property was of record in the office of the County Recorder. The record shows further that appellants built and maintained a powder magazine within 200 feet of the respondent's cabin and removed it only after they had been ordered to do so by the court; that no toilet facilities were constructed for appellants' workmen who used the yard; that some of respondent's lumber near his cabin was run over and broken by appellants' tractors. The record shows further that on one occasion respondent was in his cabin and the following occurred:

> "[Mr. Barceloux] Q. What occurred? A. A bulldozer came rattling up the front walkway toward *and* cabin and I ran to the door, took a look at the bulldozer. It was coming right on up with the blade raised. So I picked up a shotgun, put some buckshot in it, stepped out on the porch. And the bulldozer kept right on coming so I pulled a bead on the operator, and he finally looked up and saw me with a shotgun so he abruptly stopped.

> I walked down to the side of the bulldizer, and the bulldozer did have 'Piambo Construction Company' painted on the side of it. * * * When he stopped, the blade was within six or eight inches eitherway of being exactly eight feet from the porch of the cabin."

There is also evidence that on one occasion the general superintendent of appellants waved a hand in the direction of respondent's cabin and said, "I am not going to give that —— — — ——— a dime."

[6] In view of the foregoing, and of other evidence in the record, we are compelled to hold that the implied finding of the jury that appellants were guilty of both oppression and malice finds ample support in the record. It is fairly inferable from the record that appellants needed a site for their yard and headquarters, that they decided that the property in controversy was just what they wanted, and that they regarded respondent's claims and rights as of little importance. Even if they believed that respondent was occupying the property without any right to do so, they were hardly justified in acting as the record shows they did act in this case.

It is next contended that appellants should have been permitted to show that respondent was not the holder of the legal title to the property in question and that such title was held by Agnes M. Cleaveland.

Appellants offered the testimony of Mr. Clough given at the first trial and the certified copies of the records found by him in the Recorder's office of Plumas County to show that plaintiff was not the owner, and as proof of abandonment. They contend that this testimony would show: (1) That Agnes M. Cleaveland was the true owner of the claim; (2) that she conveyed to P. G. & E. the patented portion on January 17, 1949, the unpatented portion on August 3, 1949, and assigned to P. G. & E. on August 3, 1949, all causes of action with respect to said property; (3) that appellants obtained on September 18, 1950, a release from P. G. & E. from any and all claims arising out of their entry upon said land.

Respondent points out that appellants had no claim or right to the premises at the time of entry. The following appears at page 495 of the Reporter's Transcript:

> "The Court: Is it your claim * * * that at the time you went in there that you had anything from the P. G. & E. or that the P. G. & E. had anything from Agnes Cleveland?
>
> "Mr. Hewitt [Counsel for appellants]: We don't claim that they had anything from Agnes Cleveland at the time we went in there. We claim that we had the right to go in there under the consent of the P. G. &. E., first under their Power Withdrawal, and that the only person that could have complained of our going in there was Agnes Cleveland herself, because we claim that this defendant did not have possession and did not have title."

Appellants concede the following principle of law: (1) That defendant in a trespass action may not defend on the basis of title in a third person unless he can connect himself with that title; (2) title acquired after the commission of a trespass does not in and of itself afford a defendant any protection because the conveyance of the title does not constitute an assignment of prior causes of action.

Appellants argue, however, that by showing title in a third person, the damages to respondent's interest would have been restricted, and the possibilities of double recovery against appellants would not occur. They state in their brief:

> "This proof of title in a party other than plaintiff would not in and of itself defeat plaintiff's entire cause of action, but it would force Smpardos to rely solely on possession. And the jury could properly conclude that Smpardos had *possession of nothing but the cabin, thereby confining the claim for damages to those rising out of alleged ouster of possession of the cabin.* In addition, the proof of title in a third party might help to bring the jury down to earth on the question of damages."

The cases cited to support these contentions hold that damages can only be awarded to the extent of the plaintiff's interest, i.e., damages upon proof of possessory interest only does not include an award for permanent injury to the freehold. The rule of these cases was followed by the trial court in the instant case. Under instructions to the jury respondent's claim to the premises and to damages rested upon proof of prior possession. The measure of damages applied was the value of the use of the property during the time it was occupied by appellant, which would be compensation for the possessory interest of the respondent.

[7–9] It is undisputed that respondent was in the peaceful possession of the mining claim when appellants entered and established their camp and headquarters. Respondent contends, correctly, that prior peaceful possession is sufficient to maintain the action of ejectment against one who enters as a trespasser. In Lightner Mining Co. v. Lane, 161 Cal. 689, 694, 120 P. 771, 773, an action to recover damages for the removal of ore, the court stated: "It is a well-settled proposition that the proper party plaintiff in an action for trespass to real property is the person in actual possession. * * * A defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land." In 28 C.J.S., Ejectment, § 18, p. 862, it is stated: "Title by adverse possession will support ejectment; and generally prior possession alone is sufficient as against a defendant who has no better right or title."

[10] We are of the opinion that upon the record in the instant case the court did not commit prejudicial error in excluding the records of transactions which occurred long after appellants had entered upon the property.

[11] Appellants contend, also, that they should have been permitted to show an abandonment of the property and that, during the period of abandonment, the lands were withdrawn by the federal government and set aside for power purposes. The appellants offered the testimony of L. L. Clough, an abstractor, that no proof of labor had been recorded to show that assessment work had been performed on the unpatented premises for a continuous period of 34 years, from 1914 to 1948, and that prior to the time respondent received deeds to the property the Federal Power Commission issued a permit to the P. G. & E. Company granting it the right to enter upon the unpatented land for power purposes. We do not believe that the court erred in sustaining the objection to this testimony or that appellants were prejudiced by its exclusion.

[12] Proof of no assessment work prior to the purchase of the property would be insufficient in itself to show an abandonment, and failure to do assessment work has only the effect of throwing the ground open to location by another party, and where work is resumed, as here, before other rights intervent, prior failure to do assessment work is immaterial. 58 C.J.S., Mines and Minerals § 77, p. 137, states: "An original location may remain valid and not subject to forfeiture or relocation although the locator fails to perform the annual assessment work where he, his heirs, assigns, or legal representatives enter and resume the necessary work before a third person makes a relocation."

The Power Permit (Exhibit JJ) gave P. G. & E. rights to enter the premises for power purposes only, and such permit was not a grant in fee with the right in P. G. & E. to grant appellants permission to use the area as a maintenance yard. It appears from the record that most of the upper bar is and will remain above the flood line resulting from the dams constructed in the canyon.

No other points raised require discussion. In view of the foregoing the judgment and order are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

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BRUMMUND v. CITY OF OAKLAND et al.

No. 15028.

District Court of Appeal, First District, Division 1, California.

May 16, 1952.

Hearing Denied July 10, 1952.

Petition by Helen K. Brummund against the City of Oakland, a municipal corporation, and others, for a writ of mandate requiring the defendants to pay a refund to the petitioner of moneys deducted from her husband's salary as a fireman for the City of Oakland and contributed to the Firemen's Relief Fund. The Superior Court for the County of Alameda, Ralph E. Hoyt, J., rendered judgment for the petitioner and the defendants appealed. The District Court of Appeal, Bray, J., construed the charter, holding that a retroactive application of an amendment to the charter did not constitute a prohibited payment of public moneys and that a right of refund of contributions was extended to widows of firemen dying before retirement as well as those dying before they were eligible to retire.

Judgment affirmed.

1. Pensions 🔑1

Pension legislation must be liberally construed so that beneficent results thereof may be achieved.

2. States 🔑119

Where a pension right exists increases in the amount payable under such right do not constitute prohibited gifts or "public money".

See publication Words and Phrases, for other judicial constructions and definitions of "Public Money".

3. Pensions 🔑2

A pension is a gratuity only where granted for services previously rendered and which at time they were rendered gave rise to no legal obligation, but where rendered under a pension statute, the pension provisions become a part of the contemplated compensation and hence a part of the contract of employment itself.

4. Municipal Corporations 🔑871

Under the terms of the Oakland city charter with respect to firemen's relief fund, after a member's tenth year of membership in the department, his widow had a "pensionable status" and she would have been entitled to $1,000 upon his death, and an amendment which merely changed the amount that she might receive, by providing that a member dying from nonservice connected causes, should be entitled to a refund of all sums contributed to the fund, was not a prohibited gift of "public money". St.1943, p. 3327, § 104(2).

5. Criminal Law 🔑988

Courts ordinarily should not consider a theory of the case not mentioned in the trial court and which is presented for the first time on appeal.

6. Appeal and Error 🔑762

The Appellate Court does not approve of the practice of presenting in a closing brief for the first time a point that might be conclusive of the entire case.

7. Statutes 🔑219

Construction of a statute by officials charged with its administration must be given great weight.

8. Municipal Corporations 🔑200(6)

Under the provisions of the Oakland city charter with respect to firemen's relief fund, if a fireman has had ten years of service and then dies, his widow is entitled to receive $1,000 no matter what amount he has paid into the fund, and regardless of service, right of refund is extended to widow of fireman who dies before retirement, as well as to those who die before they are eligible to retire. St.1941, p. 3399, § 104(1); St. 1943, p. 3327, § 104(2).

9. Municipal Corporations 🔑200(1)

A liberal construction should be given the provisions of the Oakland city charter with respect to the firemen's relief fund. St.1941, p. 3399, § 104(1); St.1943, p. 3327, § 104(2).

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John W. Collier, George M. Cahalan, Oakland, for appellants.

St. Sure & Moore, Oakland, for respondent.

BRAY, Justice.

This appeal from a judgment granting petitioner a writ of mandate requiring the appellants to pay her a refund of certain moneys deducted from her late husband's salary as a fireman of the city of Oakland and contributed to the Firemen's Relief Fund, raises the question of the proper interpretation of section 104(2) of the Oakland City Charter, as amended in 1943, St.1943, p. 3327.

Facts.

There is no dispute as to the facts. Petitioner is the widow of Henry M. Brummund, who was a member of the fire department of the city of Oakland from January 1, 1920, continuously to the date of his death January 30, 1950. He died from nonservice-connected causes. During the whole of his more than thirty years' service payments were deducted from his pay and made in his behalf into the Firemen's Relief and Pension Fund pursuant to the charter provisions hereafter set forth. After his death, petitioner, as his widow, filed a claim with the board of trustees of that fund, asking a refund of all sums deducted from her husband's pay and contributed to the fund, from January 1, 1920, to January 30, 1950, plus simple interest at a rate fixed by the board. The board granted and paid petitioner a refund of all deductions from and after May 4, 1943, plus interest, but denied the refund of any sums deducted prior to that date. Petitioner brought this proceeding to recover those sums. The court found that she was entitled to a refund of *all* moneys paid into the fund from deductions in her husband's pay, and ordered the board to pay her, with simple interest to be determined by the board, the unpaid sums, namely, those deducted from his pay between January 1, 1920, and May 4, 1943.

Statutes.

When petitioner's husband first was employed, section 97 of the Oakland City Charter, Stats.1911, pp. 1551, 1611, provided that members of the fire department should "receive annual compensations, comprising their salaries and an allowance of two (2) dollars per month for the firemen's relief and pension fund * * *." Section 104(9), Stats.1911, p. 1615, provided that the treasurer should retain from the compensation of each member $2 per month and pay it into the fund. Section 97 was amended by Stats.1919, p. 1367, to read (so far as here involved) "There shall be allowed to each member of the Fire Department, in addition to their salaries, the sum of two dollars per month for the" fund. Again, by Stats.1933, pp. 3189, 3192, section 97 was amended to provide that there be deducted from each monthly installment of salary, a sum equal to 5 per cent of such installment, which sum should be retained by the treasurer and paid into the fund. "The city shall contribute the balance necessary to maintain said fund * * *."

In 1943, Stats.1943, p. 3325, section 97 was amended in several respects not important here and broken down into subsections. As amended it provided for a 15 per cent increase in salaries. The above-mentioned portion of section 97 which provided for the 5 per cent deduction from salaries to be paid into the fund was renumbered section 97b and reenacted in almost identical language.

Section 104(2), which is the section to be construed here, as it existed in 1920 when petitioner's husband first joined the fire department, provided that when a member, after ten years of service, died from nonservice-connected causes, his widow would be entitled to the sum of $1000. St.1919, p. 1371. In 1943, Stats.1943, p. 3327, and in effect at the date of death, section 104(2) was amended to read: "When a member of the Department shall die from [nonservice-connected] causes * * * after ten years of service, then his widow * * shall be entitled to the sum of One Thousand (1,000) Dollars; provided, further, when a member * * * shall die from [non-service-connected] causes * * * before retirement or eligibility for retirement, regardless of length of service, then his widow * * * shall have and receive *a refund of all such sums as have been deducted from his pay and contributed to the Firemen's Relief and Pension Fund, plus simple interest at a rate fixed by the Board of Trustees.* When a member of the Department dies at such time as to qualify under both provisions of this subdivision, the person or representative entitled to receive the payment or refund herein provided *shall elect whether the One Thousand (1,000) Dollar payment or the refund of salary deductions shall be received,* but in no event shall both be paid on account of the same death." *

As the section states that in the event of the death of a member under the circumstances therein set forth, his widow shall elect whether to receive $1000 or the "refund of *all* such sums as have been deducted from his pay and contributed to" the fund, it is obvious that this would include the sums paid before the amendment as well as after, unless there is some legal reason why the section cannot be made retroactive in that sense. Appellants contend that the amendment operates only prospectively, that the deductions from pay paid into the fund were not contributions but public moneys, and that to give the amendment a retroactive effect would be making a gift of public moneys and therefore illegal.

Does Retrospective Application of the Amendment Constitute a Gift of Public Moneys?

[1] Appellants rely principally upon Goodwin v. Board of Trustees, 72 Cal.App.2d 445, 164 P.2d 512. There was involved section 101½ of the charter which was added in 1943 at the same time section 104 (2) was amended as above set forth. Section 101½ provided that any member who resigned or was discharged prior to retirement would have refunded all sums which "pursuant to the provisions of Section 97b" were deducted from his pay and contributed to the fund. Prior to the enactment of that section there was no provision for the refund of any moneys to a fireman resigning or being discharged. The court in interpreting section 101½ held that it acted only prospectively and did not entitle Goodwin, who had been a member of the fire department since 1933 and who resigned May 31, 1943, to the refund of any sums deducted from his pay prior to the effective date of that section, May 4, 1943. The decision was on two grounds: (1) that, as section 101½ provided resigning members refunds of sums deducted from their salaries under the provisions of section 97b and as there was no section 97b prior to the carving of 97b out of section 97 in 1943, at the same time as the enactment of section 101½, it was obvious that the Legislature intended that the refunds could be only of deductions thereafter made. Secondly, the court held that no *right* in a member to a refund of any kind, nor any obligation on the part of the city to make such refund, when the deductions were paid into the retirement fund, had been provided for resigning members prior to the enactment of section 101½, and that the moneys paid into the fund, because of no provisions for refund, were not trust moneys belonging to the firemen, but public moneys of the city. It then said, 72 Cal.App.2d at page 452, 164 P.2d at page 516: "If no obligation existed between 1933–1943 to make such refunds, and it has already been so held, it is too clear to require further comment that for the city to assume an obligation to pay for services after they are rendered when no obligation existed at the time of rendition, would be to violate the provision of the Constitution prohibiting gifts of public funds." But the Goodwin case is clearly distinguishable from ours. As to the first ground of the decision, the right to refund relied on there and given by the new section was expressly limited to moneys which under the newly enacted section 97b were deducted from the firemen's pay. In our case the refunds provided by section 104(2) are in no wise limited to those deducted pursuant to the provisions of any particular section but "of all such sums as have been deducted" from the firemen's pay and contributed to the fund. Thus there is no apparent intention of the Legislature to limit the refunds to sums deducted at any particular time. In determining whether section 104(2) is to apply only to moneys deducted after its enactment date, the rule set forth in Cordell v. City of Los Angeles, 67 Cal.App.2d 257, 266, 154 P.2d 31, 36, must be borne in mind: "Neither can we be unmindful of the rule

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* Unless otherwise noted, all emphasis added.

so firmly established in this state that pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved. Pension provisions in our law are founded upon sound public policy and with the objects of protecting, in a proper case, the pensioner and his dependents against economic insecurity. In order to confer the benefits intended, such legislation should be applied fairly and broadly."

[2] As to the second point of decision in the Goodwin case, the court's determination that to apply the new section retroactively would amount to a gift of public moneys was based on the fact that prior to its enactment there was no right in a resigning fireman to a refund. The right being granted was a new one and could only apply to the future. But in our case the right under consideration, namely, the right of a widow to a payment on the death of her husband from non-service-connected causes had existed all the time petitioner's husband had been a member. Prior to 1943 the *amount* she would be entitled to under this *right* was only $1000. In that year the amount was changed. Instead of raising the $1000 to a flat sum or some other amount, the Legislature gave her the choice of taking the $1000 or a refund of the moneys which her husband had paid into the fund, in effect, whichever was larger. The fact that this right existed brings the case under the rule that where a pension right exists, increases in the amount payable under such right do not constitute gifts of public money. Such rule was applied in Home v. Souden, 199 Cal. 508, 250 P. 162. There the husband of the petitioner was killed in the line of duty as a member of the Los Angeles Fire Department. Under the then existing state law, which provided for the creation of a firemen's pension fund, his widow was entitled to a pension equal to one-third the amount of salary attached to the rank which her husband held in the department at the time of his death. She was granted such pension. About six years later a city ordinance was adopted creating a commission and providing for the establishment of a pension fund, and providing that the commission was authorized to continue payments to persons already receiving pensions under the state law. Later, the ordinance was amended to provide, in effect, that the widow's pension should be a sum equal to one-half of the amount of salary her husband would have received were he still a member of the department. The commission refused to pay the widow an amount equal to more than one-third of the salary her husband was receiving at the date of his death. She thereupon sought a writ of mandate to compel the payment of the amount provided in the amended ordinance. The commission contended that the amendment could only be given prospective operation, that is, could only be applied to widows of firemen dying after the amendment took effect, as otherwise the commission would be making an invalid gift of public moneys. The court held that the widow was entitled to the increased pension and that the contention that the increase amounted to a gift or gratuity and rendered the amendment void was not a valid one.

A case quite similar to ours is Sweesy v. Los Angeles, etc., Retirement Bd., 17 Cal. 2d 356, 110 P.2d 37, 38, where the question was "whether the widow of a retired pensioner is entitled to a widow's pension rights created by an amendment adopted after the retirement but before the death of the retired member of the pension system.

"Prior to the amendment of 1937, the act made provision for pension payments to surviving widows of pensioners who became retired by reason of disability ensuing from service. The 1937 amendment purports to extend the provisions for widows' pensions to widows of members retired by reason of age and years of service * *.

"It is contended on the part of the respondents that in order to avoid constitutional invalidity the amendment may operate prospectively only; and that such prospective operation contemplates pensions to surviving widows of pensioners only who were in active service at the time of the adoption of the amendment, that is, members who were in active as distinguished from retired service, or who later entered such active service. It is argued that if the amendment by the prescribed retroactive operation grants a pension to the widow in this case, it amounts to a gift of public money and is in violation of constitutional prohibitions * * *." 17 Cal. 2d at pages 358–359, 110 P.2d at page 38.

[3] In deciding against these contentions the court quoted from O'Dea v. Cook, 176 Cal. 659, 169 P. 366: "'A pension is a gratuity only where it is granted for services previously rendered, and which at the time they were rendered gave rise to no legal obligation. * * * But where, as here, services are rendered under * * * a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself.'" The court then said, 17 Cal. at pages 361, 363, 110 P.2d at page 39: "It must be accepted as the settled law of this state that unless the contrary intention plainly appears persons having a pensionable status are entitled to receive any increase of benefits which may be provided. * * * That the widow's pension affords a benefit to the pensioned member cannot be gainsaid. A pensioned member, as has been held, is as much entitled to increased benefits of the pension system as is any other member, unless the legislative body clearly indicates that such application is contrary to its intention. A provision for a pension to his widow obviously benefits the member's economic status in a way similar to an increase of his wages or pension. The problem cannot be solved merely by stating as a proposition that a provision will not be upheld which purports to grant a pension after the completion of the services for which the pension is contemplated as additional compensation. The law is well settled that additional benefits may constitutionally be provided for members of the system who have acquired a pensionable status. * * This state and other states [citations], recognize that increased benefits to one already having a pensionable status are constitutional and economically appropriate."

[4] In our case, at all times after her husband's tenth year of membership in the fire department, petitioner had a "pensionable status." She would have been entitled to $1000 upon his death. The amendment merely changed the amount that she might receive. While it was held in the Goodwin case, 72 Cal.App.2d at page 451, 164 P.2d at page 516, that "The moneys paid into the fund were not trust funds belonging to the firemen, but public moneys of the city", such fact does not constitute the payment from such funds or the refund thereof to the widow a gift or gratuity any more than the payment of the $1000 would. As said in the Sweesy case, supra, a pension is not a gratuity when based on services rendered under a pension statute. The pension provisions are a part of the contemplated payment for those services and in a sense a part of the contract of employment itself. Thus, petitioner's husband rendered services as a member of the fire department under a pension statute giving his wife a "pensionable status" which was a part of his contract of employment.

Appellants contend that there has been an administrative interpretation of section 104(2) by the board and that we should take that interpretation into consideration. This contention is based on exhibits which show that two applications for refunds were made by widows of police officers under section 96(2) of the charter, which is identical in language with section 104(2) except that it applies to widows of police officers. However, in both instances, apparently because of a misinterpretation of the decision in the Goodwin case, the applications were withdrawn without any action by the board. Hence there was no administrative interpretation.

Was Petitioner Entitled to Any Refund at All?

[5–6] In their closing brief appellants for the first time raise the point that under section 104(2) as amended in 1943 petitioner is not entitled to any sum other than the $1000. The section first states that where a member dies *after ten years of service* from non-service-connected causes, his widow shall receive $1000 "provided further" that if he dies "before retirement or eligibility for retirement," *regardless of* *length of service,* his widow shall receive a refund of all sums deducted from his pay. Appellants contend that this means that as petitioner's husband died *after* ten years of service and *after* eligibility for retirement, petitioner can bring herself only within the first or $1000 clause. In other words, say they, the payment of the refund can be made only to the widow of a fireman who has not retired and is not eligible for retirement. It is rather late, to say the least, to raise this contention for the first time in the closing brief. The board did not raise it when they paid petitioner, not the $1000, but a refund of the moneys deducted from her husband's pay from May 4, 1943, the effective date of the amendment, until his death, a period of almost seven years. In its answer appellants admitted that petitioner is entitled to a refund of all deductions from and after May 4, 1943. The case was tried and decided solely on the issue of whether petitioner was entitled to a refund of the deductions made prior to that date, and in their opening brief in this court appellants stated that that was the "single issue." Courts ordinarily should not consider a theory of the case which was not mentioned in the trial court and which is presented for the first time on appeal. See Levitt v. Glen L. Clark & Co., 91 Cal.App.2d 662, 205 P.2d 747; Marra v. Aetna Construction Co., 15 Cal.2d 375, 101 P.2d 490. However, inasmuch as an attack is made upon a provision of the charter, we feel it necessary to consider the point, particularly as we have given petitioner an opportunity to brief the subject. We do not approve the practice of presenting in a closing brief for the first time a point which might be conclusive of the entire case.

[7–9] In interpreting the section the interpretation placed upon it by the board is of some importance. "The construction of a statute by the officials charged with its administration must be given great weight, for their 'substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute.'" Whitcomb Hotel, Inc., v. Cal. Employment Commission, 24 Cal.2d 753, 756–757, 151 P.2d 233, 235, 155 A.L.R. 405. As set forth above the board interpreted the section contrary to its contentions here. Appellants' interpretation would mean that the widow of firemen dying after retirement or eligibility for retirement could not receive refunds. If that were the intention, why use the language "retirement or eligibility for retirement"? It would be sufficient to say merely "before eligibility for retirement," as obviously a fireman could not retire if not eligible. It would penalize a fireman who had paid into the fund more than $1000 and who did not retire the very moment he was eligible to retire, by depriving his widow of the right to the refund of the excess over $1000 deducted from his pay. No good reason appears for doing this. The proper construction of the section is that if a fireman has had ten years service and dies his widow receives $1000 no matter what amount he has paid into the fund. On the other hand, regardless of service, the right of refund is extended to the widows of firemen who die before retirement as well as to those who die before they are eligible to retire. The conjunctive "or" is used and not "and." Appellants' contention is that the section should be read that the refund to widows applies only to members who die before retirement *and* members who die before eligibility for retirement. Section 104(1), St. 1941, p. 3399, provides protection where the member dies in line of duty. Section 104 (2) provides protection where the member dies from non-service-connected causes. A reading of the act indicates that there was no intention to bar widows whose husbands were eligible for retirement but who had not seen fit to retire. The board of trustees of the pension fund have so interpreted it. A liberal construction, not a narrow one, should be given in accordance with the rule ordinarily used in construing pension legislation. See McKeag v. Board of Pension Comm'rs, 21 Cal.2d 386, 390, 132 P.2d 198.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

111 Cal.App.2d 156

PEOPLE v. MONTEVERDE.

Cr. 2751.

District Court of Appeal, First District,
Division 2, California.
May 16, 1952.
Hearing Denied June 11, 1952.

Defendant was convicted in the Superior Court, County of Alameda, O. D. Hamlin, Jr., J., on three counts of burglary, and he appealed from judgment of conviction and order denying new trial. The District Court of Appeal, Goodell, J., held that there was sufficient evidence to corroborate testimony of accomplices upon whose testimony case was based.

Judgment and order affirmed.

1. Criminal Law 🔑780(3)

In burglary prosecution, instruction that witness to whom defendant had sold allegedly stolen property was not an accomplice and that rule requiring corroboration does not apply to testimony of such witness was proper, in absence of evidence of understanding or agreement in advance of burglaries that witness would buy any of stolen property.

2. Criminal Law 🔑507(5)

Generally, thief and receiver of stolen property are not accomplices.

3. Criminal Law 🔑742(2)

In prosecution for burglary, evidence on question of whether witness who testified against defendant and who had received stolen property from defendant advised and encouraged commission of burglaries was insufficient to raise issue of whether witness was accomplice.

4. Criminal Law 🔑780(3)

In burglary prosecution, requested instruction that person is an accomplice although not present at scene of crime was properly refused in absence of evidence that witness who testified against defendant and who had received stolen property from defendant had made agreement in advance to buy stolen goods.

5. Criminal Law 🔑810

In burglary prosecution, instruction giving to jury process that they should use in determining whether or not testimony of an accomplice has been corroborated, and instruction that two witnesses were accomplices and that a third witness was not an accomplice and that rule requiring corroboration does not apply to testimony of that witness, were not conflicting.

6. Criminal Law 🔑1172(2)

In burglary prosecution, while court should have given statutory definition of corroborative evidence as additional evidence of a different character, to same point, four given instructions giving jury concrete illustrations of independent evidence in an incisive way substantially informed jury of meaning of corroborative evidence and were not prejudicially erroneous. Code Civ.Proc. § 1839.

7. Criminal Law 🔑511(7)

Defendant's own statements and admissions made in connection with other testimony may afford corroboratory proof sufficient to sustain a verdict.

8. Larceny 🔑64(1)

Unexplained possession of stolen property is circumstance tending to prove guilt.

9. Criminal Law 🔑511(4)

Owners' identification which established that certain property was stolen, fact that defendant's possession was unexplained, and testimony of witness that he purchased all of such property from defendant, tended to connect defendant with commission of offense of burglary and was sufficient evidence to corroborate testimony of defendant's accomplices against defendant in burglary prosecution. Code Civ.Proc. § 1839; Pen.Code, § 1111.

10. Criminal Law 🔑511(4)

Evidence to corroborate accomplice's testimony may be gathered from defendant's own conduct and attitude while testifying. Code Civ.Proc. § 1839.

11. Criminal Law 🔑511(1)

Corroborative evidence in case where guilt of an accused is sought to be established by accomplice testimony need not be strong, nor need it even be sufficient in itself, without aid of other evidence, to establish facts. Code Civ.Proc. § 1839.

12. Criminal Law 🔑511(1)

In burglary prosecution, wherein guilt of defendant was sought to be established by accomplice testimony, there was sufficient evidence to corroborate testimony of accomplices. Code Civ.Proc. § 1839.

13. Criminal Law 🔑822(12)

Where, in burglary prosecution based on accomplice testimony, court instructed jury that in determining whether testimony of accomplice has been corroborated jury must assume to remove from case testimony of accomplice and examine all of the evidence to determine whether evidence remains tending to connect defendant with commission of "any offense", but just before instruction court read to jury charging part of three counts, and following such instruction court charged jury using words "each alleged offense" and read to jury in their entirety six forms of verdict, two on each count, jury could only have taken words "any offense" to mean any of three offenses alleged in information, and hence such instruction was not reversibly erroneous.

14. Larceny 🔑64(1)

Unexplained possession of stolen property is a circumstance to be considered by jury in connection with other evidence to determine question of innocence or guilt.

15. Burglary 🔑46(7)

In burglary prosecution, sentence in instruction that if jury finds evidence that burglary was committed and that thereafter defendant was found in possession or claimed to be owner of stolen property, such fact would be circumstance tending in some degree to show guilt, although not sufficient standing alone and unsupported by other evidence to warrant finding of guilt, was proper under the evidence.

16. Criminal Law 🔑785(8)

In burglary prosecution, instruction that jury is sole and exclusive judge of effect and value of evidence and credibility of witnesses, and that character of witnesses as shown by evidence should be taken into consideratioin in determining credibility, whether or not they have spoken truth, was proper, notwithstanding there was no character evidence offered by either side.

17. Criminal Law 🔑1178

Where defendant did not on appeal call to attention of the court any injustice or unfairness resulting from failure to use certain language in instructions, District Court of Appeal would not search record and would disregard such assignment.

18. Criminal Law 🔑742(2)

Where defendant in burglary prosecution contended that accomplice witnesses testified under coercion from police officers, and defendant entered testimony addressed to such question of claimed pressure and full lee-way was allowed in its development, weight of testimony on issue of coercion was for jury.

19. Criminal Law 🔑1186(4)

Where in burglary prosecution based on accomplice testimony there was unusually strong corroboration of accomplice testimony and instructions as whole were comprehensive, and fair, on examination of entire cause, there was no miscarriage of justice. Const. art. 6, § 4½.

Alfred J. Hennessy, Walter F. Lynch, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., Sacramento, for respondent.

GOODELL, Justice.

This appeal was taken from a judgment of conviction on three counts of burglary fixed by the verdicts as second degree, and from an order denying a new trial. Appellant admitted a prior burglary conviction in 1947 as alleged in the information, on which he served a term of imprisonment. In the instant case he was sentenced to the penitentiary.

All three burglaries were of homes in the Piedmont Pines district in Oakland, in the daytime, while the occupants were absent.

The first burglary was on March 16, 1950, at the Davidson home where the articles taken were a Keystone movie camera, another camera, a revolver, some jewelry and a six-piece silver tea set engraved "R". The second was on April 26, 1950 at the Erickson home, where the articles taken were a television set, jewelry, a fur coat, and a wallet containing money. The third was on May 13, 1950 at the Smith home, where the articles taken were a Gruen wrist watch, two other watches, a ring, a silver bracelet, a camera and $7 in pennies.

Mrs. Davidson, Mrs. Erickson and Mr. and Mrs. Smith testified that no returning to their respective homes they found definite evidence of a breaking and entry and the theft of the articles named.

Appellant presents ten or more contentions on this appeal, all of which revolve around accomplice evidence and instructions respecting it.

Appellant lived in Merced and living there also were two young men named Paul Leus and Clifford Bass, each of whom took part in two of the three burglaries. They testified for the prosecution, and the court instructed the jury as a matter of law that they were accomplices of appellant.

After each burglary the stolen property was taken immediately to San Francisco where it was sold to one Ralph Mayer who also testified for the prosecution, and the court instructed as a matter of law that he was *not* an accomplice.

About three months after the last burglary Mayer was apprehended in Portland, Oregon, brought back to San Francisco and charged with receiving stolen property. He pleaded guilty and was fined $500 and given a suspended penitentiary sentence, with one year in the county jail and three years probation. He had taken to Portland some of the property stolen from the three homes and at the trial the television set, the silver tea set, a bracelet, the Gruen wrist watch and the movie camera were in court and identified by the respective owners. He testified that he had bought all of it from appellant.

The Davidson burglary: Bass testified that he and appellant set out for Oakland from Merced in a green 1935 Oldsmobile sedan, with the avowed purpose of burglary; that they entered the house by the back door and took a tea set and camera (both of which he identified) and an old revolver; that appellant later made a telephone call from Oakland and then drove over to Mayer's house in San Francisco where appellant introduced Bass to Mayer; the property was looked over by Mayer and unloaded in his garage; they then returned to Merced.

The Erickson burglary: Bass also testified that three weeks or a month later he made another trip with appellant from Merced to Oakland in the same car and for the same purpose, this time accompanied by Leus; Leus knocked on the door and there was no answer; Bass drove the car down the hill and in 10 or 15 minutes appellant came out carrying the television set (which Bass identified) with a fur coat over it; they then drove over to Mayer's place as before, where the property was unloaded and sold for from $75 to $100 and the money divided; they "came out with about $30 a piece."

Leus testified that he lived next door to appellant in Merced, and he, Bass and appellant, set out from there for Oakland in a green '35 or '36 Oldsmobile sedan to burglarize a house; he and appellant entered by the lower door; Bass took the car down the hill a short distance; he testified that they took out a television set (which he identified) and some furs and took the property over to Mayer's house where it was sold, and they then returned to Merced.

Leus testified that he made another trip with appellant from Merced to Oakland for the same purpose but in a blue '47 Buick convertible and this time one Jack Key was with them; that they stopped in front of a house and Key stayed in the car. This, we assume, was the Smith home although Leus did not testify as to what was taken. In fact he expressed a doubt as to whether the house was actually entered. Leus testified that they then went over to San Francisco and returned to Merced the next day.

The Smith burglary: Harold I. Smith testified that he left his home on Wilton

Drive about two o'clock on Saturday, May 13, to get some rock for a terrace he was building, and on returning about 30 minutes later a faded royal blue Buick or Oldsmobile convertible was in front of his home. A young man was in it who said they had run out of gas and his friends had gone to get some. Smith entered the house and got something to eat. His wife returned about 3 and found the bedroom in disarray; dresser drawers were open; a box which had contained money was empty; two pocket watches, a Gruen wrist watch, a ring, a bracelet and a camera were missing. He identified the wrist watch engraved "Elizabeth" as his wife's. Mrs. Elizabeth Smith testified that on her return about 2:30 or 3 p. m. she found things missing, among them her Gruen wrist watch, which she identified in court by her name engraved thereon and by nick on the watch. Mayer when shown the watch testified that he had bought it in San Francisco from defendant. Although Leus did not testify as to an entry here, he did testify that appellant had said "Let's get out of here" when a car drove up in front of the house.

Appellant took the stand and denied any connection with the burglaries or the stolen property. He admitted having known Mayer for from 8 to 10 years and that he had introduced Bass and Leus to him, but this, he explained, was in January, 1950, when he called on Mayer, accompanied by both boys, with respect to a St. Bernard pup which Mayer had promised him. He admitted also that on May 13 (which was the day of the Smith burglary) he was in San Francisco and driving Jack Key's blue Buick convertible. The evidence shows that on that day he was tagged in San Francisco for going through a red traffic signal.

Appellant's first point is that there was prejudicial error in instructing that "If the crime of burglary * * * was committed by anyone, * * * then under the evidence in this case and as a matter of law the witness Ralph Mayer was not an accomplice, and the rule requiring corroboration does not apply to the testimony of that witness."

[1, 2] Appellant relies on People v. Lima, 25 Cal.2d 573, 154 P.2d 698, 700, where the defendant was convicted of receiving stolen property on the testimony of the thieves, and the question presented was whether they were his accomplices. The evidence showed that in the early part of the olive season Lima had "agreed to buy all the stolen olives the witness and Larkin could bring in." In the case at bar the stolen property was sold to Mayer, but appellant points to no evidence whatever of any understanding or agreement in advance of the burglaries that he would buy any of it, and we find none. The general rule, restated in the Lima case, 25 Cal.2d at page 576, 154 P.2d at page 700, "that the thief and the receiver of stolen property are not accomplices" fully justified the instruction that Mayer was not an accomplice.

[3] Appellant's second point, which is that there was prejudicial error in not submitting to the jury, sua sponte, the question whether or not Mayer was an accomplice, has just been answered. Under this head appellant quotes Mayer's testimony at great length. He identified the stolen property, piece by piece; said that Monteverde had sold all of it to him; that he had resold the television set in San Francisco and moved the rest of it to Portland, and that he had met Leus and Bass several times with Monteverde. His recollection was that the first time he met Bass was when Monteverde sold the tea set and camera (which would be on or about March 16, 1950). However, appellant does not specify how or why the evidence was, as counsel now claim, susceptible of different inferences as to Mayer's "complicity in advising and encouraging the commission of the burglaries." We find no evidence in the record from which such inference could be drawn. Since appellant did not request such an instruction he apparently did not consider there was any evidence to warrant it.

[4] Appellant's third point is that there was error in not instructing, sua sponte, that a person is an accomplice although not present. If Mayer had made no agreement in advance to buy the stolen goods he

was not an accomplice, and there would be no point at all in injecting into the instructions the abstract question of presence at, or absence from, the scene of the burglary. The jurors would have wondered what it meant and how it was supposed to apply, and it probably would have confused them.

Appellant's fourth point is that there was prejudicial error in giving conflicting instructions as to the requirement that the testimony of an accomplice must be corroborated and that, therefore, it cannot be determined which one was followed. The court instructed that "In determining whether or not the testimony of an accomplice has been corroborated as required by law, you must, * * * assume to be removed from the case the testimony of the accomplice, and then examine all other evidence with a view of determining if there be any inculpatory evidence, that is, evidence tending to connect the defendant with the commission of any offense. If such other evidence does do that, then the testimony of the accomplice is corroborated. If it does not, then there is no corroboration, although the accomplice may be corroborated in regard to any number of facts sworn to by him."

It is said that it conflicted with the following: "If the crime of burglary * * * was committed by anyone, then * * * the witnesses Paul Leus and Clifton Bass were accomplices * * * then * * * the witness Ralph Mayer was not an accomplice, and the rule requiring corroboration does not apply to the testimony of that witness."

[5] There is no conflict since they deal with different subjects. The one last quoted was limited to telling the jury outright, as a matter of law, that Leus and Bass were accomplices; that Mayer was not, and that his testimony required no corroboration. The one first quoted was confined to giving the jury a process for determining whether the testimony of Leus and Bass was corroborated, by removing their testimony for the purposes of the test, and then looking at all the other evidence to see if it connected the defendant with the crime. One told the jury precisely who were accomplices, the other told the jury how to test the corroboration.

Appellant's fifth point is that the court erred in failing to give the jury sua sponte, the code definition of corroborative evidence. Beyond stating the point, appellant does nothing to develop or elaborate it except to quote the definition itself as found in § 1839, Code of Civil Procedure.

"As provided by the Code of Civil Procedure, 'Cumulative evidence is additional evidence of the *same character,* to the same point,' while 'Corroborative evidence is additional evidence of a *different character,* to the same point'." 10 Cal.Jur. p. 690; emphasis added. Admittedly the statutory definition was not given in so many words, and the question is whether by some other means the jury was substantially informed as to the meaning of corroborative evidence. We are satisfied that this was done.

In instructing on stolen property the court said: "In addition to *proof of possession* of such property, there must be proof of corroborating circumstances tending of themselves to establish guilt. Such corroborating circumstances may consist of the *acts, conduct, falsehood, if any, or other declarations, if any, of a defendant, and any other proved circumstance tending to show the guilt of the accused.*" (Emphasis added.) On accomplices, the court instructed: "A conviction cannot be had upon testimony of an accomplice unless it is corroborated by *such other evidence as shall tend to connect the defendant with the commission of an offense* * * *." (Emphasis added.) Again: "The corroboration of the testimony of an accomplice required by law *may not be supplied by the testimony of one or more other accomplices,* but must come from *other evidence or circumstances,* or from the testimony of one or more *witnesses who were not accomplices.*" (Emphasis added.) By telling the jury that accomplices cannot be corroborated by one another the idea was clearly communicated to the jury that the source of their corroboration must be "additional evidence of a *different character,* to the same point."

The same idea is accentuated by the instruction first quoted under the preceding heading respecting the process of removing and excluding all accomplice testimony and then examining all the other evidence independently of it.

[6] We are satisfied that in these four instructions the jury was just as well informed of the meaning of corroborative evidence as it would have been by a mere reading of the statutory definition in the abstract. Instead of a mere abstract verbal definition those four instructions gave the jury *concrete illustrations* of independent evidence. While the language of § 1839 should have been given, no prejudice could have resulted from its omission in view of the incisive way in which these other instructions illustrated "additional evidence of a different character, to the same point" or, in other words, evidence derived from independent sources.

Appellant's supplemental brief cites People v. Sternberg, 111 Cal. 11, 43 P. 201, where the defendant requested, but the court refused, the following instructions: "(1) The jury is instructed that it is their duty to view with distrust evidence of the oral admissions of defendant. (2) The jury is instructed that the evidence of an accomplice is to be viewed by a jury with caution and distrust. (3) By corroborative evidence is meant additional evidence of a different character to the same point." The court held that the first was properly refused but that the second and third should have been given, and reversed the judgment. In discussing the failure to give the last two instructions it is noteworthy that the court pointed out that *"They were not covered by any that were given * * *."* (Emphasis added.) In our opinion, expressed earlier, the four instructions given in this case gave the jury an adequate idea of "additional evidence of a different character, to the same point." There is nothing in the Sternberg opinion indicating that if the failure to define corroborative evidence had been the only error the case would have been reversed, and appellant has cited no case of a reversal on that sole ground. Moreover there the defendant requested the instruction while here he did not.

People v. Dobkin, 74 Cal.App.2d 269, 168 P.2d 729, cited by appellant, was decided by this court. In that case the circumstances shown by the testimony of the complaining witness brought the case squarely within the rule of People v. Robbins, 171 Cal. 466, 154 P. 317, and we held that it was the duty of the court to instruct the jury as a matter of law that he was an accomplice *and reversed for that reason.* The only instruction given in that case which could "be said to define or deal with accomplices and their corroboration" [74 Cal. App.2d 269, 168 P.2d 730] was the following:

> "I instruct you that a conviction of this defendant on charges of violation of Section 286 of the Penal Code cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

In the Dobkin case as in People v. Sternberg, the court not only failed to define corroborative evidence but to instruct *that the testimony of an accomplice should be viewed with distrust*, as we pointed out, 74 Cal.App.2d at page 278, 168 P.2d 729. We pointed out also that the court failed to instruct that oral admissions should be viewed with caution. The reversal, however, was on the ground first stated, namely, *the failure to directly tell the jury that the complaining witness was an accomplice.* The failure to define corroborative evidence was but one of several omissions in the instructions in the Dobkin case.

Appellant in his supplemental brief also cites People v. Swoape, 75 Cal.App. 404, 242 P. 1067, where (as in the Sternberg and Dobkin cases) the court failed to define corroborative evidence. But in the Swoape case, as in the Dobkin case, the court failed also to instruct the jury as a matter of law that Johnson was an accomplice. It also failed to give an instruction on accessories and it erred also in giving an instruction on feigned accomplices. There was a reversal in the Swoape case for these several errors. Moreover, there is nothing in the Swoape opinion to indicate that instructions substantially equivalent (to the omitted definition of corroborative evidence) were given, as they were in the case at bar.

Appellant's sixth point is that the testimony of the accomplices was not sufficiently corroborated as a matter of law, hence the evidence as it stands did not warrant or support the verdicts.

As in other instances in briefing this appeal, appellant's counsel after making the assertion of error or insufficiency do not assist the court by any argument or analysis. While a number of authorities are cited and quoted under this head, still we are not told wherein the corroboration breaks down.

Bass testified that he was with appellant on the Davidson burglary where they got a tea set, a camera, and an old revolver, and he identified the first two articles, which were identified also by Mrs. Davidson the owner. Bass testified that they then went over to Mayer's place. Mayer testified that he bought the property from appellant and there met Bass for the first time. Bass was thus corroborated by Mayer and Mrs. Davidson.

[7] "The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict", People v. Davis, 210 Cal. 540, 558, 293 P. 32, 40, and when appellant admitted that he had introduced Bass to Mayer the jury, sole judges of credibility, might have disbelieved his timing of the introduction as of January, 1950, and his explanation of the St. Bernard pup incident as having been the occasion, and treated appellant's own testimony as corroboration of Bass. Defendant admitted that he had owned a green 1935 Oldsmobile sedan during at least part of the period in question. He testified that he bought it around March 19 (which would be about three days after the Davidson Burglarly). He also admitted knowing Jack Key and testified that Bass had introduced Key to him.

Bass and Leus both testified as to the Erickson burglarly and identified the television set in court. Both testified that they drove with appellant directly to Mayer's place, where he paid from $75 to $100 for that and other property. Mayer testified to that transaction. The boys' testimony was thus corroborated by both Mrs. Erickson and Mayer. With respect to Leus' meeting with Mayer, what has already been said with respect to the introduction of the boys to Mayer by appellant—and how the jury might have viewed the time and occasion of such introduction—applies here as well.

There is less direct evidence in the Smith case than in the other two burglaries, since Leus did not testify that he saw appellant enter the Smith home. That the Gruen wrist watch was Mrs. Smith's was positively established and Mayer testified that he bought it from appellant. While there is no corroboration of Leus up to this point, there is ample corroboration on other important circumstantial details. He testified that he, appellant and Jack Key traveled to Oakland in a blue '47 Buick convertible and that they were first in San Francisco; that the car was stopped in front of the house with Key remaining in the car; that he (Leus) reconnoitered the rear of the house while appellant did so in front; that another car drove up; that appellant then said "Let's get out of here" and they did so. Smith's testimony that when he drove up with the rock he found a royal blue Buick or Oldsmobile convertible in front of his home and was told by its occupant that they had run out of gas, corroborates Leus' description of the car and his testimony that Key remained in the car in front of the house; that another car drove up, and that appellant then ordered a get-away.

Independent evidence given by the Smiths established that their home had been burglarized on May 13 since it showed that about 3 o'clock they found the house in disorder and the Gruen watch and other things missing. The watch was produced in court. Mayer testified that he had bought it from appellant. Independent testimony given by Harold Smith established that a blue Buick or Oldsmobile convertible was stopped in front of his home a few minutes before he and his wife discovered the burglary. Appellant admitted being in San Francisco on that day, in Key's blue Buick convertible. All this evidence is independent of all Leus had to say about coming up to Oakland with appellant and Key in a blue Buick convertible and about the actions of all three at the Smith premises when another car drove up. This circumstantial evidence corroborated Leus' story in many important respects. Piecing together these circumstances the jury might well have concluded (since *somebody* had entered the Smith home) that appellant had entered without Leus having seen him enter.

[8, 9] Mayer's testimony with respect to the purchase of *all* the stolen property from appellant corroborated the testimony of Bass and Leus on the same subject and met the requirement of § 1111 Penal Code that such evidence must "tend to connect the defendant with the commission of the offense". It connected him because (a) by the owners' identification it was established that it was stolen property, and (b) the unexplained possession of stolen property "is a circumstance tending to prove guilt." People v. Porter, 64 Cal.App. 4, 9, 220 P. 20, 22; People v. Braswell, 103 Cal.App. 399, 403, 284 P. 709; People v. Frahm, 107 Cal.App. 253, 265, 290 P. 678, all burglary cases. Moreover, the testimony of Mayer and of the owners of the stolen property, met the negative provision of § 1111 Penal Code that "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." None of it related to such circumstances. It was in every respect "additional evidence of a different character, to the some point." § 1839, Code Civ.Proc.

Appellant at first testified that he came to San Francisco on May 13 in a Packard car, but later admitted that it was Key's blue Buick convertible. Such conflicting testimony of the defendant himself may be used, as we have seen, as corroboration. In People v. Watson, 21 Cal.App. 692, 697, 132 P. 836, 838, the court quotes from People v. McLean, 84 Cal. 480, 24 P. 32, as follows: "Although more is required by way of corroboration than to raise a mere suspicion, * * * yet the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration. People v. Melvane, 39 Cal. [614] 616; People v. Clough, 73 Cal. [348] 351, 15 P. 5." And adds: "It is also held that a necessary corroboration may be furnished by the defendant's own testimony. People v. Sullivan, 144 Cal. 471, 77 P. 1000."

[10–12] The corroboration may be gathered from the defendant's own conduct and attitude while testifying. People v. Todd, 9 Cal.App.2d 237, 241, 49 P.2d 611. The law governing the character of corroborative circumstances in a case where the guilt of an accused is sought to be established by accomplice testimony is the same as in a perjury case, "and that being so, the corroborative evidence need not be strong, nor even be sufficient in itself without the aid of other evidence to establish the fact." People v. Todd, supra, 9 Cal. App.2d at page 241, 242, 49 P.2d at page 613, and cases cited.

Appellant's seventh point is that there was prejudicial error in instructing the jury that in determining whether the testimony of an accomplice has been corroborated they must assume to be removed from the case the testimony of the accomplice and then examine all other evidence to determine whether there remains any evidence tending to connect the defendant with the commission of any offense.

The basis for this claim seems to be that the words "*any* offense" left the jury's inquiry too indefinite.

"Instructions should be given a reasonable, not a close and technical, interpretation, and they should be construed in connection with the evidence and the remainder of the charge. Whether a jury has been correctly instructed is not to be determined from a consideration of parts of an instruction or from particular instructions, but from the entire charge of the court". 8 Cal.Jur. p. 631.

The defendant was charged in one information with three burglaries. The first count covered the Smith home, the second the Davidson home, the third the Erickson home. A minute or two (judging by the transcript) before reading the instruction now under discussion, the court read to the jury the charging part of these three counts, hence they had freshly in mind precisely the three offenses with which the defendant was charged.

Immediately following the instruction now under discussion the jury was given the following: "The mere fact, if it be a fact, that testimony has been corroborated does not mean that you are required to accept it as true. Your duty is to weigh such evidence, as you do all other evidence, and to *require as to each alleged offense charged against the defendant that all* the evidence pertaining thereto, considered together, carries the convincing force required by law before you find the defendant guilty of such charge against him." (Emphasis added.)

Moreover, just before the jury retired the court read *in their entirety* the six forms of verdict, two on each count.

[13] In listening to the instructions *as a whole* the jurors could only have taken the words "any offense" to mean *any of the three offenses alleged in the information,* the charging parts of which had just previously been read by the judge. It would have been natural and reasonable to do so. 8 Cal.Jur. p. 631, supra. They could not have been misled or confused by the words used. The instruction, read as a whole, was understandable.

Appellant's eighth point is that there was prejudicial error in giving the following instruction:

"The mere possession of stolen property, however soon after the taking, unexplained by the person having possession, is not sufficient to justify a conviction. It is, however, a circumstance to be considered in connection with other evidence in determining the question of innocence or guilt. If you should find from the evidence that a burglar was committed on the premises involved in this case, and that thereafter the defendant was found in possession or claimed to be the owner of property stolen from the burglarized premises, such a fact would be a circumstance tending in some degree to show guilt, although not sufficient, standing alone and unsupported by other evidence, to warrant your finding him guilty. In addition to proof of possession of such property, there must be proof of corroborating circumstances tending of themselves to establish guilt. Such corroborating circumstances may consist of the acts, conduct, falsehoods, if any, or other declarations, if any, of a defendant, and any other proved circumstance tending to show the guilt of the accused."

[14] This instruction is composed of five sentences. Appellant cannot complain of the first. He cannot criticize the second since it states a well-settled rule. See People v. Porter, 64 Cal.App. 4, 9, 220 P. 20; People v. Braswell, 103 Cal.App. 399, 403, 284 P. 709; People v. Frahm, 107 Cal. App. 253, 265, 290 P. 678, all burglary cases. In People v. Porter, supra, an instruction which went even further was approved by this court. It read: "* * * the mere possession of stolen property * * * the fruits of a burglary * * * is not presumptive evidence of guilt, but is a circumstance *tending to prove guilt.* * * *" (Emphasis added.) *We held there,* 64 Cal.App. 10, 220 P. 22, *that such instruction did not conflict with* People v. Nichols, 39 Cal.App. 29, 33, 177 P. 861, *upon which appellant now relies.* In People v. Frahm, supra, the instruction also went further than in the case at bar.

[15] With respect to the third sentence, the testimony of the owners proved the three burglaries on the premises involved without recourse to accomplice testimony or to Mayer's testimony. That appellant thereafter had possession of the property was proved by Mayer's testimony that he bought it from appellant. The testimony just discussed came from sources independent of the accomplices. Moreover it does not stand alone. The owners' identification of

the several articles, showing that it was *stolen*, is to be taken in connection with the testimony of Mayer (who needs no corroboration) that he bought it from appellant. All that testimony is supported by the testimony of Bass and Leus and by all the circumstances discussed earlier including appellant's admittedly long acquaintance with Mayer. The third sentence of the instruction is therefore invulnerable. There is no need to discuss the remainder of the instruction in view of what has been said earlier.

In arguing that there was no evidence that appellant's possession of this property was not a "secondhand possession", appellant entirely ignores the testimony of the accomplices that it was taken *directly* from the burglarized homes to Mayer and sold to him.

In People v. Nichols, 39 Cal.App. 29, 177 P. 861, 863, claimed by appellant to be squarely in point, the instruction read:

"The court instructs you that where goods have been feloniously taken by means of a burglarly, and either immediately or soon after are found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the goods, but that he made use of the means by which access to them was obtained." Nothing of the kind was contained in the instruction here under attack. Moreover in the Nichols case the only testimony connecting the defendant with the burglary was that of a pawnbroker who had bought some of the stolen property from a man who looked like Nichols according to the pawnbroker. The Nichols case is not in point. See People v. Porter, supra, 64 Cal.App. 4 at page 10, 220 P. 20.

Appellant's ninth point is that there was prejudicial error in instructing that "The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them, and of the credibility of the witnesses who have testified in the case. *The character of the witnesses, as shown by the evidence should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth* * * *." (Emphasis added.)

The basis for the criticism is that no character evidence was offered by either side.

[16] In People v. Mohammed, 189 Cal. 429, 208 P. 963, which was a first degree murder, death penalty, case, an instruction that the "character of the witnesses as shown by the evidence should be taken into consideration" in determining their credibility was attacked on appeal. The court held the instruction proper and affirmed the judgment. Its reasons are stated, 189 Cal. at pages 431–432, 208 P. 963. In People v. Amaya, 134 Cal. 531, 539–540, 66 P. 794, a similar instruction was approved. And on the authority of the Mohammed case the court in People v. Factor, 125 Cal.App. 618, 623, 13 P.2d 984, approved a similar instruction.

Appellant's tenth point is that there was prejudicial error in failing to incorporate in particular instructions such language as "if you find from the evidence" or "if you are satisfied from the evidence" and further that the jury was not generally instructed as to the non-applicability of particular instructions unless they found the existence of the facts making them applicable.

Again, as noted earlier, counsel do not assist the court by pointing to any instruction where any injustice or unfairness resulted from the failure to use such language.

[17] In the absence of such specifications we are not called on to search the record, and such assignments may properly be disregarded. People v. Siderius, 29 Cal.App.2d 361, 372, 84 P.2d 545; People v. Corlett, 67 Cal.App.2d 33, 50, 153 P.2d 595, 964; People v. Chait, 69 Cal.App.2d 503, 519, 159 P.2d 445; 2 Cal.Jur. 731–732.

[18] Appellant's eleventh and last point is that certain witnesses for the prosecution "were not free to testify uncontrolled, but testified under coercion from the police officers." This objection is directed particularly to the witnesses Bass and Mayer. The record shows that the defense put on testimony addressed to this question of claimed pressure and full lee-way was allowed in

its development. The testimony was laid before the jury for whatever it was worth and the question respecting its weight was for the jury. The verdict indicates that the jury did not give the testimony much weight.

[19] The evidence which we have summarized at considerable length under appellant's sixth point presents an unusually strong case of corroboration of accomplice testimony. In view of that showing and "an examination of the entire cause, including the evidence", Const.Art.VI, § 4½, we have no doubt that there was no miscarriage of justice. The instructions read as a whole were comprehensive and fair. The omission of the definition of corroborative evidence could not have led to a miscarriage of justice under the facts of this case and in view of the equivalent instructions which were given.

We find no merit in any of the appellant's numerous contentions.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

111 Cal.App.2d 242

KALMANOVITZ v. REMPP et al.

Civ. 18618.

District Court of Appeal, Second District, Division 1, California.

May 22, 1952.

Action by Paul Kalmanovitz against Adolph E. Rempp, and others, individually, and as copartners, and others, in unlawful detainer for leased premises. From an adverse judgment in the Superior Court of Los Angeles County, James M. Pope, J., defendant Norman Lamoreaux appealed. The District Court of Appeal, Drapeau, J., held that alleged fraud in execution of the lease was not a defense under the circumstances and that evidence to show that the defendant had a different understanding of the rental to be paid was inadmissible.

Judgment affirmed.

1. Landlord and Tenant 🔑290(3)

Rule that tenant while in possession who is fraudulently induced to enter into a lease may set up the alleged fraud in an unlawful detainer action does not apply where the only right to possession is a lease which the tenant claims to be void by the reason of fraud in its execution.

2. Contracts 🔑245(2)

A written contract supersedes all negotiations or stipulations concerning matters preceding or accompanying its execution.

3. Landlord and Tenant 🔑290(3)

In action for unlawful detainer of leased premises where lessees took possession under the terms of the lease and defendant on behalf of himself and other defendants as copartners by written amendment agreed to be bound by the terms of the lease, defendant could not set up the defense of alleged fraud.

4. Evidence 🔑461(1)

Where terms of lease were clear and unambiguous as to the amount of rent to be paid under a percentage provision, evidence to show that defendant had a different understanding of the rental to be paid under the lease was properly excluded.

5. Pleading 🔑259

In unlawful detainer for leased premises where fraud was not a defense, denial of permission to file an amended answer asserting affirmative defense sounding in fraud was not error.

6. Landlord and Tenant 🔑291(16)

In unlawful detainer for leased premises where lease was unambiguous and purpose of affirmative defenses was to alter the terms thereof, the finding that they were immaterial was not erroneous.

7. Appeal and Error 🔑1071(6)

If findings are made upon issues which determine a cause other issues become immaterial and a failure to find thereon is not prejudicial error.

8. Landlord and Tenant ⚿291(13)

In action for unlawful detainer of leased premises evidence established that notice to quit or pay rent was timely served.

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Francis C. Whelan, Los Angeles, for appellant.

G. Vernon Brumbaugh, Los Angeles, for respondent.

DRAPEAU, Justice.

By this action in unlawful detainer, plaintiff sought to recover possession of certain real property leased to defendants for a cafe and cocktail lounge, and rentals therefor alleged to be due and unpaid.

Plaintiff and defendant Rempp executed the lease of the premises on December 19, 1949, for a term beginning December 20, 1949 and ending March 30, 1956. The rent was $750 per month, in advance, and a sum equal to six percent of the gross receipts from the business. Defendant Rempp, as lessee under the written lease, took possession of the premises. Later he disappeared and left the premises abandoned.

Thereafter, on January 31, 1950, upon the written representation of defendant Lamoreaux that Rempp had leased the premises on behalf of a copartnership consisting of Rempp, Vincent and Lamoreaux, the lease was amended by a writing signed by plaintiff and Lamoreaux which substituted the copartnership members as lessees in place of Rempp. Subsequently Lamoreaux took possession of the premises and paid the monthly minimum rental of $750 until August 19, 1950.

A three-day notice to pay rent or quit the premises dated September 12, 1950, it was stipulated, was received by defendant Lamoreaux. Complaint was filed September 26, 1950. It alleged that monthly rental, as well as percentages of $987.12, was due.

Defendant Rempp's answer alleged that the rental agreed upon was $750 per month, or six percent of the gross receipts, "whichever was the greater."

Defendant Lamoreaux answered averring that the percentage provision in the lease was to apply only in the event that the monthly sales exceeded $12,500. Also, that he and plaintiff agreed that the minimum rental of $750 per month was a payment against the percentage of six percent of gross sales. In addition he averred the deposit in court of $1500 for rental from August 19 to October 19, 1950. This defendant also set up four affirmative defenses, to-wit: (1) custom and practice in the restaurant business; (2) establishment of an account stated; (3) estoppel of plaintiff to deny the construction placed on the lease by defendant; (4) reliance by defendant upon fraudulent representations of plaintiff.

There was evidence that no rent in excess of $750 per month was ever paid, and that this rental was paid up to August 19, 1950, in accordance with statements rendered to defendant by plaintiff's office. Also, that in May, June and July of 1950, plaintiff asked defendant's business manager to give him a statement of the gross receipts, but such statement was never made until September 15, 1950, in response to plaintiff's notice to perform covenants under the lease.

Accompanying that statement was a check dated September 14, 1950, in which the figures thereon called for payment of "$775" and the writing was for "Seven and 75/100 Dollars." This check was returned to defendant by plaintiff's attorney on September 22nd. On September 25th, defendant's business manager sent a new check for $775. This latter check was returned to defendant Lamoreaux on the ground that the amount thereof was not in accord with the amount of unpaid rental called for in the three-day notice to pay or quit. In the meantime, the instant complaint in unlawful detainer was filed.

The trial court found that plaintiff was entitled to $2700, the unpaid rental at $750 per month from August 19 to December 8, 1950 (the date of the judgment), together with $987.12, the unpaid six percent of gross receipts for the months of March to July, 1950, inclusive, or a total of $3687.12, and $500 attorney's fees.

From the judgment which followed, defendant Lamoreaux appeals.

Appellant asserts that the trial court erred in several particulars, to-wit:

1. In excluding all evidence except that of payment as computed on the face of the lease;

2. In sustaining respondent's objections to the introduction of certain evidence and to offers of proof made by appellant;

3. In denying permission to appellant to file an amended answer;

4. In finding that the allegations of appellant's affirmative defenses and the amendment to his answer were immaterial;

5. In failing to find on appellant's fourth affirmative defense.

It is also contended that the evidence does not sustain the findings and that the judgment is against law.

The lease provided for rental at "a minimum sum of $750.00 per month payable in advance on the first day of each and every month during the term of this lease. That the Lessee further agrees to pay to Lessor as additional rental on the 10th day of each calendar month for the calendar month immediately preceding, a sum equal to six (6%) per cent of the gross receipts of the Lessee arising from or in any manner connected with any business performed or transacted on any and all of said demised premises."

In an effort to prove that the minimum rental applied against the percentage rental, appellant sought to introduce in evidence an escrow agreement for transfer of the liquor license dated November 30, 1949. This document recites that rental is "payable $750 per month against a 6% of the gross receipts." The trial court sustained respondent's objection to the admission of this document, whereupon appellant offered to prove that it was the basis of his understanding of the terms of the lease.

Appellant here asserts as error the trial court's ruling that negotiations prior to the execution of the lease were incompetent to prove the terms of the lease which were "clear, concise and unambiguous. There is only one question and that is performance. * * * payment under the terms of the lease."

In this connection it is argued that the allegations of the fourth affirmative defense entitled appellant to show that he took possession of the premises under mistake of fact owing to fraudulent representations of respondent, and therefore the court improperly restricted the issues to the question of performance under the terms of the lease.

Those allegations are to the effect that in December, 1949, respondent represented to appellant that the lease provided for a minimum rental of $750 per month to be applied against the percentage rental; that he relied upon and believed such representations, which were fraudulently made for the purpose of inducing him to assume possession of the premises.

The complaint alleged and the court found that by virtue of the written agreement of lease, the defendants Rempp, Lamoreaux and Vincent went into possession and occupation of the premises and "ever since have, has and still continue to hold possession of said premises as tenants of the plaintiff."

[1] We believe the holding in D'Amico v. Riedel, 95 Cal.App.2d 6, 8, 212 P.2d 52, is applicable here. In that case it was contended that fraud could be shown as a defense in an unlawful detainer action, and that the lease having been procured by fraud, the terms thereof were unenforceable. The court cited Smith v. Whyers, 64 Cal.App. 193, 194, 221 P. 387, and with reference thereto said [95 Cal.App.2d 6, 212 P.2d 53]: "In the Smith case the court concedes that a tenant who while in possession is fraudulently induced to enter into a lease may set up the fraud in an action in unlawful detainer but states 'This rule does not apply to a case where the tenant was not in possession at the time the lease was executed, but where her only right to possession is the lease which she claims to be void by reason of fraud in its execution.' The court further points out that 'the very purpose of the statute would be defeated if a defendant who claimed that she entered under a void lease through the fraud of the plaintiff should be permitted to remain in possession under the lease while the va-

lidity of the lease was being litigated.' * * *

"Defendants' assertion that they should have been permitted to set up the fraud as a defense to the claim for rental and attorneys' fees provided for in the lease is without merit. An unlawful detainer action is not upon contract but for recovery of possession of the premises and incidentally for the damages occasioned by the unlawful detainer. The court may, pursuant to section 1174 of the Code of Civil Procedure, assess damages and find the amount of any rent due. * * * Harris v. Bissell, 54 Cal.App. 307, 312, 202 P. 453."

As hereinbefore stated, the lessees took possession of the premises under the terms of the instant lease. Appellant on behalf of himself and the defendants, individually and as copartners, thereafter by written amendment to the lease agreed to be bound by its terms.

[2, 3] It is a cardinal rule of law that a written contract supersedes all negotiations or stipulations concerning matters which preceded or accompanied its execution. Dobbins v. Horsfall, 58 Cal.App.2d 23, 136 P.2d 35. And as stated in McClure v. Cerati, 86 Cal.App.2d 74, 81, 194 P.2d 46, 50: "The written contract, in the absence of fraud, therefore superseded all such previous negotiations or stipulations."

[4] The trial court found that the terms of the lease were clear and unambiguous. Therefore, since fraud is not a defense in the circumstances here presented, the court properly limited the evidence to the question of payment under the terms as expressed in the lease, and properly sustained respondent's objections to the introduction of evidence to show that appellant had a different understanding of the rental to be paid.

[5] Likewise the denial of permission to file an amended answer was proper. This was an amendment to appellant's fourth affirmative defense sounding in fraud.

[6] Since the purpose of the affirmative defenses was to alter the terms of the lease, the finding that they were immaterial was not erroneous.

[7] Appellant urges that the trial court's failure to find on his fourth affirmative defense constitutes reversible error. "It has been repeatedly held that if findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error." (24 Cal.Jur. 947, § 190.)

[8] Appellant finally contends that the evidence does not sustain the findings and the judgment is against law. This for the reason that the matter of service of the three-day notice to pay rent or quit was put in issue by the answers of appellant and defendant Rempp, and it does not appear from the evidence when such notice was served.

That notice was introduced in evidence. It is dated September 12, 1950. At the trial it was stipulated that appellant received the notice. In view of the fact that appellant's business manager on September 14 mailed a check purportedly for the minimum rental unpaid at that time, but for the wrong amount, it must be assumed that the notice was served on the day of its date. The complaint was not filed until September 26, 1950.

For the reasons stated, the judgment appealed from is affirmed.

DORAN, Acting P. J., and HANSON, J., pro tem., concur.

111 Cal.App.2d 277

AUMONT v. NEBENZAL.

Civ. 18762.

District Court of Appeal, Second District,
Division 2, California.
May 23, 1952.

Action by Jean Pierre Aumont, administrator-with-the-will-annexed of Maria Montez Aumont, against Seymour Nebenzal for breach of agreement guarantying a corporation's contract for the services of deceased. The Superior Court, Los Angeles County, Edward R. Brand, J., gave judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that the deceased did each, all and everything required by the terms of her contract with the corporation to be done, rendered or performed on her part.

Judgment affirmed.

1. Guaranty ⚿91

In action by administrator of the estate of an actress against individual who had guaranteed a corporation's contract of employment of the actress, evidence sustained finding that actress did each, all and everything required by the terms of the contract to be done, rendered or performed on her part.

2. Contracts ⚿190

Where contract of employment of motion picture actress provided that, after completion of picture, she would appear at such times and places as the employer might require unless her other engagements prevented it, that provision, when read in conjunction with other provisions, meant that actress would appear for changes to be made in the picture subsequent to the time it had been completed but not that she obligated herself to render services in connection with distribution or exploitation of the picture.

3. Contracts ⚿143

To correctly construe a provision, in contract for employment of motion picture actress, which related to services to be performed by actress after the completion of the picture, provision had to be read in conjunction with the other provisions of the contract.

4. Guaranty ⚿91

In action by administrator of estate of motion picture actress against individual who guaranteed payments required under a corporation's contract of employment with actress if picture were not in general release by March 1948, evidence sustained finding that picture was not in general release at any time prior to December, 1948.

5. Appeal and Error ⚿989

On appeal on grounds that there is not any substantial evidence to sustain findings of trial court, conflicting evidence must be disregarded by appellate court.

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Fred Horowitz and Alvin F. Howard, Los Angeles, for appellant.

Bautzer, Grant, Youngman & Silbert and Bernard M. Silbert, all of Beverly Hills, and A. Fredric Leopold, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for breach of a warranty agreement, defendant appeals.

Viewing the evidence in the light most favorable to plaintiff (respondent) and pursuant to the rules set forth in Davis v. Stulman, 72 Cal.App.2d 255, 262[2], 164 P.2d 787 (Fox, J.), the record discloses the following facts:

Plaintiff's decedent, hereinafter referred to as the "actress" on October 2, 1946, entered into a contract with the Atlantic Production Company, hereinafter called the "corporation", of which defendant, hereinafter called the "producer", was the president and a large stockholder. The agreement employed the actress to perform in a motion picture sometimes entitled "Atlantis", and hereinafter called the "picture", at a salary of $100,000, of which $50,000 was to be payable during the period of service, and $50,000 payable (1) within nine months after completion of the picture, or (2) at such time as the corporation had recouped 90% of the cost of its production, whichever should occur first.

On February 24, 1947, the actress at the request of the producer, in order to enable him to obtain certain financing, executed a subordination agreement whereby she agreed not to stand on her right to request the corporation to pay her deferred compensation of $50,000 as provided in her contract, but to postpone such request until the picture was in "general release." In consideration of the actress's promise the producer agreed on February 28, 1947, that if the picture went into general release later than October 15, 1947, he personally would pay her deferred compensation of $50,000 at the time called for by the employment agreement.

On December 2, 1947, the picture was not in general release and the actress executed an extension agreement extending the condition upon which the guaranty agreement of the producer would become effective to March, 1948.

The trial court found: (1) The actress had performed her employment agreement; (2) There was no general release of the picture by March, 1948. Thereupon judgment was rendered in favor of plaintiff for the sum of $32,916, which constituted the unpaid balance of the $50,000 which the actress was to receive when the picture was generally released.

[1] The producer (defendant) appeals, contending that there was not any substantial evidence to sustain the following findings of the trial court:

(1) That the actress (plaintiff) "did each, all and everything required by the terms of said Agreement of October 2, 1946, to be done, rendered or performed on her part * * *."

This finding was fully supported by the evidence. The actress testified that she had finished the picture, and defendant established that minor additions and changes in the picture had been completed subsequent to the time the main picture had been filmed.

[2] There is no merit in the producer's contention that the actress failed to perform her contract of employment by not making a personal appearance when requested to do so at Las Vegas where the picture was displayed at a "test showing" during the month of March, 1948. Among other things the contract provided as follows: "The Artist further agrees that after the completion of the picture, she will appear at such times and such places as the Corporation may require unless other actual engagements of the Artist prevent the Artist from so doing."

[3] The foregoing provision when read as it must be in conjunction with the other provisions of the contract was correctly construed by the trial court to mean that the actress would, subject to other engagements, appear for changes to be made in the picture subsequent to the time it had been completed and that she did not obligate herself to render services in connection with the distribution or exploitation of the picture. In other words, the quoted provision of the contract merely provided that the actress, after the picture was finished, would do the usual things necessary for the perfection of the negative, such as rendering service for the completion of the picture with trick shots or added scenes.

[4] (2) That the picture was not in general release within the meaning of the agreement of February 28, 1947 (the producer's guarantee agreement), at any time prior to the month of December, 1948.

The foregoing finding is substantially supported by the evidence. Witness Louis Shurr testified that "according to the best of my understanding, the picture was released around 1949." This evidence in connection with official documents of the United Artists Corporation received in evidence disclosed that the picture (Atlantis) was not in general release any time during 1948, and was in general release in February, 1949.

[5] Conflicting evidence must, of course, be disregarded by an appellate court, and since the foregoing evidence which was apparently believed by the trial judge sustains the questioned findings, no useful purpose would be subserved by setting forth additional evidence which would

lead to the same conclusions. (Thatch v. Livingston, 13 Cal.App.2d 202, 203, 56 P.2d 549.)

In view of our conclusion it is unnecessary to discuss any other questions presented by counsel.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

111 Cal.App.2d 311

SANFORD v. SUPERIOR COURT OF STATE, IN AND FOR KERN COUNTY.

Civ. 4396.

District Court of Appeal,
Fourth District, California.
May 26, 1952.

Petition by Robert Thomas Sanford for writ of mandamus to compel Superior Court of Kern County to dismiss an appeal from a justice's court. The District Court of Appeal, Barnard, P. J., held that since the party appealing from the justice's court had not filed the memorandum to set for seven months after the appeal was filed in the Superior Court, and nothing was done thereafter although such person had warning that the case would not be tried within the statutory one year period if the ordinary routine were followed, and there was no showing that it was impossible for such person to bring the matter to a hearing within the statutory period or that he was prevented from doing so by causes beyond his control, the Superior Court was without jurisdiction to entertain the appeal.

Peremptory writ granted.

1. Justices of the Peace 🔑166(2)

Provision of Code of Civil Procedure that appeal from justice's court must be dismissed where appealing party fails to bring it to trial within one year, unless such time is extended by written stipulation filed in court, is mandatory and deprives superior court of jurisdiction to try cause unless facts appear which bring it within one of the recognized exceptions. Rules for Superior Court, rules 6, 12; Code Civ. Proc. § 981a.

2. Justices of the Peace 🔑166(2)

Purpose of statute providing that appeals from justice's court must be dismissed where appealing party fails to bring action to trial within one year unless such time is extended by written stipulation filed in court is to prevent avoidable delay. Code Civ.Proc. § 981a.

3. Justices of the Peace 🔑166(2)

The exceptions to statutory provision that appeals from justice's court must be dismissed where appealing party fails to bring action to trial within one year unless such time is extended by written stipulation filed in court arise only where appealing party is unable from causes beyond his control to bring the cause to trial within the statutory time. Code Civ.Proc. § 981a.

4. Justices of the Peace 🔑166(2)

Where party appealing from justice's court did not file memorandum to set for seven months after appeal was filed in superior court, and thereafter did nothing, although clerk's letter gave adequate warning that if ordinary routine were followed, case would not be tried within the statutory one year period, and there was no showing that it was impossible for such person to bring matter to a hearing within the statutory period or that he was prevented from doing so by causes beyond his control, superior court was without jurisdiction to entertain the appeal. Rules for Superior Court, rules 6, 12; Code Civ.Proc. § 981a.

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T. R. Claflin, Bakersfield, for petitioner.

Walter F. Keen, James S. Reese, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is a petition for a writ of mandamus to compel the superior court of Kern County to dismiss an appeal from a justice's court, based upon section 981a of the Code of Civil Procedure.

The petitioner obtained a judgment in the justice's court of the Third Township, County of Kern, in an action for damages arising out of an automobile collision. The defendant's appeal from that judgment, on questions of law and fact, was filed in the superior court on March 7, 1951. A memorandum to set for trial was filed on October 9, 1951, pursuant to Rule 6 of the Superior Court Rules, in which it was stated that the nature of the action "is tort negligence-auto," that a jury was not demanded, and that the estimated time for trial was two hours. The memorandum said nothing about this being an appeal, and no motion to advance or for a special setting was ever made.

On January 15, 1952, the attorney for the defendant wrote to the county clerk asking whether or not the case had been set for trial. On January 18, 1952, he received a reply stating that the matter would be placed on the civil active list to be set in turn for trial; that the matter would come up in March; and that possibly the case would be heard "in late Spring." On March 11, 1952, the attorney for this petitioner filed a motion to dismiss the appeal, based on section 981a of the Code of Civil Procedure. The motion was heard and denied on March 31, 1952, it being further ordered that the cause be set for trial within sixty days.

In answer to this petition for a writ it is contended that the defendant owed no further duty since it sufficiently appeared from the papers in the clerk's office that this was an appeal from a justice's court; that in view of the increase in litigation in recent years the delay here was unavoidable; that this case comes within the exceptions recognized in the more recent cases; and that the trial court was justified in finding that it was impossible for the defendant to bring the matter to a hearing within the required time.

[1-3] Section 981a provides that such an action must be dismissed where the appealing party fails to bring it to trial within one year, unless such time is extended by written stipulation filed in court. This provision is mandatory, and deprives the superior court of jurisdiction to try the cause unless facts appear which bring it within one of the recognized exceptions. Emerson v. Superior Court, 7 Cal.2d 685, 62 P.2d 363; Rossi v. Superior Court, 7 Cal.App.2d 91, 45 P.2d 376, 46 P.2d 1019. The purpose of the statute is to prevent avoidable delay. The exceptions which have been applied arise only where the appealing party is unable, *from causes beyond his control,* to bring the cause to trial within the statutory time. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153. Marr v. Superior Court, 27 Cal.App.2d 393, 80 P.2d 1005.

[4] In this case nothing was done for seven months after the appeal was filed in the superior court, when a memorandum to set was filed. Nothing was done therafter, although the clerk's letter gave adequate warning that, if the ordinary routine were followed, the case would not be tried within the time limit. Under Rule 12 of the Superior Court Rules provision is made for advancing or specially setting a case for trial, which was obviously intended to cover cases where some reason exists for so doing. Although this procedure was available at all times, the appealing party failed to make such a request. After a long delay in filing the ordinary memorandum to set, he let the rest of the time expire without calling the urgency to the attention of the court or taking any steps whatever to bring the matter to a hearing within the required time. There is no showing that it was impossible for him to bring the matter to a hearing within that time, or that he was prevented from doing so by causes beyond his control, and the facts do not bring him within the exceptions relied on.

It is ordered that a peremptory writ of mandamus issue directing the respondent court to dismiss the action.

GRIFFIN and MUSSELL, JJ., concur.

111 Cal.App.2d 261

SCHREIBER v. DUNCAN.

Civ. 4386.

District Court of Appeal,
Fourth District, California.
May 22, 1952.

S. L. Schreiber sued R. L. Duncan for faulty workmanship in structural improvements upon plaintiff's residence, and default judgment was rendered for plaintiff, which defendant moved to set aside. The Superior Court of Kern County, Warren Stockton, J., denied the motion and defendant appealed from the final judgment and from the order denying the motion. The Court of Appeals, Griffin, J., held that where nothing appeared on face of the default judgment nor in the record indicating that the judgment was not proper or should be reversed, the trial court's exercise of discretion would not be interfered with though reviewing court would have affirmed an order granting relief from default.

Affirmed.

1. Appeal and Error ⟹957(1)

Before appellate court may reverse an order denying a motion to set aside a default, it must conclude from facts established that trial court abused its discretion, and burden of showing such abuse of discretion rests on the party seeking reversal.

2. Appeal and Error ⟹957(1)

Where nothing appeared on face of judgment or in record indicating that default judgment from which appeal was taken was not proper, or should be reversed, reviewing court would not interfere with trial court's exercise of discretion in refusing to set aside default, even though reviewing court would have affirmed an order relieving against default which allegedly resulted from ill health and pressing business of defendant's attorney.

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Oscar F. Catalano, Allan Campbell, Bakersfield, for appellant.

Dorris, Fleharty & Phillips, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff brought an action against defendant alleging faulty workmanship in certain structural improvements in relation to the work done upon plaintiff's residence by defendant in which plaintiff claimed damages in the sum of $1832.50. Defendant was personally served with summons and complaint on March 23, 1951. He failed to appear. Default, upon application of plaintiff, was entered on April 4, 1951, and on April 5th, the clerk, for some undisclosed reason, entered judgment by default for the amount claimed. On July 5, 1951, three months later, attorney Catalano filed his affidavit and motion to set aside the default and default judgment, claiming that on March 27, 1951, defendant retained him as his attorney and gave him a copy of the summons and complaint served upon him and that, due to pressing business and ill health, he mislaid it; that on or about April 4, 1951, he attempted to file a demurrer with the clerk and was informed that a default had been taken; that about ten days after April 4th, he talked with the attorney for plaintiff and asked him if he would enter into a stipulation setting it aside; that the attorney told affiant that it would be necessary for him to file a notice of motion to set it aside because of the peculiar relationship between plaintiff and his attorney; that affiant told said attorney that within due course he would file such a notice; that the attorney for the plaintiff did not, at said time, commit himself either one way or another about resisting said motion; that about that time affiant was in partnership with one H. E. Schmidt, who was severely ill and who expired on May 15th; that affiant, for more than six months prior thereto, was required to do about 90 per cent of their partnership business; that at that particular time affiant was physically handicapped and was pressed with a great deal of work and was laboring under the thought that he had six months time from the entry of default within which to file his motion and believed that three months thereafter was not unreasonable; that defendant had a good and meritorious defense to plaintiff's action, and did not owe any portion of the amount claimed. An affidavit of merit was also filed.

The motion came on for hearing on July 23. Plaintiff's counsel appeared and no one appeared for defendant. The court (Judge Bradshaw) denied the motion.

Thereafter, on August 1st, defendant's counsel filed a supplemental affidavit, offered a proposed answer to the complaint, and in response to a motion by defendant to set aside and vacate the order theretofore made denying the motion, the court (Judge Bradshaw) ordered that the order denying such motion as to the default and default judgment be vacated.

On August 21st, defendant filed a motion to reconsider the previous motion to set aside the default and default judgment based upon new and former affidavits, the answer, amended answers presented, and on the records on file. The affidavits enlarged upon the facts set forth in the prior affidavits. The attorney for the defendant therein stated that at the time he consulted the attorney for the plaintiff about stipulating to the setting aside of the default, counsel for plaintiff "left the definite impression in my mind" that he would not resist it; that he told counsel for plaintiff at the time that he was very busy in his office and that he would file the motion as soon as convenient for affiant; that he was confined to the hospital and in bed for fifteen days after April 18; that he has been and is crippled and confined to a wheel chair; that he tried two jury cases in May and June and moved his offices after the death of his partner; that plaintiff has not been prejudiced by the delay since he did not endeavor to collect the judgment; that his failure to file an answer was due solely to inadvertence and was excusable. It was also called to the court's attention at that time that the default judgment, as entered by the clerk, was not a judgment that could be entered by default by such clerk.

Plaintiff's attorney filed an affidavit in opposition, admitted that defendant's attorney spoke to him after the default was entered, but definitely stated that he told him that he could not stipulate to set aside the default and told him that plaintiff would resist any attempt to set it aside, due to the feeling between the parties to the action; that his relationship with plaintiff was only that of attorney and client and that plaintiff had informed his counsel that he had made efforts to settle the difficulty with defendant and that defendant changed his mind and forced plaintiff to sue.

The motion to reconsider came on for hearing before Judge Stockton. The motion to set aside the default was denied. The motion to set aside the default judgment was granted. On September 28, a judgment by default was entered by the court.

On October 8, defendant filed another motion to reconsider the previous motion to set aside the default and default judgment, based on similar facts to those previously alleged. Counsel for the defendant gave as a reason for the new application that Judge Stockton stated to him that he denied the previous motion to set aside the default because "it was against his desires to overrule another judge" of that court.

On October 15, Judge Stockton made an order denying that motion which order was entered on November 6. Defendant appealed to this court from the final judgment entered on September 28, and from the order entered on November 6th.

At the outset it could be readily said, had the trial court granted defendant's motion to be relieved of the default and default judgment, this court would not hesitate in affirming the order under the recognized rule that great liberality is afforded trial courts in relieving attorneys from their excusable neglect. Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979. Many of the cases cited by defendant involve an appeal from an order granting relief, and they are therefore not particularly applicable to the facts in this case.

[1, 2] Before an appellate court is authorized to reverse an order on appeal denying a motion to set aside a default it must first conclude from the facts established that the trial court abused its dis-

cretion and the burden of showing such abuse of discretion rests on the party seeking the reversal. The uncontradicted facts here established do not bring defendant within the rules announced in Burns v. Scooffy, 98 Cal. 271, 33 P. 86; and Karlein v. Karlein, 103 Cal.App.2d 496, 229 P.2d 831, relied upon by him. Nothing appears on the face of the judgment nor in the record indicating that the judgment from which the appeal was taken was not proper, or that it should be reversed.

The court was confronted with similar questions in Kester Motors, Inc. v. Haddad, 109 Cal.App.2d 369, 240 P.2d 1011 (Hearing in the Supreme Court denied). No good purpose would be served by reiterating the principles and rules there enunciated, which appear to be applicable to the facts in this case.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

111 Cal.App.2d 218

WOODARD et al. v. BROADWAY FEDERAL SAVINGS & LOAN ASS'N OF LOS ANGELES et al.

Civ. 18769.

District Court of Appeal, Second District, Division 3, California.

May 19, 1952.

Hearing Denied July 17, 1952.

Action by Allen C. Woodard and others against Broadway Federal Savings and Loan Association of Los Angeles, and others, to have declared invalid an election of certain individual defendants to Board of Directors of defendant association. The Superior Court of Los Angeles County, J. F. Maroney, J., entered judgment for plaintiffs, and denied defendants' motion for new trial, and to amend conclusions of law, and defendants appealed. The District Court of Appeal, Vallée, J., held that administrative remedy was provided by Home Loan Bank Board for determination of validity of election under charter of association, and such remedy must have been exhausted before resort to courts.

Judgment reversed, with directions to dismiss action.

1. Administrative Law and Procedure 🔑229

Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and such remedy must be exhausted before courts will act.

2. Administrative Law and Procedure 🔑229

Doctrine of exhaustion of administrative remedies applies where statute provides an administrative remedy, even though terms of statute do not make the exhaustion of that remedy a condition of the right to resort to the courts.

3. Administrative Law and Procedure 🔑229

The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures, but requires that they be pursued to their appropriate conclusion and that their final outcome be awaited before seeking judicial intervention.

4. Administrative Law and Procedure 🔑229

Determination whether given controversy follows within statutory grant of jurisdiction to administrative body lies in first instance within power of administrative agency.

5. Administrative Law and Procedure 🔑417
Building and Loan Associations 🔑2

Rules and regulations promulgated by Home Loan Bank Board under authority of the Home Owners' Loan Act, governing operation of federal savings and loan associations from their inception to their dissolution, have force and effect of law and are binding on association, its board of directors, and its members. Home Owners' Loan Act of 1933, §§ 1 et seq., 5(a, f), as amended, 12 U.S.C.A. §§ 1461 et seq., 1464 (a, f).

6. Administrative Law and Procedure 🔑229
Building and Loan Associations 🔑2

Where Home Loan Bank Board had adopted rules and regulations governing operation of federal savings and loan associations from their inception to their dissolution, and Board was empowered to entertain and hear application or petition of any interested person in connection with any provision of charter of association, its bylaws, and rules and regulations, administrative remedy was available to determine validity of election of association expressly provided for in its charter, and such remedy must have been exhausted before resort to courts might be had. Home Owners' Loan Act of 1933, §§ 1 et seq., 5(a, f), as amended, 12 U.S.C.A. §§ 1461 et seq., 1464(a, f).

7. Administrative Law and Procedure ⚷228
Building and Loan Associations ⚷2

Home Loan Bank Board has authority in first instance to determine whether controversy with respect to internal management of savings and loan association is within its sphere of jurisdiction. Home Owners' Loan Act of 1933, §§ 1 et seq., 5(a, f), as amended, 12 U.S.C.A. §§ 1461 et seq., 1464(a, f).

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Thomas L. Griffith, Jr., Bishop & Hoffmann, and Sylvester Hoffmann, Los Angeles, for appellants.

Russell H. Pray and Eric A. Rose, Long Beach, for respondents.

VALLÉE, Justice.

Appeal by defendants from (1) a judgment which declared invalid the election of the individual defendants to the board of directors of defendant Broadway Federal Savings & Loan Association of Los Angeles, directed that a new election be held, and appointed a master for the purpose of supervising the election proceedings; (2) an order denying their motion for a new trial; and (3) an order denying their motions to amend the conclusions of law, to vacate the judgment and to dismiss the action, and for entry of another and different judgment.

Defendant Broadway Federal Savings & Loan Association of Los Angeles, a federal savings and loan association, was chartered on November 25, 1946, by the Federal Home Loan Bank Board[1] under section 5 of the Home Owners' Loan Act of 1933,[2] and is engaged in the business of home financing in California, with its principal place of business in Los Angeles.

Plaintiffs and the individual defendants are members of defendant association. Some of the plaintiffs and the individual defendants were nominees for the positions of director of defendant association. On February 24, 1950, a special meeting was held for the principal purpose of conducting the annual election of directors. The individual defendants were elected directors at the meeting.

On February 27, 1950, plaintiffs brought this action under sections 2236 et seq. of the Corporations Code of California[3] to determine the validity of the election of the individual defendants. Plaintiffs challenged the manner in which the election and balloting was conducted, the right of the secretary to determine the maximum number of proxy votes certain members were entitled to cast and the validity and effect of those cast and counted. No application or petition was filed by plaintiffs with the Home Loan Bank Board challenging the validity of the election.

The court adjudged that the election was null and void, of "no force and effect," for the reason it was conducted contrary to the charter and bylaws of defendant association and the laws of California, and that the individual defendants had not been elected to the office of director at the election, and ordered that a new election be called.

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[1] Now the "Home Loan Bank Board." 12 U.S.C.A. § 1462.

[2] 12 U.S.C.A. § 1464.

[3] § 2236. "Upon the filing of an action therefor by any shareholder, the superior court shall try and determine the validity of any election or appointment of any director of any domestic corporation, or of any foreign corporation if the election was held or the appointment was made in this State. In the case of a domestic corporation the action shall be brought in the county in which the principal office of the corporation is located. In the case of a foreign corporation the action shall be brought in the county in which the corporation has its principal office in this State or in which the election was held or the appointment was made."

§ 2238. "The court may determine the person entitled to the office of director or may order a new election to be held or appointment to be made, and direct such other relief as may be just and proper."

Defendants contend that plaintiffs have an administrative remedy which they have not initiated or exhausted, that under the Home Owners' Loan Act of 1933 and the rules and regulations adopted thereunder, jurisdiction over the subject matter is vested in the Home Loan Bank Board and the superior court had no jurisdiction. The contention must be upheld.

[1-4] Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy must be exhausted before the courts will act. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715. Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. Abelleira v. District Court of Appeal, supra, 17 Cal.2d at page 293, 109 P.2d 942, 132 A.L.R. 715; United States v. Superior Court, 19 Cal.2d 189, 194, 120 P.2d 26. The doctrine of exhaustion of administrative remedies applies where a statute provides an administrative remedy, even though the terms of the statute do not make the exhaustion of the remedy a condition of the right to resort to the courts. First Nat. Bank of Greeley v. Board of County Com'rs, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784, 788, 789. The doctrine, whenever applicable, requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. Home Loan Bank Board v. Mallonee, 9 Cir., 196 F.2d 336; Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767, 67 S.Ct. 1493, 91 L.Ed. 1796, 1806; Red River Broadcasting Co. v. Federal Communications Commission, 69 App.D.C. 1, 98 F.2d 282, 287, certiorari denied 305 U.S. 625, 59 S.Ct. 86, 83 L.Ed. 400. "[I]t lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction. United States v. Sing Tuck, 194 U.S. 161, 24 S.Ct. 621, 48 L.Ed. 917; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638; Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978; Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408; South Porto Rico Sugar Co. v. Munoz, 1 Cir., 28 F.2d 820; 48 Yale L.J. 981, 992-995." United States v. Superior Court, 19 Cal.2d 189, 195, 120 P.2d 26, 29. The importance of giving the administrative agency the first opportunity to determine the extent of its jurisdiction and to decide in a final way matters falling therein is discussed in Camp v. Herzog, 88 U.S.App.D.C. 373, 190 F.2d 605, and S.S.W., Inc. v. Air Transport Ass'n of America, D.C.Cir., 191 F.2d 658. See, also, Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030, which held that before an action could be brought to enjoin a conservator of a federal savings and loan association appointed by the Board under the rules and regulations, the parties were first required to exhaust their administrative remedy before the Board.

The Home Owners' Loan Act of 1933[4] empowers the Home Loan Bank Board "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, *operation,* and *regulation*" of federal savings and loan associations, and "to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." § 1464(a). Italics added. Upon issuance of a charter, the association automatically becomes a member of the Federal Home Loan Bank of the district in which the association is located. § 1464(f). Each association is issued a standard, prescribed form of charter and bylaws.[5] Pertinent provisions of defendant-association's charter and bylaws relating to the subject matter of the action are set forth in the margin.[6] The charter provides that defendant association "shall have such powers as are conferred by law and shall exercise its powers in conformity with the Home Owners' Loan Act of 1933 and all laws of the United States as they now are, or as they may hereafter be amended, and with the rules and regulations made thereunder which are not in conflict with this charter."

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[4] 12 U.S.C.A. § 1461 et seq.

[5] 24 C.F.R., (1951 Supp.), Ch. 1, Subchapter C, §§ 144.1-144.7.

On November 25, 1946, when defendant-association's charter was issued it was known as "Charter K." (24 C.F.R.

[5] The rules and regulations promulgated by the Board under authority of the Home Owners' Loan Act of 1933, which were in effect at the time of the challenged

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(1949 ed.), Ch. 1, Subchapter C, § 142.9.) Currently all newly chartered associations are issued "Charter N." (24 C.F.R. (1951 Supp.), Ch. 1, Subchapter C, § 144.1.) An association having a Charter K may amend such charter in its entirety to read in the form of Charter N. (§ 144.3.) The differences between the two charters do not concern any of the matters relating to this appeal.

[6] "3. Objects and powers.—* * * The statute [Home Owners' Loan Act of 1933], this charter, and rules and regulations made thereunder provide for examination and supervision and at the same time for the protection of all private rights concerned, and shall be construed in keeping with the best practices of local mutual thrift and home-financing institutions in the United States. * * * The association shall have * * * bylaws not inconsistent with the Constitution or laws of the United States, this charter, and rules and regulations of the Federal Home Loan Bank Board, providing for the management of its property and regulation and government of its affairs; * * *

"In addition to the foregoing powers expressly enumerated, the association shall have power to do all things reasonably incident to the accomplishment of its express objects and the performance of its express powers. The association shall have such powers as are conferred by law and shall exercise its powers in conformity with the Home Owners' Loan Act of 1933 and all laws of the United States as they now are, or as they may hereafter be amended, and with the rules and regulations made thereunder which are not in conflict with this charter.

"4. Members.—All holders of share accounts of the association and all borrowers therefrom shall be deemed and held to be members thereof. In the consideration of all questions requiring action by the members, each holder of a share account shall be permitted to cast one vote for each $100, or fraction thereof, of the participation value of his share account. A borrowing member shall be permitted, as a borrower, to cast one vote, and to cast the number of votes to which he may be entitled as the holder of a share account. No member, however, shall cast more than 50 votes. Voting may be by proxy. * * * A majority of all votes cast at any meeting of members shall determine any question. The members who shall be entitled to vote at any meeting of the members shall be those owning share accounts and borrowing members of record on the books of the association at the end of the calendar months next preceding the date of such meeting. The number of votes which each member shall be entitled to cast at any meeting of the members shall be determined from the books of the association as of the end of the calendar month next preceding the date of such meeting. * * *

"16. Amendment of charter.—No amendment, addition, alteration, change, or repeal of this charter shall be made unless such proposal is made by the board of directors of the association, and submitted to and approved by the Federal Home Loan Bank Board, and is thereafter submitted to and approved by the members at a legal meeting. Any amendment, addition, alteration, change, or repeal so acted upon and approved shall be effective, if filed with and approved by the Federal Home Loan Bank Board, as of the date of the final approval by the members."

The bylaws provide: Voting at any meeting may be by proxy "provided that no proxies shall be voted at any meeting unless such proxie shall have been placed on file with the secretary of the association, for verification, at least (5) days prior to the date on which such meeting shall convene." (§ 1.)

All meetings of the members and of the board of directors shall be conducted in accordance with Roberts' Rules of Order. (§ 4).

The bylaws may be amended at any time by a two-thirds affirmative vote of the board of directors, or by a vote of the members of the association. Each and every amendment shall be ineffective until approved by the Home Loan Bank Board. (§ 10.)

election, are found in Title 24, Code of Federal Regulations (1949 Ed.), Chapter 1, Subchapter C, Parts 141–150. They are comprehensive, explicit, and govern the operation of federal savings and loan associations from their inception to their dissolution. They have the force and effect of law and are binding on an association, its board of directors, and its members. Community Federal Savings & Loan Ass'n v. Fields, 8 Cir., 128 F.2d 705, 707.

Part 142.2 thereof provides: "Any person who has made an application or petition to the Board pursuant to any provision of Parts 143, 144, 145, or 146 of this subchapter may request a hearing thereon, provided such application or petition has been denied or disapproved by the Board. At any time after the filing of any such application or petition and before consideration thereof by the Board, any interested person may request a hearing upon such application or petition. *The Board may order a hearing in connection with the consideration of any matter arising under any provision of the rules and regulations in this subchapter, whether or not any request therefor has been made by any person.* The Board may deny any request for, or dispense with, any hearing for which this section provides when, in its judgment, no need therefor exists." (Italics added.)

The "subchapter" referred to in the foregoing quotation, is "Subchapter C," covering the entire subject matter of the "Federal Savings and Loan System [Revised]." Parts 141–150, inclusive, are all a part of Subchapter C. Part 144, entitled "Charter and Bylaws," contains the prescribed form of charter and bylaws. The charter defines the powers of the association, and the bylaws prescribe the rights and duties of the members with respect to the "management of its property and regulation and government of its affairs." Under Part 142.2 the Board may order a hearing in connection with the consideration of any matter arising under any provision of the rules and regulations, including matters arising under the charter and bylaws.

[6, 7] We think it is unmistakable that there is an administrative remedy available to plaintiffs before the Home Loan Bank Board. The Board is empowered to and it has adopted rules and regulations for the operation and regulation of federal savings and loan associations. Such an association must exercise its powers in conformity with the rules and regulations. The charter and bylaws are prescribed by the Board. The charter of defendant association expressly provides how balloting at elections of directors shall be conducted; who may vote; the number of votes that shall determine any question; and that voting may be by proxy. The bylaws provide when and how proxies shall be voted, and that all meetings of the members shall be conducted in accordance with Roberts' Rules of Order. The Board is empowered to entertain and hear the application or petition of any interested person in connection with any provision of the charter, the bylaws, and the rules and regulations. An administrative remedy is thus provided to determine the validity of the challenged election. Since an administrative remedy is provided, plaintiffs must first exhaust that remedy before turning to the courts for relief. It lies within the power of the Board to determine in the first instance whether a controversy with respect to the internal management of an association is within its sphere of jurisdiction, and the superior court has no jurisdiction to act. To hold otherwise would, in effect, substitute the determination of the courts for the determination which Congress intended should be made by the Board, and would defeat the purpose of the Act.

The trial court erred in not dismissing the action on the ground that an administrative remedy was open to plaintiffs which was not first exhausted.

The appeals from the orders denying the motion for a new trial, and denying the motion to amend the conclusions of law, are dismissed. The judgment is reversed with directions to dismiss the action.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

111 Cal.App.2d 285

FIGLEY et al. v. CALIFORNIA ARROW AIRLINES et al.

Civ. 8128.

District Court of Appeal,
Third District, California.
May 23, 1952.

Action by Dorothy D. Figley and another against the California Arrow Airlines and others to recover damages for the death of an airplane passenger caused when the airplane in which the passenger was riding crashed. After answering, defendants moved for change of venue from Solano County to Los Angeles County on ground of convenience of witnesses. The Superior Court, Solano County, Joseph M. Raines, J., entered an order denying the motion, and defendants appealed. The District Court of Appeal, Van Dyke, J., held that the trial court had not abused its discretion in denying such motion and therefore its action would not be disturbed.

Affirmed.

1. Appeal and Error ⚷965
Venue ⚷52(1)

The granting or refusing of motion for change of venue on ground of convenience of witnesses rests in discretion of trial court, and that court's action will not be disturbed on appeal except for abuse of discretion. Code Civ.Proc. § 397, subd. 3.

2. Venue ⚷52(1)

Affidavits presented in support of and opposed to motion for change of venue on ground of convenience of witnesses are considered with object of conveniencing the witnesses and serving the ends of justice, and a mere numerical majority of witnesses on one side or the other does not necessarily determine the merits. Code Civ.Proc. § 397, subd. 3.

3. Venue ⚷52(1)

Ordinarily, the convenience of a litigant is not considered in ruling upon motion for change of venue on ground of convenience of witnesses, but serious illness or other disability of the litigant which will prevent travel to attend the trial justifies an order granting or denying a change even as against the interests of the numerical majority of the witnesses. Code Civ.Proc. § 397, subd. 3.

4. Venue ⚷52(3)

Generally, the convenience of experts should not be considered in determining question of convenience of witnesses upon application for change of venue except where experts have personal knowledge of facts upon which their testimony is to be based. Code Civ.Proc. § 397, subd. 3.

5. Venue ⚷52(1)

Denial of motion for change of venue on ground of convenience of witnesses was not an abuse of discretion. Code Civ.Proc, § 397, subd. 3.

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A. J. Blackman, Los Angeles, for appellants.

Bradford, Cross, Prior & Dahl, Philip C. Wilkins, Sacramento, Alfred P. Peracca, Los Angeles, for respondents.

VAN DYKE, Justice.

Plaintiffs and respondents, the widow and mother of Vincent T. Figley, deceased, brought action in Solano County to recover damages for his death which they alleged had been negligently caused by defendants and appellants through operation of an airplane on which he was a passenger. It is admitted that he was such passenger and was killed when the plane crashed against a hill in Solano County. After answering, appellants moved for a change of venue from Solano County to Los Angeles County on the ground of convenience of witnesses. C.C.P., sec. 397, sub. 3. Their motion was denied and they appeal.

[1–3] The granting or refusal of such a motion rests in the discretion of the trial court and that court's action will not be disturbed on appeal except for abuse of that discretion. Wood v. Silvers, 35 Cal.App.2d 604, 607, 96 P.2d 366, 97 P.2d 265. The affidavits presented in support of, and opposed to, the motion are considered with the object of conveniencing the witnesses and serving the ends of justice and mere numerical majority of witnesses on one side or the other does not necessarily determine the merits. Id. While ordinarily the convenience of a litigant is not considered, yet serious illness or other disability of the party which will prevent travel to attend the trial will justify an order granting or denying a change even as against the interests of a numerical majority. Simonian v. Simonian, 97 Cal.App.2d 68, 217 P.2d 157. The code authorizes the court to consider "the ends of justice" as well as "the convenience of witnesses".

Appellants presented affidavits by two people to the effect that eight others would be material witnesses, all of whom were residents of Los Angeles County. Six were officials of the Civil Aeronautics Administration who, in pursuit of their official duties, went to the scene of the crash to investigate the causes thereof. The two others had also investigated such causes at the scene. As to all eight it is averred that they "have personal knowledge of the propriety of operation of said aircraft" or "personal knowledge of the circumstantial evidence indicating proper operation and control" thereof. Just what these men saw and why it is that what they saw indicates proper operation and control of an aircraft which crashed a hill on a routine flight from Oakland to Sacramento is not disclosed; but the trial court had the conclusion of the two affiants who were not there that what these men saw would so indicate. Affiants allege that there are no eyewitnesses to the wreck and to the ensuing holocaust which cost the lives of all on board.

Opposed to this showing stands the lone affidavit of decedent's mother, a party litigant and respondent herein, who avers that she is sixty-seven years old, impoverished and without funds to finance a trip to Los Angeles to testify; that she lives with her daughter and granddaughter who are pooling their resources in order to exist without the necessity of asking for relief; that her health is poor; that she is under a doctor's care; that because she is "going blind" she cannot get about without help, which she avers she has no way of getting in Los Angeles, whereas her relatives could assist her during a Solano County trial which, as the Court knows judicially, is a short trip from her home in Sacramento; that she is a material witness to establish the decedent's educational and financial attainments, his contributions to the support of, and his love and affection toward, the parties plaintiff.

[4, 5] We think little need be said beyond the foregoing statement of the contents of the opposing affidavits to make it clear that the action taken by the trial court in denying the motion for change of venue was within discretionary limits and must be affirmed. Brief consideration of the averred facts will sufficiently demonstrate this. The trial court could well conclude as to the eight witnesses named in the affidavits in support of the motion that only one or two would be necessary to establish the physical facts which were observed and concerning which there could reasonably be little, if any, dispute; and that the real value of their testimony would lie in their expert knowledge as to what these observed facts indicated touching the issue of negligence or none. And the court could have considered that it would be entirely unnecessary that eight expert witnesses or any more than one or two would be needed to give such conclusions as might be drawn from their expert knowledge. Generally, the convenience of experts should not be considered in determining the question of convenience of witnesses on application for change of venue except where the experts have a personal knowledge of the facts upon which their testimony is to be based. Security Investment Co. v. Gifford, 179 Cal. 277, 176 P. 444. In this case, as we have commented, the court might well have considered that what one of these men knew it would be reasonable to suppose all knew, and hence the exception to the rule above stated, based upon personal knowledge of the experts, would have no application. Furthermore, it appears that six of these eight witnesses whom the appellants desire to convenience are public officials and it is to be supposed that they, being such, would be willing at the least to appear and give to the trier of facts the benefit of their expert knowledge in ascertaining the cause of the catastrophe, for it is the duty of even private citizens,

and much more so of officials within the scope of their official duties, to so aid the courts of the country. Enough has been said, we think, to show the truth of what was hereinbefore asserted, that, considering the showing on both sides, the trial court was confronted with a situation where it could have decided the motion either way and its action in deciding as it did cannot be here disturbed.

The order appealed from is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

111 Cal.App.2d 365

RILEY et al. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR ORANGE COUNTY.

Civ. 4460.

District Court of Appeal
Fourth District, California.
May 27, 1952.

Dale Richard Riley, a minor, by his guardian ad litem, Aileen S. Riley, and others filed a petition for a writ of prohibition and certiorari, seeking to set aside an order of the Superior Court of the State of California, in and for the County of Orange, vacating a dismissal filed by the petitioners' attorney in their suit for declaratory relief against Portia A. Riley. The District Court of Appeal, Mussell, J., held that since affirmative relief had been sought in the answer filed by Portia A. Riley in the declaratory relief suit, the dismissal had been without authority and void, and therefore properly subject to vacation.

Writ denied.

1. Dismissal and Nonsuit 🔑19(1)

Where defendant in suit for declaratory relief set forth in her answer instruments upon which she relied, and prayed for court decree that she was entitled to property in accordance with such instruments and that plaintiffs were not entitled to any relief on their complaint, she thereby sought affirmative relief in her answer and plaintiffs could not prevent further proceedings on her motion for judgment on the pleadings by filing a dismissal of the suit. Code Civ.Proc. §§ 473, 581.

2. Clerks of Court 🔑67

The county clerk, in entering order for dismissal, acts in mere ministerial capacity and exercises no judicial function; and in exercising power conferred he is required to conform strictly to provisions of statute or his proceedings will be without binding force and any judgment entered by him will be void. Code Civ.Proc. §§ 473, 581.

3. Judgment 🔑346

A court has inherent power, apart from statute, to correct its records by vacating judgment which is void on its face, for such judgment is a nullity and may be ignored.

Alford P. Olmstead, Los Angeles, for petitioners.

Forgy, Reinhaus & Forgy, Santa Ana, and Bertram H. Ross, Los Angeles, for respondents.

MUSSELL, Justice.

In these proceedings, petitioner seeks to set aside an order vacating a dismissal filed by the clerk in an action brought in the Superior Court of Orange county and to restrain the trial court from taking any further proceedings in said action.

The complaint, for declaratory relief, was filed in Orange county on November 15, 1951. Defendant filed a demurrer thereto and a motion to strike portions of the complaint. On January 31, 1952, defendant filed her answer and on March 21, 1952, moved for judgment on the pleadings. The trial court continued the hearing on these matters to April 11, 1952, and on that date, prior to the hearing, plaintiffs' attorney filed a dismissal of the action with the county clerk. Plaintiffs then objected to further proceedings at the hearing on the motions on the ground that a dismissal of the action was on file with the clerk. The objection was overruled and the court ordered that the dismissal be set aside, continuing the hearing on the motions to April 18, 1952. Plaintiffs then filed a petition for a writ of prohibition and certiorari herein.

[1] It is conceded that plaintiffs had the right to dismiss the action under the provisions of Section 581 of the Code of Civil Procedure, provided that no affirmative relief was sought by defendant in her Answer and the principal question involved herein is whether such relief is sought therein.

It is alleged in the complaint, among other things, that defendant claims to own solely and exclusively an undivided one-half interest in and to real property known as the Riley Building (particularly described in the complaint) and all of three parcels of real property described on "Schedule 3" (attached to the complaint) free and clear of any rights of plaintiffs or interests therein; that said claim is without right and plaintiffs are and of right ought to be the owners of and entitled to an undivided one-third of an undivided one-half interest in the Riley Building and an undivided one-third interest in the property described in Schedule 3; that defendant holds the same in trust for the plaintiffs and that plaintiffs are entitled to one-third of the rentals received from the Riley Building.

In the Answer filed by the defendant Portia A. Riley it is alleged, among other things, that by virtue of a devise to her in the last will of Chester J. Riley she is the owner of an undivided one-half interest in the Riley Building, free and clear of any claims, demands or rights of the plaintiffs. The answer sets forth the will and agreement under which she claims title and it also alleges that the agreements under which plaintiffs were claiming title had been set aside and terminated by a later agreement between the parties. In the prayer in her Answer, defendant seeks a court decree that she is entitled to the estate of Chester J. Riley in accordance with the terms and provisions of his last will and testament and that plaintiffs are not entitled to any relief on their complaint. By her Answer, defendant seeks a decree establishing her title to real property. She sets forth the instruments upon which she relys and alleges that plaintiffs have no interest in the property claimed by her. Clearly, affirmative relief is sought in the Answer within the meaning of Section 581 of the Code of Civil Procedure. Aten v. Aten, 69 Cal.App.2d 589, 159 P.2d 672.

[2, 3] Petitioners next claim that the Superior Court action here involved stands dismissed and the attempt of the lower court to decide it upon its merits is in excess of its jurisdiction. In this connection, the case of Biggs v. Biggs, 103 Cal.App.2d 741, 230 P.2d 32, is cited. It is there held that the entry of an order for dismissal in the clerk's register has the effect of a final judgment and that a judgment can be nullified by the court which rendered it only: (1) On motion for a new trial; (2) by a motion under the provisions of section 473 of the Code of Civil Procedure; (3) by motion therefor at any time where the judgment is void on its face. However, the county clerk, in entering the order for dismissal, acts in a mere ministerial capacity and exercises no judicial function. In exercising the power conferred, he is required to conform strictly to the provisions of the statute or his proceedings will be without binding force and any judgment entered by him will be void. Baird v. Smith, 216 Cal. 408, 410, 14 P.2d 749; Burtnett v. King, 33 Cal.2d 805, 808, 205 P.2d 657, 12 A.L.R.2d 333. Since affirmative relief was sought in the Answer filed by defendant, the dismissal was without authority and void. As is said in Olivera v. Grace, 19 Cal.2d 570, 574, 122 P.2d 564, 567, 140 A.L.R. 1328;

> "* * * a court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face, for such a judgment is a nullity and may be ignored. People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am. St.Rep. 448; 126 A.L.R. 968; 31 Am. Jur. 298; 14 Cal.Jur. 1023, 1024."

In the instant case we conclude that the trial court properly set aside and vacated the dismissal. The writ is denied.

BARNARD, P. J., and GRIFFIN, J., concur.

111 Cal.App.2d 264

PEOPLE v. WERNER.

Cr. 845.

District Court of Appeal, Fourth District, California.

May 22, 1952.

Defendant was convicted in the Superior Court, Fresno County, Milo Popovich, J., of murder in the first degree, and he appealed. The District Court of Appeal, Barnard, P. J., held that the evidence, with the inferences which could reasonably be drawn therefrom, was sufficient to support an implied finding of deliberation and premeditation, and to support verdict of guilty of murder in first degree.

Judgment affirmed.

1. Homicide 🔑22(2)

In order to sustain conviction for murder in the first degree, evidence must be sufficient to show deliberation and premeditation.

2. Homicide 🔑332(2)

In prosecution for murder, the weight of the evidence is for the trial court, and in order to upset a verdict of first degree murder it must clearly appear that upon no hypothesis is there sufficient evidence to support the conclusion reached by the trier of facts.

3. Criminal Law 🔑1159(3)

In criminal prosecutions, it is not within the province of appellate court to determine conflicts in the evidence or to choose between different inferences which may reasonably be drawn therefrom.

4. Homicide 🔑253(3)

No rule can be laid down as to the character or amount of proof necessary to show deliberation and premeditation for first degree murder, and each case must depend upon its own facts.

5. Homicide 🔑253(3)

The deliberation and premeditation required for first degree murder need not be directly shown by the evidence but may be inferred from circumstances which furnish a reasonable foundation for such conclusion.

6. Homicide 🔑253(3)

In prosecutions for first-degree murder, the mere fact that no witness saw the killing or heard the defendant say what was in his mind at the time in question does not necessarily preclude a finding of deliberation and premeditation.

7. Homicide 🔑253(3)

Evidence, with inferences which could reasonably be drawn therefrom, was sufficient to support an implied finding of deliberation and premeditation, and to support verdict of guilty of first-degree murder.

Robert E. Sears, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., Richard L. Shepard, Asst. Dist. Atty., of Fresno County, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of his wife on or about April 2, 1951. A jury found him guilty of murder in the first degree, fixing the punishment as life imprisonment, and he has appealed from the judgment.

The appellant and the deceased had been married for six years, but separated on February 8, 1951. He remained in their old apartment on College Street and she moved into a one-room apartment on Nevada Street, both in Fresno. During the separation period the appellant had been attempting to affect a reconciliation with his wife who worked at the office of the Housing Administration in Fresno. When she left work on the evening of Friday, March 30, her superior gave her keys to the office so she could finish some work for him during the weekend.

A nephew of the deceased, who was in the Navy, came to visit her on this weekend. He arrived at 3:00 A.M. on Saturday, March 31, going to the apartment on College, and the appellant took him to the deceased's apartment. She was not there when they arrived, but the appellant got the key from a crevice where it was kept and they went in. The deceased arrived a few minutes later and they talked for half an hour. Since the deceased had no place for the nephew to sleep, they decided they would all go to the appellant's apartment and sleep there for the weekend. They talked about the nephew's returning on the following weekend, and the deceased stated she would then sleep at a friend's house and the nephew could use her apartment. They then went to the appellant's apartment, taking some blankets and a radio phonograph with them. The nephew slept with the appellant, and the deceased on a couch in the living room. Later that day they visited Yosemite Park and went to a night club in the evening. On Sunday, April 1, they visited friends and entertained the nephew in various ways. During the two days the nephew heard the appellant repeatedly ask the deceased to come back to him, pleading with her to do so, and she kept refusing. On Sunday a mutual friend called at the apartment and when he left the appellant followed him to his car and asked him to try to talk the deceased into coming back to him. There was evidence that he had made attempts to have other mutual friends intercede to this end.

The three had dinner at appellant's apartment on Sunday, April 1, between five and six P.M. The appellant and the deceased took the nephew to the airport and he left for San Diego at 8:40 P.M. En route to the airport they stopped at the deceased's apartment, dropping off her radio phonograph and the blankets. On the way to the airport the appellant told the deceased he would take her back to her office, where she had some work to do. At the airport they talked about the nephew returning the following weekend. When he and the nephew were alone, the appellant told the nephew that if anything should happen to him or to the deceased the nephew should write to the deceased's parents in Pennsylvania "and tell them how they were living." A neighbor in an adjoining apartment testified that she thought she heard the appellant and the deceased return to his apartment that evening, stay for a few minutes, and leave about 9:15 P.M. At about 9:30 that evening the deceased called one of her coworkers from the Housing Administration office. Apparently she was there to do the work which she was to do over the weekend, which would take her from an hour to two hours, and the work was found on the desk of her superior when he came to work the next morning. Adjoining neighbors heard someone moving in the appellant's apartment shortly after 1:00 A.M. on April 2d, and this continued until about 2:30 A.M.

Between 9:00 and 10:00 A.M. on Monday, April 2, the appellant appeared at the office of the Dean of an Episcopal Church in Fresno. He appeared agitated and left shortly when he found the Dean was not there. Later that morning, he withdrew $115 from his account in a bank in Fresno. On the morning of April 3, the appellant sent a telegram from Hollywood to the deceased's employer, purportedly signed by her, which read: "Feel very bad to let you down on job. Must settle problem concerning Ted. Have left town to be alone and think. Plan to return Monday."

When the deceased failed to show up on Monday, April 2, her associates became quite concerned since she was a very punctual person, and she was to receive a promotion on that day. Her immediate superior and another employee went to her apartment at 3:00 o'clock that afternoon. They found the door locked with a typewritten note tacked to the door, reading: "Ted. Have gone to visit Lee and Lorna. Will notify office so don't bother them by calling. Be back next week. Bennie." Two coworkers returned at 5:00 o'clock and saw the note on the door. They looked in the window and seeing no activity, left. At 7:00 o'clock that night another coworker, with some other people, obtained a key from the landlady and went in. They saw a bunch of quilts piled on the divan, which the appellant used as a bed, and observed the bottom of a foot sticking out from under the covers. Without touching anything they walked out and the police were called. The police arrived at 7:13 P.M. and an officer raised the quilts revealing the body which was immediately identified. The deceased appeared to have been prepared for bed, having on pajamas and a bath robe and with her hair in bobby pins. There was blood on her hair, on the pillow and coverings, on the pajamas, on the back of the divan, and on the wall. About eight inches above the divan there was a hole through the plasterboard about the size of an egg. A hammer-head was found partly underneath the body of the deceased which appeared to have been freshly broken from the handle. The rest of the hammer handle was found on the opposite side of the apartment between a portable closet and the wall. There was blood on the handle of the hammer and also on the hammer-head. A wash rag and a bandana were found on the floor. There was blood on both and the wash rag was damp.

The officers searched the appellant's apartment on College and found in a clothes hamper a sweater, a T shirt, and a pair of shorts, all of which had blood on them. Analysis showed that this was human blood which corresponded to the blood type of the deceased. A typewriter was also found there, on which the note pinned to the door of the deceased's apartment had been typed. The torn pieces of a similar note were found in a waste basket, and the officers also found the keys to the office which had been given to the deceased.

An autopsy was conducted that night revealing that the deceased was about 30 years old, five feet three inches in height, and weighed about 120 pounds. From the testimony of the autopsy surgeon it appears that the deceased had been hit on the head with a blunt instrument in seven places. Two of these showed lacerations and one had cracked the outer layer of the skull but not enough to injure the brain. These injuries were not sufficient to cause death although they might have been a contributory cause. There was a narrow line of excoriation extending around the entire neck except for an inch and a half at the back of the neck. The front part of the neck showed linear abrasions as though something had been held tightly and moved back and forth, causing a scraping of the skin at the Adam's apple. There were also bruises below the elbow on the left arm. The autopsy surgeon expressed the opinion that the primary cause of death was strangulation by some sort of cord-like thing around the neck. He gave ample reasons for this opinion, which are confirmed by the pictures of the body which are in evidence. He estimated the time of death as two to seven hours after the last meal was eaten by the victim. He testified that the blows on the head would probably have had the effect of rendering the victim unconscious; that it would take longer than thirty seconds for strangulation to have occurred, as otherwise the hemorrhages in the lungs would not have been present; that if a person had died in a shorter period than that in which one can hold his breath he would not be dying from strangulation; that it would take five minutes after shutting off the blood to cause death if there were no other condition, like a heart condition, to hasten it; and that in this case the hemorrhages show that the heart had continued to beat after oxygen was excluded from the lungs.

On June 7, 1951, the appellant was arrested by two special agents of the FBI at a monastery in New York State, about 60 miles from New York City. When they asked him his name he became excited and said: "I am the man. I am the fellow you are after. I did it. It was a horrible mess." They searched him and found in his pockets a small vial and another package of potassium cyanide. They told him they were going to take him to New York, that he did not have to say anything if he did not want to, and that he could procure counsel. When they got in the car the appellant said: "Thank God it is over. It was horrible. I am at the end of my rope." On the way to New York the appellant kept saying how much he loved his wife and that he could not understand how he had done this horrible thing. He also said "I am sure that I did it. Everything points to me." Also, "When I get to California I will get what I—what you found in my pocket." He further stated that he had studied criminology, had been quite interested in it, had read a number of books, and that he had written some manuscripts in that connection. He also said "that he sure made a blunder of this matter, that he had been swimming with his wife and that he could have held her under the water." They stopped on the way to New York to feed appellant at a jail. After he had eaten, the agents asked him to sign a statement, which one of them had written, of the things he had told them. He refused to sign the statement although he admitted that it was correct. According to this statement, admitted but not signed by the appellant, he had told the officers that on the Saturday night of this weekend he and his wife and a relative had stayed in his apartment and the following day had gone to some park. They later drove the nephew to the airport, from which he was returning to San Diego. Later on, at 9:00 P.M., they went to the deceased's apartment where the appellant said he reviewed with her a radio script which he had prepared. He said he did not remember anything after that but the next morning he woke up and there was blood all over his clothes; that he changed his clothes and went to his wife's apartment and saw her on the floor; that there was blood all over her face and her body; that he lifted the body and put it on the couch and covered it with a blanket; that he then returned to his apartment and typed the note which he tacked on the door of her apartment; that he went into the deceased's apartment and took $10 from her pocketbook and left; that he tried to talk to the Dean at the church but could not see him; that later he went to the bank and withdrew $115; that he drove his car to Los Angeles and stayed at a motel; that he sent a telegram to his wife's employer saying that she was going to stay there; that later he went to the Lockheed airport, left his car there and went to New York, traveling under the name of Hart; that he stayed at various places in New York City and worked for a while in one place under the name of Hill; that he returned to New York City and just prior to his arrest proceeded to the monastery; and that he had attempted to commit suicide by running his car in a garage. He also told the agents that he and his wife owned two hammers, that either might have been at either home, and that he had been fixing some screens at his wife's house and he might have had the hammer at her home in that connection.

The pictures in evidence, taken after death, show a very pronounced line around the neck, apparently made by a rather narrow cord or something of that nature. No such cord or article of that nature was found. At the trial the appellant did not take the stand.

The sole question raised on this appeal is whether the evidence is sufficient to sustain a finding of premeditation and deliberation necessarily implied in a conviction of murder in the first degree. Conceding that the evidence is otherwise sufficient, the appellant contends that there is no evidence of the circumstances surrounding the death of his wife; that the gruesomeness of the attack and the manner in which she met her death would tend to indicate a violent act, committed in a wild fit of rage; that there is no evidence which would indicate that the intent to kill was arrived at after the deliberation and premeditation which is required; and that the judgment should be modified and reduced to murder of the second degree.

[1–6] Beyond question, it is necessary that the evidence be sufficient to show deliberation and premeditation in order that a conviction of first degree murder may be sustained. People v. Thomas, 25 Cal.2d 880, 156 P.2d 7; People v. Holt, 25 Cal.2d 59, 153 P.2d 21; People v. Bender, 27 Cal.2d 164, 163 P.2d 8. In most of the cases in this state, in which the crime has been reduced to second degree murder, there was evidence of some situation, arising from excessive drinking or a violent quarrel, indicating that the crime was committed in a sudden fit of rage. The weight of the evidence is for the trial court, and in order to upset such a verdict it must clearly appear that upon no hypothesis is there sufficient evidence to support the conclusion reached by the trier of fact. People v. Odle, 37 Cal.2d 52, 230 P.2d 345; People v. Coston, 82 Cal.App.2d 23, 185 P.2d 632. It is not within the province of an appellate court to determine conflicts in the evidence or to choose between different inferences which may reasonably be drawn therefrom. People v. Hills, 30 Cal.2d 694, 185 P.2d 11. No rule can be laid down as to the character or amount of proof necessary to show deliberation and premeditation, and each case must depend upon its own facts. People v. Eggers, 30 Cal.2d 676, 185 P.2d 1. The required deliberation and premeditation need not be directly shown by the evidence but may be inferred from facts and circumstances which furnish a reasonable foundation for such a conclusion. People v. Eggers, 30 Cal.2d 676, 185 P.2d 1; People v. Hills, 30 Cal.2d 694, 185 P.2d 11; People v. Guldbrandsen, 35 Cal.2d 514, 218 P.2d 977. The mere fact that no eyewitness saw the killing or heard the defendant say what was in his mind at the time in question does not necessarily preclude a finding of deliberation and premeditation. People v. Coston, 82 Cal.App.2d 23, 185 P.2d 632. "In arriving at the intention of the defendant, regard should be given to what occurred at the time of the killing, if indicated by the evidence, as well as to what was done before and after that time." People v. Eggers, 30 Cal.2d 676, 185 P.2d 1.

Although the appellant later said he could not understand how he had done such a thing, he at no time claimed that he had not intended to kill his wife. His only claim was that he did not remember what happened at the time in question and no explanation, reasonable or otherwise, was offered or appears for his lack of memory covering only that period. He made no claim that there was any provocation for the attack, and there was no evidence of any drinking or carousal or of any quarrel. There was no evidence indicating that there had been any struggle. It rather clearly appears that the deceased must have been sitting on the divan when the blows with the hammer were struck. She was hit repeatedly, and apparently the final blow must have hit the wall with such force as to break the hammer handle. The blows she received would have rendered her unconscious but would not have killed her. The evidence amply justifies the inference that she was strangled after the blows were struck and while she was unconscious. She was not strangled by the use of the hands pressed on vulnerable spots, but by some narrow cord-like article. It clearly appears that this was done from the rear, with the article completely around her neck except where its two ends were held. It also appears that this article had been moved back and forth and held so tight around the neck as to leave a very unusual mark, showing rather clearly what had occurred. The appellant must have taken sufficient time to get the hammer, whether or not it was in the room, and later taken time to get and use whatever was used to strangle her, which was then disposed of where it was never found. These facts tend to indicate sufficient premeditation. People v. Peete, 54 Cal.App. 333, 202 P. 51.

A motive appears in the appellant's failure to affect a reconciliation. The nature of the attack, as shown by the physical evidence, is even more suggestive in view of the appellant's actions shortly thereafter, including his long continued movements in his room and the note pinned on the door and the telegram sent to the office where the deceased worked, both purporting to be signed by her. There is also his statement to the nephew a short time before the crime was committed. Although the nephew was expected to return in a few days, the appellant asked him to make some explanation to the deceased's parents if anything should happen to her. It may fairly be inferred that he had something rather definite in mind. His later statement to the officers that he expected to get cyanide when he returned to California is also suggestive, in view of his admitted interest in and knowledge of criminology.

The fact that the appellant was apparently back in his apartment about 1:00 A.M. indicates that the killing had then been accomplished, and this is supported by the autopsy findings. He covered the body in such a way that things would look natural to anyone looking in at the window, and went to unusual lengths in trying to make it appear that his wife was still alive. There is no evidence of excessive drinking or of any fact which would indicate anything that might naturally lead to a sudden rage; he made no claim of that nature when he told his story to the officers; and he did not take the stand to explain or deny any of the incriminating facts which were brought out against him.

[7] Applying the established rules to the facts of this case it must be held that the evidence, with the inferences which can reasonably be drawn therefrom, is sufficient to support the implied findings of deliberation and premeditation and to support the verdict as rendered by the jury.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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111 Cal.App.2d 248

McMAHON et al. v. MARSHALL et al.

Civ. 18792.

District Court of Appeal, Second District,
Division 1, California.
May 22, 1952.
Hearing Denied July 17, 1952.

Action by Julia Ann McMahon, a minor, by Agnes I. McMahon, her guardian ad litem, against Betty J. Marshall, and another, for injuries received by plaintiff pedestrian while in cross-walk at intersection when struck by automobile driven by named defendant after named defendant passed two other automobiles which had been stopped to permit pedestrian to cross. The stopped automobiles were about 25 feet from cross-walk. The Superior Court of Los Angeles County, George Francis, J., read to jury statutes providing that when any vehicle has stopped at cross-walk to permit pedestrian to cross, driver of vehicle approaching from rear should not overtake and pass such stopped vehicle, and entered judgment for pedestrian, and defendants appealed. The District Court of Appeal, White, P. J., held that reading of statute to jury was not prejudicial error.

Judgment affirmed.

1. Negligence 🔑138(3)

It is proper to give instruction on unavoidable accident where there is evidence that accident is proximately caused by circumstances beyond control of a reasonably prudent person, or where there is no evidence that accident is caused by any factor other than lack of care.

2. Negligence 🔑134(11)

A determination that an accident was unavoidable is proper where evidence merely shows that plaintiff has failed in his proof.

3. Appeal and Error 🔑1067

Automobiles 🔑246(57)

In action for injuries received by minor pedestrian while in cross-walk at intersection when struck by automobile driven by defendant after defendant had passed two other automobiles which had stopped to permit pedestrian to cross, refusal to give requested instruction on unavoidable accident was not prejudicial error, in view of other instructions given, nor would giving such instruction have been error.

4. Appeal and Error 🔑1067

Failure to give instruction on unavoidable accident, even in an appropriate case, does not necessarily result in prejudicial error.

5. Appeal and Error 🔑1064(1)

In action for injury received by minor pedestrian while in cross-walk at intersection when struck by automobile driven by defendant after defendant passed two other automobiles which had been stopped 25 feet from cross-walk to permit pedestrian to cross, reading to jury text of statute providing that, whenever any vehicle has stopped at cross-walk to permit pedestrian to cross, driver of vehicle approaching from rear should not overtake and pass such stopped vehicle, was not prejudicial error. Vehicle Code, § 560(a, b).

6. Trial 🔑241

Required proximity between cross-walk and stopped vehicle necessary before statute providing that, when vehicle has stopped at cross-walk to permit pedestrian to cross, driver of vehicle approaching from rear shall not overtake and pass such stopped vehicle, may be read to jury, must be determined by facts of each case, in light of which claimed negligence of driver of approaching vehicle must be adjudicated. Vehicle Code, § 560(b).

7. Negligence ⚿1

"Negligence" is a relative term and its existence is dependent upon surrounding circumstances, viewed in light of what an ordinary prudent person, confronted with such situation, would have done.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

◆

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for appellants.

Demler & Eckert, Everett E. Demler, Long Beach, for respondent.

WHITE, Presiding Justice.

This is an appeal by defendants from a judgment in favor of the minor plaintiff, Julia Ann McMahon, awarding her damages for injuries sustained when she was struck by an automobile operated by the defendant Betty J. Marshall.

The plaintiff was struck as she was crossing Santa Fe Avenue on the south side of 21st Street, in the City of Long Beach, in a marked pedestrian crosswalk. Two vehicles proceeding south on Santa Fe Avenue were stopped by their operators to permit the plaintiff to cross. Defendant Betty Marshall drove her automobile past these two vehicles and into the crosswalk striking the child in the crosswalk and near the center line of the street.

It is contended that the trial court committed prejudicial error in failing to give a requested instruction on "unavoidable accident", and in reading to the jury subsection (b) of section 560 of the Vehicle Code, which provides that "Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle." A careful perusal of the record discloses no prejudicial error.

[1, 2] With respect to the failure to instruct on the subject of unavoidable accident, appellant relies upon the cases of Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823, and Driver v. Norman, 106 Cal.App.2d 725, 236 P.2d 6. Concededly, under these cases, it is proper to give the instruction in question where there is evidence that the accident was proximately caused by circumstances beyond the control of a reasonably prudent person; and the application of the rule allowing this defense is not limited to cases where the defendant relies upon evidence of a proximate cause beyond his control, but the instruction is also approved where there was no evidence that the accident was caused by any factor other than the lack of care. Parker v. Womack, supra, 37 Cal.2d at pages 120, 121, 230 P.2d 823. A determination that an accident was unavoidable is proper where the evidence merely shows that the plaintiff has failed in his proof. Parker v. Womack, supra, 37 Cal.2d at page 122, 230 P.2d 823; Jolley v. Clemens, 28 Cal. App.2d 55, 73, 82 P.2d 51.

[3] But in both Parker v. Womack, supra, and Driver v. Norman, supra, the court on appeal was concerned with the propriety of an order granting a new trial after a verdict for the defendant, the trial court believing that the giving of the instruction had resulted in error prejudicial to the plaintiff. In each case it was held that the instruction was proper and the order granting a new trial was reversed. The question here presented is whether, in the light of the evidence and the instructions given, the failure to give the instruction constituted prejudicial error. While it would not have been error to have given an instruction on unavoidable accident, neither was it prejudicial error to refuse to give it, because the record before us reflects that the jury was fully and fairly instructed that the defendant was not liable if she was not negligent, or if negligent, her negligence was not a proximate cause of the accident. The court instructed the jury as to the meaning of a "preponderance of the evidence" and defined "negligence" for the jury, noting that the person whose conduct is set up as a standard is not the extraordinarily cautious or skillful individual, but a person of reasonable and ordinary prudence. The jury was advised that the burden was upon the plaintiff to

prove by a preponderance of the evidence that defendant was negligent and that such negligence was a proximate cause of injury; that the mere fact that an accident happened, considered alone, would not support an inference that some party was negligent; that the jury could not speculate as to the cause of the accident, and if the evidence is equally balanced on the issue of negligence, then the party making the charge of negligence has failed to sustain the burden of proof. The jury was also instructed upon the doctrine of unexpected peril.

In Jaeger v. Chapman, 95 Cal.App.2d 520, 213 P.2d 404, 406, it was held that it was not error to fail to give an instruction on unavoidable accident. There, as here, the jury was fully instructed as to negligence, burden of proof, and duty in case of sudden peril. The court there said:

> "Thus the jury was fully instructed that the defendant was not liable if he was not negligent and if such negligence was not a proximate cause of the accident. While it would not have been error to have given such an instruction, it was not error to refuse to give it where all elements of defendant's liability were covered by other instructions. The defendant is not entitled to have his defense overemphasized and cannot complain that his defense is not stated in a particular way, as long as the defense is adequately and fairly covered."

[4] It is true that in Parker v. Womack, supra, the Supreme Court held that the defendants were entitled to have the instruction given to the jury, but it does not follow that a failure to give such instruction, even in an appropriate case, necessarily results in prejudicial error. As was said in Jaeger v. Chapman, supra, 95 Cal.App.2d at page 524, 213 P.2d at page 406, quoting from Guay v. American President Lines, 81 Cal.App.2d 495, 184 P.2d 539, "The jury was fully and fairly instructed on the general rules of liability for negligence. It has impliedly found that defendant's negligence solely and proximately caused the accident. Such finding is supported by the evidence, and the permissible inferences therefrom. Under these circumstances no error was committed in failing to instruct on unavoidable accident."

Appellants concede that it was proper to read subsection (a) of section 560 of the Vehicle Code to the jury, this subsection having to do with the duty of the vehicle operator to yield the right of way to a pedestrian within a crosswalk, but urge that subsection (b) hereinbefore quoted was inapplicable and that its reading constituted prejudicial error, because, it is contended, the vehicles of the witness Campagna and the witness Albair did not stop *at* the marked crosswalk on the south side of Twenty-First Street, but stopped on the north side of Twenty-First Street. Appellants submit that Mrs. Marshall was under no statutory duty to refrain from passing these two stopped cars when there was the whole width of Twenty-First Street between them and the marked crosswalk in which plaintiff was crossing. It is conceded that "in the application of common sense a few feet could not make any material difference," but that a line must be drawn somewhere; and if it be held that a vehicle stopped 25 feet from the crosswalk is stopped "at the crosswalk", then it could as well be held that a vehicle 30, 40 or 50 feet from the crosswalk is also "at" the crosswalk.

[5–7] Abstractly speaking, there may be some merit to appellant's contention "that a line must be drawn somewhere," but the rule in that regard must be determined by the facts and circumstances presented in a particular case, in the light of which the claimed negligence of the driver of a motor vehicle must be adjudicated. Negligence is a relative term and its existence is dependent upon the surrounding circumstances, viewed in the light of what an ordinarily prudent person, confronted with such a situation, would have done.

Assuming it would not be a violation of section 560(b) of the Vehicle Code to overtake and pass another vehicle which has been stopped 50 feet from a pedestrian crossing, that is not the situation with which we are here confronted. Twenty-First Street in Long Beach, where it enters Santa Fe Avenue from the west, is only 25 feet wide. The witness Campagna brought his vehicle to a stop "a foot or two" into the intersection, thus bringing the front of his car not over 25 feet and perhaps less from the north line of the crosswalk (not over a car length and a half), and waved the little girl to proceed. Another automobile going in the same direction was also brought to a stop to give the child the right of way. The crosswalk was painted and there is testimony that a standard with the warning "Stop for Pedestrians" stood in the middle of the roadway.

We do not, however, hesitate to hold that, in a particular case, it may be a violation of section 560(b) of the Vehicle Code, when a vehicle has been stopped within one or two car lengths of a crosswalk to permit the passage of a pedestrian, for the driver of a second vehicle to proceed past the stopped vehicle and into the pedestrian crosswalk, and that such conduct is negligence per se. (Concededly, if the leading vehicle or vehicles made a sudden stop for a pedestrian, it would be a question for the jury to determine under all the evidence whether or not the defendant in the exercise of ordinary care was able, or should have been able, to stop also. Further, the question of a violation of section 560(b) would be of no importance if the second vehicle, after passing the stopped vehicle, was brought to a stop before entering the pedestrian zone.) The question of whether appellant Betty Marshall did in fact violate section 560(b) of the Vehicle Code was expressly left to the determination of the jury. The jury was also advised that such violation was of no consequence unless they found that it was the proximate cause of plaintiff's injury. The jury impliedly found that she did violate the code section. From a review of the transcript we find that about the only substantial conflict in the evidence was as to when the child broke into a run after stepping into the crosswalk—whether she started running immediately and ran into the defendants' vehicle or whether she tried to run when she saw the vehicle bearing down upon her. The jury was fully instructed on the issue of contributory negligence and there is no claim of error in this regard.

The record discloses no prejudicial error. The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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111 Cal.App.2d 306

FARISH v. BROWN.

Civ. 8119.

District Court of Appeal,
Third District, California.

May 26, 1952.

Rehearing Denied June 12, 1952.

Action by R. A. Farish against M. W. Brown on an open book account for a balance due on the sale of two motor trucks, wherein defendant filed a pleading designated an answer, cross-complaint and counterclaim. The Superior Court, Shasta County, Richard B. Eaton, J., made an order setting aside a default judgment on defendant's pleading, and defendant appealed. Plaintiff cross-appealed from that portion of the order finding no excusable neglect justifying relief from entry of the default. The District Court of Appeal, Schottky, J. pro tem., held that the defenses were in fact counterclaims rather than cross-complaints and were deemed controverted without necessity of any pleadings.

Order setting aside default and vacating judgment affirmed.

1. Pleading 🔑138

Counterclaim is not an independent pleading, and may stand or fall in conjunction with answer.

2. Pleading 🔑138

As between counterclaim and cross-complaint, nature of pleadings will be determined from allegations regardless of its designation.

3. Pleading ⟹138

There need be no connection between cause of action set up in complaint and that which forms basis of counterclaim.

4. Pleading ⟹167

In seller's action against buyer on open book account for balance due on sale of two motor trucks, defendant's pleading denominated an "answer and cross-complaint and counterclaim," which alleged that plaintiff had become indebted to defendant on oral contract for goods sold and delivered and that plaintiff promised to pay sum which was not paid, and which further stated defense that defendant was to pay for four trucks when delivered, that he demanded possession, and that plaintiff failed and refused to deliver to defendant's damage stated defenses which were in fact counterclaims, rather than cross-complaints and were deemed controverted without necessity of further pleading. Code Civ.Proc. § 462.

◆

R. P. Stimmel, Frank W. Shuman and L. C. Smith, Redding, for appellant.

John G. Evans, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff filed an action in the Municipal Court of San Francisco. His complaint was based upon an "open book account" and alleged that defendant became indebted to plaintiff for two motor trucks sold and delivered to defendant, in the sum of $2,000 plus $60 sales tax; that defendant was entitled to a credit of $850 for two automobile tires, leaving a balance due to plaintiff of $1,210.

On November 30, 1950, a demurrer to the complaint was filed and notice of motion given for change of venue to Shasta County. It appears from the briefs, but not from the record, that the motion for change of venue was denied, and on appeal the Appellate Division of the Superior Court of the City and County of San Francisco reversed the Municipal Court order denying the motion for change of venue. Pending this appeal, and on December 29, 1950, defendant filed in said Municipal Court what he denominated as "Answer and Cross-complaint and Counter-claim." In his answer defendant denied any indebtedness to plaintiff, "and for a separate and further defense and by way of counterclaim and cross-complaint and a first cause of action, cross-complainant complains of cross-defendant and alleges" that prior to March 23, 1950, cross-defendant became indebted to defendant and cross-complainant upon an oral contract in the sum of $1,066.34 for goods, wares and merchandise sold and delivered in Shasta County, which sum plaintiff and cross-defendant promised and agreed to pay, which was not paid, and prayed for the $1,066.34 with interest from March 23, 1950. A second count was added for the same $1,066.34 except alleging "reasonable value" instead of "agreed" sum. In the third defense "and by way of counter-claim and cross-complaint" defendant alleged that prior to March 23, 1950, plaintiff and cross-defendant was the owner of four described motor trucks and in Shasta County plaintiff "sold and delivered, or caused to be sold and delivered," to defendant and cross-complainant the said four trucks at the agreed price of $2,000; that by the agreement, defendant was to pay for the four trucks when they were delivered; that defendant was ready to receive and demanded possession of the four trucks but plaintiff failed and refused to deliver them and has made only two of said trucks available and by reason thereof defendant has been damaged in the sum of $1,500. Defendant prayed for $1,066.34 with interest thereon from March 23, 1950, at seven per cent (7%) per annum, for $1,500 for damages, and for costs.

On May 18, 1951, the case was ordered transferred to Shasta County, the record being filed there on May 28, 1951. On June 7, 1951, the clerk entered the default of plaintiff, and on the same day a judgment, signed by Judge Ross, was filed, which judgment was in favor of defendant upon his cross-complaint for $2,566.34, with interest and costs.

Promptly thereafter, by a notice dated June 14, 1951, plaintiff gave notice that on June 25, 1951, he would move the Shasta County court for an order setting aside said default judgment on the grounds: (1) Excusable mistake; (2) that the pleadings of the defendant constituted counterclaims and not a cross-complaint, and that a default judgment thereon was improper.

In support of the motion, the attorney for plaintiff made an affidavit in which he stated that he prepared a demurrer to defendant's counter-claim designated as "Answer and Cross-Complaint and Counter-Claim," and gave it to his then secretary, Mary Shaw-Reilly, with instructions to mail same to the clerk of the Municipal Court of the City and County of San Francisco, and a copy thereof to counsel for the defendant; that she inadvertently filed the demurrer in the office file instead of mailing it as directed, and her failure to mail said demurrer was not discovered until June 8, 1951; that she died January 21, 1951, and the demurrer was prepared January 8, 1951. Defendant filed an affidavit opposing the motion. In deciding the motion Judge Eaton filed an opinion and order which stated:

> "* * * [T]he Court finds:
>
> "(a) That excusable neglect justifying relief from entry of default is not shown. Doyle v. Rice Ranch Oil Co., 28 Cal.App.2d 18 [81 P.2d 980].
>
> "(b) That nevertheless, default was entered improperly and inadvertently herein, in that defendant's pleading is in fact a counter-claim and not a cross-complaint, and hence does not require in its turn to be pleaded to. Section 462, C.C.P.
>
> "In that defendant's pleading neither brings in new parties nor seeks any new *kind* of relief, it is not a cross-complaint, though it not only tends to defeat plaintiff's recovery, but goes further and claims a balance of money due defendant. Section 626, C.C.P.; Todhunter v. Smith, 219 Cal. 690 [28 P.2d 916].
>
> "Plaintiff's demurrer and answer to defendant's pleading are inappropriate and will not be filed herein.
>
> *"The motion to set aside the default and vacate the judgment entered thereon is therefore granted."*

Defendant has appealed from the order setting aside the default and argues that his pleading was a cross-complaint and not a counterclaim, and that, therefore, the court erred in setting aside the default judgment.

Plaintiff has filed a cross-appeal from the portion of the order which finds that no excusable neglect was shown justifying relief from the entry of default.

We shall first consider the appeal of defendant, because if we conclude that the court correctly determined that the pleading in question was a counterclaim instead of a cross-complaint it will be unnecessary to discuss plaintiff's appeal.

[1–3] In the recent case of Case v. Kadota Fig Association, 35 Cal.2d 596, at page 603, 220 P.2d 912, at page 916, our Supreme Court said:

> "A counterclaim is not an independent pleading, and may stand or fall in conjunction with the answer. Section 438 of the Code of Civil Procedure provides that the counterclaim '* * must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action. * *' Also, by statute: 'If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.' Code Civ.Proc. sec. 439.
>
> "'* * * [U]nder our system of procedure, there is a very shadowy line of distinction between a crosscomplaint and a counterclaim and a considerable area in which they overlap.' Schrader v. Neville, 34 Cal.2d at page 112, [114] 207 P.2d 1057, 1058. Moreover, '* * * it is well established that as between a counterclaim and a crosscomplaint the nature of the pleading will be determined from its allegations regardless of its designation. Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474; Cornblith v.

Valentine, 211 Cal. 243, 294 P. 1065; Robertson v. Maroevich, 42 Cal.App. 2d 610, 109 P.2d 708.' Schrader v. Neville, supra, 34 Cal.2d at page 112, [114] 207 P.2d [1057] 1058. Therefore, regardless of the caption and introduction of Kadota's pleading, it may be treated as a counterclaim if it satisfies the statutory requirements for a pleading of that kind.

"In Elevator Operators [etc.] Union v. Newman, 30 Cal.2d 799, 808, 186 P.2d 1, 6, the sole requisites of a counterclaim were said to be that it '* * "must tend to diminish or defeat the plantiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474, 477; Luse v. Peters, [ante], 219 Cal. [at page] 625, 28 P.2d 357.' Kadota's claims for damages resulting from breach of contract by Case-Swayne tended to diminish or defeat the similar claim by Case-Swayne against the association. It was a claim in favor of a defendant and against a plaintiff between whom a several judgment might be, and in fact was, rendered. Had Kadota not presented its claim in the action, the right to recover damages against Case-Swayne would have been waived, Sec. 439, Code Civ.Proc.

"For these reasons, Kadota's pleading was a counterclaim as well as a cross-complaint, and the omission of the names of the individual members was not fatal. * * *"

And in Luse v. Peters, 219 Cal. 625, at page 630, 28 P.2d 357, at page 359, the court said:

"Under the 1927 amendment to section 438, Code of Civil Procedure, the sole requisites of a counterclaim are that it 'must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action.' Under this amendment it is not necessary that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim. Terry Trading Corp. v. Barsky, 210 Cal. 428, at page 435, 292 P. 474, 477. The facts of the cited case are particularly germane to the case now before us. In that case plaintiff sued on a note given for services performed by virtue of a written contract. In the instant case the plaintiff sued for the price of goods sold under a written contract. There, as here, the defendant averred an assignment to plaintiff of accounts receivable and prayed for an accounting. Defendants therein also prayed for damages for failure of the services performed by plaintiff to comply with the contract. In the instant case defendants seek damages because, they allege, the product sold to them was not as represented by plaintiff. In disposing of the appeal in Terry Trading Corp. v. Barsky, we held that obviously the claims for accounting and damages were the subject of counterclaim under the section as amended, and, further, that even prior to the amendment the matters alleged would have been a valid counterclaim not only as a 'cause of action arising also upon contract' under subdivision 2 of section 438, but also a cause 'arising out of the transaction set forth in the complaint,' under subdivision 1 as it formerly read. The nature of the pleading will be determined from its allegations regardless of its designation. Terry Trading Corp. v. Barsky, supra, at page 434 of 210 Cal., 292 P. 474; Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065. 'The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction.' [Citing cases.] It follows that the court erred in entering judgment against plaintiff by default for $6,000."

[4] In view of these authorities we are convinced that the trial court was correct in its conclusion that the three separate defenses of defendant, although designated

as "by way of counter-claim and cross-complaint" were in fact counterclaims, and that therefore the default and default judgment against plaintiff were erroneously entered because a counterclaim is part of defendant's answer and under section 462 of the Code of Civil Procedure is deemed controverted without the necessity of any pleading.

No other points raised require discussion.

The order setting aside the default and vacating the judgment is affirmed, plaintiff to recover his costs of appeal.

ADAMS, P. J., and VAN DYKE, J., concur.

111 Cal.App.2d 254

LONG et al. v. CALIFORNIA–WESTERN STATES LIFE INS. CO.

Civ. 18408.

District Court of Appeal, Second District, Division 3, California.

May 22, 1952.

Rehearing Denied June 10, 1952.

Hearing Denied July 17, 1952.

Action by Pearl K. Long and others against the California-Western States Life Insurance Company, a corporation on life and accident policies with a defense of suicide. Verdict of the jury for plaintiffs and from an order of the Superior Court of San Luis Obispo County granting a new trial, Ray B. Lyon, J., the plaintiffs appeal. The District Court of Appeal, Wood, J., held that the order was not shown to be an abuse of discretion under the evidence.

Order granting motion for new trial affirmed.

1. Evidence 🔑59

Where a violent death has occurred, presumption in absence of further evidence is in favor of accidental death and against suicide.

2. Evidence 🔑87

Presumption in favor of accidental death and against suicide does not impair force of rule that on the whole evidence including presumptions, plaintiff must show that injuries were effected by accidental means.

3. New Trial 🔑69, 72

In determining a motion for new trial, trial court could consider the credibility of the witnesses and the probative value and force of the evidence.

4. Appeal and Error 🔑1015(1)

It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse an order of the trial court granting a new trial.

5. Appeal and Error 🔑933(1)

On appeal from an order granting a new trial all presumptions favor the order as against the verdict.

6. New Trial 🔑70

In action on life policies and accident policy with double indemnity provision for accidental death with defense of suicide where verdict was rendered in favor of plaintiff, order granting defendant a new trial on the ground that the evidence was insufficient to support a verdict that the death of insured was result of accident rather than suicide was not an abuse of discretion under the evidence.

◆

Renetzky & Davis and Paul W. Davis, all of San Luis Obispo, for appellants.

A. H. Brazil, San Luis Obispo, for respondent.

PARKER WOOD, Justice.

Clarence R. Long died on July 7, 1949, as the result of a gunshot wound, and at that time three policies of insurance on his life, which had been issued by the defendant company, were in effect. His wife was the principal beneficiary and his children were alternate beneficiaries under those policies. They commenced this action to recover money which would be payable under said policies if his death resulted from an accident.

One of the policies, issued in 1941, was for $5,000, and provided for double indemnity in the event of death by accidental means. Defendant paid the $5,000 on that policy, and denied liability under the double indemnity provision, contending that the insured committed suicide. Each of the other policies, issued on January 22, 1948, was for $10,000, and provided that: "In case of suicide of the insured * * * within two years from the date of issue * * * the limit of recovery * * * shall be the total amount of the premiums paid, less any indebtedness hereon." The death occurred about 1½ years after those two policies were issued, and defendant denied that any money was payable thereunder except the amount of premiums paid, and it alleged that payment of said amount had been tendered.

The verdict of the jury was in favor of plaintiffs and judgment was entered in accordance therewith. Defendant's motion for a new trial was granted on the ground that the evidence was insufficient to justify the verdict. Plaintiffs appeal from the order granting a new trial.

Appellants contend that the granting of the motion for a new trial was an abuse of discretion. It seems to be their theory that Mr. Long went out of his house in the nighttime to investigate the barking of dogs and that the gun which he was carrying was discharged accidentally when he tripped over a string which was tied to the porch. Respondent (defendant) contends that the evidence points overwhelmingly to suicide and excludes any reasonable theory that death resulted from accident.

Mr. and Mrs. Long, their two sons (ages 4 and 5), and his two daughters (ages 13 and 15) by a prior marriage, resided on a ranch near Paso Robles. On the evening of July 6, 1949, Mr. and Mrs. Long and their sons had dinner at a restaurant which was about 10 miles from the ranch. The restaurant was operated by their friends, Mr. and Mrs. Gowans. About 1 a. m. Mr. and Mrs. Long and the boys left the restaurant and went home. Mrs. Long, according to her testimony, was driving the automobile on the way home, but Mr. Long wanted to drive and she stopped the automobile and he drove the remainder of the way home. When they returned home the daughters were in bed. Mr. Long went into his bedroom and undressed. Mrs. Long put the boys to bed, and then she went into the bedroom where Mr. Long was. According to her testimony, he was in bed and he asked her how soon she was coming to bed; she told him she was tired and was going to sleep on the couch in the living room; he was angry and they passed a few words; he said that she "was being a hell of a wife"; she replied that she thought she was a good wife and mother; she went into the living room and went to sleep on the couch; when she awakened she heard Mr. Long talking to her and at the same time she heard the dogs (which were outside) barking; she heard Mr. Long say something about "not bothering" her, and he then went outside; about a second later she heard a shot; she ran outside, saw him lying on the grass, and saw a mass of blood; she began screaming for Shag (the hired man); about that time the two daughters came out and one of them ran to Shag's house, about a block away, to get him; decedent (Mr. Long) was lying face down and his hands were under him; she (witness) and Shag turned him over and put him on a blanket; a gun (a German Luger) was in his right hand, and when they turned him over it "fell off" and Shag picked it up; at that time she thought decedent had been shot in the right temple. She testified further that she had seen the gun quite a few times; decedent kept it in the top drawer of his dresser with his socks, and she saw it there the day before his death when she put the laundry away. On cross-examination she testified that, in a statement which she made to counsel for defendant in September, 1949, she had said she did not know where decedent kept the gun, that it seemed he had it in the "pickup" a couple of times, but that they "knew afterwards he must've gotten it out of the stocking drawer"; when she saw the decedent at the funeral parlor she saw the bullet hole, and it was over the left eye and toward the hairline; she had been told that after decedent was shot she said over and over again, "Oh, Busty, why did you do this to me"; she did not recall anything she said or did—"it's like a nightmare."

According to the testimony of Shag, he arrived at the house about 3 a. m.; decedent was lying face down on the lawn with his right hand under his chest; he and Mrs. Long turned decedent over and the gun was in decedent's right hand; he (witness) took the gun by its tip end with two fingers and dropped it to the ground; decedent's face was full of blood; there was a blood clot on decedent's right temple and that is where Shag thought the bullet hole was.

One of decedent's daughters, called as a witness by plaintiffs, testified that she heard her parents after they returned home; she did not hear what her father said but her mother said that she had always been a good wife and mother; their voices were normal and not loud or argumentive; she heard the dogs barking; she heard decedent walk through the kitchen, the living room, and out the front door; a few seconds later she heard a shot, and she heard her mother run out and say, "Busty, why did you do this to me"; she (witness) ran out on the porch; her father was lying on his stomach, he was in his shorts, and his body was a little bit off the porch and parallel with the front of the house; there were four chairs on the porch; the boys always built play houses with them; she noticed that one of the chairs was turned over, and that a string had been tied to the chair and also tied to the porch post which was nearest the front door. She testified further that it was not unusual to hear the dogs bark during the night.

Mr. Gowans, called as a witness by plaintiffs, testified that he arrived at decedent's ranch about 4 a. m. on July 7th and he left about 8 a. m.; after daylight he went on the porch; a chair was lying on the porch with its back practically against a post of the porch; a string—carpenter's chalk line—was tied to the post and to the chair; there were two strings tied to the arms of the chair and to the post; he untied the strings either at the post or at the chair.

Mrs. Long's aunt, called as a witness by plaintiffs, testified that Mrs. Long said to her, "Why did he do it"; about 6:30 a. m. she went outside with Mr. Gowans; she saw the chair which was turned over against the post; there were toys all around the chair.

A doctor, called as a witness by defendant, testified that about 2:30 a. m. on July 7, 1949, he was asked to go to decedent's residence; a Mrs. Ross went with him and showed him the way; when they arrived Mr. Long was dead, and he (witness) made no examination of him; Mrs. Long told him that decedent came through the living room, where she was sleeping, and made a statement which was to the effect that, "Well, you won't be bothered with me any more," and then he went on the front porch and almost immediately she heard the shot.

A deputy sheriff, called as a witness by defendant, testified that he arrived at the ranch on July 7th about 3:45 a. m.; he talked to Mrs. Long and she told him that while she and decedent were at the restaurant they had "a few drinks"—he had more than she had, and they got into an argument on the way home concerning decedent's driving the automobile; she also told him that ordinarily decedent kept a gun in the glove compartment of "the pickup," and when he went outside he said (as she recalled it), "You won't see me again."

Mrs. Ross, a witness called by defendant, testified that when she arrived at the ranch, decedent's body was on the lawn; she heard Mrs. Long tell the deputy sheriff that there had been a slight argument and she had told decedent she was going into the living room to sleep, that he came into the living room, it was dark, he spoke to her, and at first she did not understand what he said, then she heard him say, "Well, I won't bother you any more." She testified further that she and Mr. Gowans walked out in front and picked up some chairs.

Mr. Ross, called as a witness by defendant, testified that he was at the ranch early on the morning of July 7th, and he heard Mrs. Long say that the decedent said, "All right; that's the last time I'll bother you"; Mrs. Long said she thought that decedent meant that he was going back to bed and was not going to bother her any more that evening. He testified further that during the trial (before he testified) that he asked Mrs. Long how the case was coming, and she said, "If you do not damage me too much, I think I'll win it"—"If you don't remember, I couldn't lose."

A brother of decedent, called as a witness by defendant, testified that he arrived at the ranch about 9:30 a. m. on July 7th; Mrs. Long's first words were, "Oh, why did he ever do it?" and "he had no rhyme or no reason to do a thing like that"; she said they had some kind of an argument coming home from the restaurant about who was going to drive; they continued the argument after they returned home, and she decided to sleep on the davenport; decedent came out and said he was not going to bother her any more, and a minute later she heard a shot.

Another brother of decedent, called as a witness by defendant, testified that he and the last witness went to the ranch together; one of the first statements he remembered Mrs. Long making was that "there was no rhyme or reason for him to do it"; he (witness) asked her if she was sure it was suicide and she said that all the facts pointed to it; he then told her that "her insurance wasn't any good, she couldn't collect on it because there was a two-year clause in the policies."

A firearms expert, called as a witness by plaintiffs, testified to the effect that it would be extremely difficult for a person to get the gun into such a position with his right hand, when his index finger was on the trigger, that he could inflict upon himself a wound similar to the one described herein.

A physicist, called as a witness by defendant, testified that he made numerous tests to determine whether the gun would discharge accidentally from any type of impact or shock, and that in those tests he was unable to cause the gun to discharge.

[1–6] As above shown, appellants (plaintiffs) contend that the granting of the motion for a new trial was an abuse of discretion. They assert in effect that in view of the presumption in favor of accidental death and against suicide, and in view of the fact that the burden of proving suicide was upon the defendant, and in view of the physical facts showing that decedent did not intentionally take his own life, the evidence was insufficient to support a verdict that the insured committed suicide. Where a violent death has occurred, "the presumption, in the absence of further evidence, is in favor of accidental death and against suicide. * * * This presumption is, however, merely an item in the evidence, and does not impair the force of the rule that on the whole evidence, including the presumptions, the plaintiff must show * * * that injuries were effected by accidental means." Postler v. Travelers' Ins. Co., 173 Cal. 1, 6, 158 P. 1022, 1025. It is clear, as shown by the evidence above referred to, that there was substantial evidence that would have supported a verdict in favor of defendant. In determining the motion for a new trial it was the province of the trial court to consider the credibility of the witnesses and the probative value and force of the evidence. "It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court." Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690. Upon appeal "from an order granting a new trial, all presumptions favor the order as against the verdict". Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, 340.

The order granting the motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

111 Cal.App.2d 237

SOLVANG MUNICIPAL IMPROVEMENT DIST. v. JENSEN.

Civ. 19069.

District Court of Appeal, Second District, Division 3, California.

May 20, 1952.

Proceeding for writ of mandate by the Solvang Municipal Improvement District, a public corporation, against Arden T. Jensen, as District Secretary, to compel defendant to publish notice of sale of certain bonds of District in manner directed by board of directors. The District Court of Appeal, Shinn, P. J., held that special legislation creating such district was valid and that District had right to issue bonds.

Writ issued.

1. Mandamus ⚷103

Mandate was proper remedy to compel secretary of municipal improvement district to publish notice of sale of certain bonds of district in manner directed by its board of directors. St.1951, pp. 3676, 3684, §§ 1 et seq., 97.

2. Statutes ⚷210

Recitals in statutes stating reasons for special legislation, if not contrary to facts of common knowledge, will be deemed conclusive by the courts. St.1951, pp. 3688, 3689, §§ 210, 211.

3. Constitutional Law ⚷70(2)

Statutes ⚷210

Whether existing general laws could have been made applicable to accomplish purposes of special law is a judicial question, but declarations in a statute that creation of a municipal improvement district by special law is only alternative to incorporation as city will not be ignored.

4. Statutes ⚷76(2)

Where combined sewage, fire, lighting, and water district could have been organized, with additional powers, under Public Utility District Act or Municipal Corporation Act, but pressing need existed for such public improvements, and people in area wished to organize district of limited powers and might not adopt utility district or city form of government, special legislation creating such district did not violate constitutional prohibition against special legislation if general law can be made applicable and district had right to issue bonds. St.1951, pp. 3676, 3680, 3684, 3688, 3689, §§ 1 et seq., 40, 43, 97, 210, 211; Gen. Laws, Act 6391, § 30; Government Code, § 34300 et seq.; Const. art. 4, §§ 1, 25, subd. 33.

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Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for petitioner.

Arden T. Jensen, in propria persona.

SHINN, Presiding Justice.

The present proceeding is an application for a writ of mandate. The facts are set forth in an agreed statement. The application was filed with the Supreme Court and transferred to this court.

Solvang Municipal Improvement District, a public corporation, was created by special act of the legislature, Stats. 1951, ch. 1635, p. 3676, and was duly organized. Proceedings were had for the issuance of district bonds. The district seeks a writ of mandate commanding respondent Jensen, as secretary of the district, to publish notice of sale of certain bonds of the district in the manner directed by its board of directors. The application is resisted upon the ground that the district was created by special act of the legislature in contravention of constitutional limitations, and is an illegal entity. We shall refer to the act as the Solvang Act.

[1] Mandate is a proper remedy. In re City and County of San Francisco v. Boyle, 195 Cal. 426, 429, 233 P. 965; Dufton v. Daniels, 190 Cal. 577, 581, 213 P. 949; Hartsock v. Merritt, 93 Cal.App. 365, 265 P. 757. Original jurisdiction has frequently been exercised by the upper courts in proper cases of this nature. City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P.2d 894; Ventura County Harbor Dist. v. Board of Supervisors, 211 Cal. 271, 295 P. 6; In re City and County of San Francisco v. Boyle, supra; Los Angeles Co. F. C. Dist. v. Hamilton, 177 Cal. 119, 169 P. 1028.

The obvious purpose of the proceeding is to obtain a judgment establishing the validity of the district and its right to issue bonds. Section 97 of the act authorizes the district to bring an action in the superior court to obtain such a judgment. The present proceeding was instituted in the hope that some time would be saved in bringing the proceeding to final judgment.

Article IV, section 25, subdivision 33, of the Constitution provides: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * [33rd] In all other cases where a general law can be made applicable." The act which created petitioner, being a special law, is a valid enactment if there was no general law which could be made applicable to accomplish the purposes of the special law. This is the sole question for decision.

There are existing in the area a sanitary district, a fire district and a lighting district, all of which under the Solvang Act are consolidated and merged with the new district. Sec. 40. The powers of the district are enumerated as follows: "The district may acquire, construct, reconstruct, alter, enlarge, lay, renew, replace, maintain, and operate street and highway lighting facilities and facilities for the collection, treatment and disposal of sewage, industrial wastes, storm waters, garbage and refuse; the production, storage, treatment and distribution of water for public and private purposes; and fire departments and facilities." Sec. 43. Sections 210 and 211 of the act read as stated in margin.[1]

[2, 3] The recitals of section 210 are determinations of fact as to the conditions which required the organization of an improvement district. Such recitals, if not contrary to facts that are of common knowledge, will be deemed conclusive by the courts. People v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207; Ventura

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[1] "Sec. 210. The purpose of this act is to form the Solvang Municipal Improvement District in order that the area benefited may be provided with various municipal improvements; special facts and circumstances, applicable to the area in which the district lies and not generally, make the accomplishment of this purpose impossible under existing general laws and therefore special legislation is necessary. The special facts are as follows:

"(a) The area has no facilities for the treatment and disposal of sewage and is consequently contaminating the waters of the State.

"(b) The area is without an adequate water supply, storage, and distribution system for public and private purposes.

"(c) There is urgent need for the municipal improvements which the district is empowered to construct under this act, but other municipal powers which could be exercised by a city are not required, and would result in more government than the area needs or wants. There are no existing general laws under which the area could be provided with the facilities it needs short of incorporation as a city. Therefore, the only way in which the particular needs of the area can be provided is by special act.

"(d) The existing districts are performing sewage, fire protection, and lighting functions. Their administration under a single governing body will result in economies of administration which cannot be obtained by continued unit functioning.

"(e) The area is of strategic importance during times of war or threatened war. Its local airport is strategically located midway between the military and air installations at Santa Maria and at Santa Barbara. Influx of military men and their families during times of war or threatened war greatly increases the necessity of providing municipal facilities.

"Sec. 211. This act is an urgency measure necessary for the immediate preservation of the public peace, health, and safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

"Water pollution and the providing of water for domestic and fire protection purposes are critical problems in the proposed district. State and local health authorities are agreed on the urgent need for immediate sewage treatment and water facilities in the area if a serious health condition is to be avoided. Inadequacy of existing law makes it necessary that this legislation take immediate effect so that necessary facilities may be provided."

(It is conceded that the act cannot be given effect as an emergency measure for the reason that it creates offices consisting of memberships on the board of directors. (See Art. IV, sec. 1, par. 4.)

County Harbor Dist. v. Board of Supervisors, 211 Cal. 271, 295 P. 6. It is a judicial question whether existing general laws could have been made applicable to accomplish the purposes of the special law, but the declaration that creation of the district by special law was the only alternative to incorporation as a city should not be ignored. It is evidence of the fact that the legislature was influenced by considerations which, as we shall see, fully justified the special legislation.

[4] Historically, the legislature has exercised the power to create improvement and protection districts by special laws when it was deemed necessary in order to accomplish purposes that could not be accomplished through the use of existing general laws. An urgent need for furnishing necessary facilities in a particular situation has been held to be a sufficient reason for the creation of a district by special law, even though in other respects the facilities could be provided by proceedings under general laws. American Riv. Flood Control Dist. v. Sweet, 214 Cal. 778, 7 P.2d 1030; Monterey Peninsula Airport Dist. v. Mason, 19 Cal.2d 446, 121 P.2d 727.

At the time the Solvang Act was passed there were two general laws under which a district could have been organized: one was the Public Utility District Act of 1921, Stats. 1921, p. 906, as amended, Deering's General Laws, Act 6391; the other was the Municipal Corporation Act of 1883, Stats. 1883, page 93, as amended, now sections 34300 et seq., Government Code. A district organized under the former act would have had not only the powers granted to the Solvang District, but also power to acquire, construct, own, operate and use works for supplying light, power, heat, transportation, telephone service and other means of communication, public parks, public playgrounds, public swimming pools and public recreation buildings and buildings to be used for public purposes and the use of the district. Sec. 30. The powers of a city would be even more extensive.

The sole contention of the respondent is that the Solvang district should have been organized under one or the other of these general laws. The contention is without support in authority or reason.

It clearly appears from the face of the act that there is pressing need for the public improvements which the district proposes to provide. The people of the area wished to organize a district with limited powers. If they had desired to incorporate as a city, or as a utility district, they would have done so. Proceedings under either of the general laws are permissive. They require petitions signed by percentages of the voters or land owners, and elections at which a majority vote is required to carry the propositions. In considering the propriety of creating the Solvang district by special act the legislature no doubt was influenced by the fact that the land owners and voters of the area were evidently adverse to both the utility district and city forms of government, and might not adopt either. This has been recognized as a good reason for the creation of an improvement district by special act, where there was imperative need for local public improvements or facilities. American Riv. Flood Control Dist. v. Sweet, 214 Cal. 778, 7 P.2d 1030, supra, Monterey Peninsula Airport Dist. v. Mason, 19 Cal.2d 446, 121 P.2d 727, supra. The special act authorizes the facilities which the district needs. Incorporation under the general law would give the residents a form of government which they do not need and do not want. Special legislation in this situation has none of the evils against which the Constitution affords protection. Upon the contrary, it was the only means by which the requirements and the desires of the people in the area could be satisfied. That they are satisfied is attested by the fact that the vote was 205 to 28 in favor of the issuance of revenue bonds in the amount of $250,000 for the establishment of water and sewage facilities. No action by the legislature could have been more consistent with the proper exercise of its powers than to give the district the form of district government the people asked for.

Respondent has cited no authority which is opposed to the views we have expressed. Such cases as City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604; Mojave River

Irr. Dist. v. Superior Court, 202 Cal. 717, 262 P. 724, Ventura County and Harbor Dist. v. Board of Supervisors, 211 Cal. 271, 295 P. 6, supra, do not aid respondent. They all dealt with factual situations in which proceedings under the general laws would have been adequate and there was no conceivable reason for special legislation.

It appears from the record that the district has been duly organized and that steps have been duly taken to put out a bond issue. Petitioner was created by a valid act of the legislature and has the right to issue the proposed bonds.

Let the writ issue.

WOOD and VALLÉE, JJ., concur.

111 Cal.App.2d 428

NEVADA COUNTY v. PHILLIPS et al.

Civ. 8108.

District Court of Appeal, Third District, California.

May 28, 1952.

The County of Nevada, a political subdivision of the State of California, brought an action against Oscar Phillips and Buster Boswell for damages to a bridge maintained as part of plaintiff's public road system. The Superior Court, Nevada County, James Snell, J., denied defendants' motion for a change of venue and defendants appealed. The District Court of Appeal, Adams, P. J., held that motion was properly denied under record.

Order affirmed.

1. Counties 🔑215

Venue 🔑74

Under statute relating to venue for actions brought by and against a county an action brought by a county against defendants who, for aught that appears are residents of such county, is properly triable in such county, and only when defendants or one defendant is a resident of another county is court obliged on motion to change place of trial, and obligation then is to transfer case to a county selected by court in which no defendant is a resident, and not to a county selected by a nonresident defendant. Code Civ.Proc. § 394.

2. Venue 🔑46

Where county brought action for damages to bridge maintained by county as part of its public road system, and record did not show that either defendant resided out of such county, and action was brought in such county, statute relating to venue of actions brought by and against a county did not obligate trial court to change place of trial to another county and defendants' motion for change of venue to another county was properly denied. Code Civ.Proc. § 394.

3. Appeal and Error 🔑762

Where record did not show that any defendant in action brought by county for damages to a bridge maintained by county was not a resident of such county, in which county action was brought, and trial court therefore denied defendants' motion for change of venue to another county, fact that defendants in closing brief on appeal from order denying motion stated that in oral argument in support of motion it was pointed out to trial court that one defendant was not a resident of such county, so that under statute change of venue should be granted, could not be basis for reversing order. Code Civ.Proc. § 394.

4. Appeal and Error 🔑760(1)

District Court of Appeal cannot act on a mere assertion of appellant in his brief as to matters not shown by record and cannot reverse a judgment of trial court thereon.

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Miller, Kroloff & Brown, Stockton, for appellants.

Vernon Stoll, Dist. Atty., Nevada City, for respondent.

ADAMS, Presiding Justice.

Plaintiff filed this action against defendants, alleging that said defendants, by reason of their negligent and careless operation of a truck, had damaged a bridge maintained by plaintiff as a part of its public road system. Defendants Phillips and Boswell were served with summons in the county of Nevada and both answered. They denied the allegations of the complaint and alleged contributory negligence on the part of plaintiff. Said defendants then demanded a jury trial and plaintiff filed a memorandum to set the cause for trial. July 16, 1951, was set as the trial date, but prior thereto defendants noticed a motion for a change of venue to San Joaquin County on the ground that the action having been brought by a county it could not be tried in such county, "as provided for by section 394 of the Code of Civil Procedure." An affidavit of merits was filed by one of the attorneys for defendants in which he alleged that said action had been commenced in and for the county of Nevada, but it contained no allegation as to defendants' place or places of residence.

After argument the motion for a change of venue was denied by the court, whereupon defendants appealed from said order.

Nowhere in the record does it appear that either of the defendants was not a resident of Nevada County. It is obvious that in the trial court and also in the opening brief of appellants their contention was that solely by reason of the fact that the county was a party to the action it was mandatory upon the trial court to transfer it to another county.

Section 394 of the Code of Civil Procedure provides:

> "An action or proceeding *against* a county, or city and county, may be tried in such county, or city and county, unless such action or proceeding is brought by a county, or city and county, in which case it may be tried in any county, or city and county, not a party thereto.
>
> "Whenever an action or proceeding is brought *by* a county, city and county, or city, against a resident of *another* county, city and county, or city, or a corporation doing business in the latter, the action or proceeding must be, on motion of either party, transferred for trial to a county, or city and county, other than the plaintiff, if the plaintiff is a county, or city and county, and other than that in which the plaintiff is situated, if the plaintiff is a city, and other than that in which the defendant resides, or is doing business, or is situated." (Italics added.)

[1, 2] We construe the foregoing section as providing that an action such as this, brought by a county against defendants who, for aught that appears, are residents of the same county, is properly triable in that county, and that it is only when the defendants or one of them is a resident of another county that the court is obligated to change the place of trial, at least as to such defendant, and that the obligation then is to transfer it, not to a county which may be selected by a nonresident defendant, but to a county, selected by the court, in which none of the defendants is a resident. As heretofore stated, the record before us gives no indication that either of the above named defendants resided out of Nevada County; and we think that the trial court properly denied the motion for change of venue in the absence of any showing whatsoever that defendants did not reside in Nevada County, and, if not, where they did reside. From the fact that defendants were served with process in Nevada County, and also from the fact that nowhere in the record did they show where they did reside, it may well have been inferred that they were residents of that county. The intent of the foregoing statute is, apparently, to permit the trial of an action brought by a county to be tried in that county when the defendants reside therein, on the assumption that where all parties are in effect residents therein no disadvantage to either would result; but that where one or the other of the defendants is a resident of another county the venue, at least as to him, should be changed to a county other than the plaintiff county, and other than the county of the residence of said defendant, so that neither party would then be advantaged by reason of residence. See City of Oakland v. Darbee, 102 Cal.App.2d 493, 227 P.2d 909.

[3, 4] Appellants in their closing brief state that at the time of the oral argument

in support of their motion for a change of venue, it was "pointed out" to the trial court that Boswell was not a resident of the county of Nevada. This court cannot, however, act upon a mere assertion of an appellant in his brief as to matters not shown by the record, and reverse a judgment of a trial court thereon.

Upon the record before the trial court and now before us defendants were not entitled to a change of venue. See Fitzpatrick v. Sonoma County, 97 Cal.App. 588, 591, 276 P. 113.

The order appealed from is affirmed.

SCHOTTKY, J. pro tem., and VAN DYKE, J., concur.

111 Cal.App.2d 409

LEWIS et al. v. BJORNESTAD et al.

Civ. 7980.

District Court of Appeal,
Third District, California.

May 28, 1952.

Rehearing Denied June 27, 1952.

Hearing Denied July 24, 1952.

Louis S. Lewis, individually, and Louis S. Lewis, doing business under the firm name and style of Lakeside Dairy, and Ella Lewis, brought action against Ras Bjornestad, also known as Ras R. Bjornestad, individually, and Ras Bjornestad, doing business under the firm name and style of Ras Welding & Boiler Works, and others to recover for fire damage that allegedly occurred when the named defendant, who was the contractor who installed gas boiler in dairy of plaintiff, negligently turned on gas while T outlet was open so that gas escaped and became ignited. The Superior Court of Solano County, Joseph M. Raines, J., entered judgment for plaintiffs, and the named defendant appealed. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that the named defendant was negligent and that plaintiffs were not contributorily negligent.

Judgment affirmed.

1. Gas 🔑17

Gas is a dangerous commodity, and he who undertakes to control it must use a high degree of care to prevent its leaking.

2. Gas 🔑18

If contractor, who installed gas boiler in dairy, and who turned on gas, failed to detect leakage of gas from open T outlet, with result that leakage continued to a point where escaping gas became ignited and burned dairy, contractor was liable to owners of dairy for the fire loss.

3. Gas 🔑20(2)

In action by owners of dairy against contractor who installed gas boiler in dairy, for fire damage that allegedly occurred when contractor negligently turned on gas while T outlet was open, so that gas escaped and became ignited, evidence sustained finding that contractor was negligent so as to render him liable for the fire loss.

4. Gas 🔑20(2)

In action by owners of dairy against contractor who installed gas boiler in dairy, for fire damage that allegedly cleared when contractor negligently turned on gas while T outlet was open, so that gas escaped and became ignited, evidence sustained finding that owners of dairy were not contributorily negligent.

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De Meo & De Meo, Santa Rosa, Charles V. Barfield and Rogers & Clark, all of San Francisco, for appellant.

Geary, Spridgen & Moskowitz, Santa Rosa, O'Hara, Randall, Castagnetto & Kilpatrick, Vallejo, for respondent.

VAN DYKE, Justice.

Louis S. Lewis and his wife Ella brought this action against Ras Bjornestad to recover damages for loss suffered by them when a fire damaged the Lakeside Dairy in Vallejo, which they owned and operated. They charged that the fire was caused by the negligence of Bjornestad. Judgment was rendered in their favor and Bjornestad appeals.

A few months prior to November 6, 1943 respondents undertook the construction of certain improvements in their dairy, which improvements included the replacement of a gas boiler, gas line and gas meter. Appellant Bjornestad contracted to install a new gas boiler. A plumber contracted to install the gas line leading from the gas pipe of the Pacific Gas and Electric Company, hereinafter called the "utility", to the boiler; and the installation, at the request of the respondents, included the insertion into the line and the capping or plugging of a "T" outlet designed at some later time to be connected with and to supply gas to a floor heater for the use of the apartment above the main dairy building. The base of the floor heater, with its pilot light, extended through the ceiling of the dairy proper. This brought the pilot light approximately 10 feet distant from the T in the gas line, which line ran along under the ceiling of the dairy proper. When the boiler had been installed save for final testing and the gas was in, the utility installed its meter, but did not turn on the gas. On November 6th appellant appeared at the premises for the purpose of placing his boiler in operation and making his final adjustments. Since the gas had not been turned on at the meter appellant either himself called the utility or had the call placed by an employee of the respondents, with the request that the gas be turned on, this being the conceded duty of the utility. Appellant was told that the utility had at the moment no man available and did not know when one could be sent out. After waiting for some time and no one having appeared from the utility, appellant undertook to turn on the gas himself. It appears that there is a standard practice followed by the utility in doing this. The valve is opened and the test hand of the meter is watched. If the line is tight the test hand will move temporarily and for a very short period until the pressure in the line being serviced equals that in the main and thereupon the test hand becomes stationary. Thereafter a watch is kept for several minutes and if the test hand continues stationary it is considered that the tightness of the line has been demonstrated. There was testimony on the part of appellant, which he argues was uncontradicted, that, being thoroughly familiar with what had to be done in turning on gas into a new line and having, with the authority of the utility, done it many times, he carefully and completely followed the prescribed routine, noted the preliminary fluctuation of the test hand when he opened the valve, and that it became stationary, indicating a tight line; and that thereupon, leaving a helper to watch the test hand further, he went to his boiler, bled the line of air until raw gas came out at the burners, then lighted the burners and began adjusting them to get maximum efficiency. It appeared that before the gas was turned on, and in compliance with law, the Vallejo inspector tested the line after it was installed and found and certified that it was tight. He removed the cap or plug from the T and affixed his pressure guage thereto and thus used that orifice as a convenient means of testing the line. In compliance with law he thereupon hung his certificate on the meter or at the meter location which certified that the line had been tested and found tight. The certificate was there when appellant later turned on the gas. Appellant was busy at the gas boiler for 15 or 20 minutes and there was testimony that during that time a strong smell of gas pervaded the dairy. Then there was an explosion, followed by the fire which caused the loss for which respondents brought this action against appellant. After the fire the Vallejo Fire Chief inspected the premises and traced the gas line and, so tracing it, came to the T in the line and there found that the T was open. It was the theory of respondents that this T had been open when the appellant turned on the gas; that he was negligent in the manner in which he turned on the gas, and did not, as he should have done, discover that the line was leaking; that, while he was testing his boiler, gas escaped from the open T, was ignited, probably by the pilot light in the floor furnace, and that the fire and loss ensued. This theory impliedly was adopted by the trial court. It found that appellant "negligently, carelessly and recklessly turned on and/or caused to be turned on a certain gas meter, which said gas meter was connected to a gas pipe which led to a boiler located approximately thirty to forty feet distant from said gas meter, which boiler had been installed by Defendant Ras Bjornestad * * * at the instance of said Plaintiffs, * * *. That as the direct and proximate result of" appellant "turning on said gas meter and as a result of the carelessness, negligence and recklessness of said" appellant "said distributing plan and building and said equipment * * * was burned and thereby damaged."

[1-3] Appellant discusses his points in support of the appeal along the lines of the measure of the duty of a utility supplying gas to a consumer's appliances, to inspect and make sure of the safety of those appliances, citing the rule declared in Sawyer v. Southern California Gas Co., 206 Cal. 366, 274 P. 544, and declares that the evidence is uncontradicted that appellant complied fully with the measure of those duties. In this appellant is mistaken. Regardless of the measure of duty of a utility supplying gas through its appliances to the appliances of a consumer with respect to the safety of the consumer's appliances we have here a situation which is simple in the extreme. Appellant undertook to turn the gas into the respondents' appliances in order that he might finally test and regulate the gas boiler that he had installed. Gas is a dangerous commodity and he who undertakes to control it must use a high degree of care to prevent its leaking. If, therefore, there was leakage and appellant failed to detect it, with the result it continued to a point where the escaping gas became ignited and burned the property of respondents, the appellant was liable in damages for the loss. That is the simple situation portrayed by the evidence and as to whether or not he was so negligent the evidence was squarely in conflict. While he and his helper, and to some extent one of the employees of respondent, testified as to what he did in the way of observing the test hand of the meter as a means of determining whether the line was tight, by their testimony showed that he had complied with the ordinary standard of care, which we may assume was all that was required of him under the circumstances, nevertheless that testimony is contradicted by the testimony introduced by respondent that gas was observed to be leaking throughout the premises while appellant was testing his boiler; that the T was found open after the fire; that something in the nature of an explosion took place in the area in which the escaping gas had been detected; and that the fire ensued. The particular materiality of this testimony as being contradictory to that of appellant and his witnesses lies in this: If, and here assuming the meter was in fact in good working condition so that it would give notice that the line was leaking, the appellant had followed the routine of watching the test hand and the T had been open, the meter would have told him that gas was leaking. If, therefore, gas in fact was leaking, and this the trial court impliedly found to be a fact, then appellant did not properly watch the meter. If the meter failed from defect to be reliable, the fault was appellant's, for he had no right to make use of it. His assumption that it was reliable was at his risk. In the last analysis it was for the trial court to determine where the truth lay and upon this conflicting testimony, part direct and part circumstantial, it resolved the issue against the appellant, and under familiar rules that finding concludes the matter on appeal.

There was other testimony introduced by appellant tending to show that he received at the boiler burners a full flow of gas which would not have been the case had there been a leak in the line. This also did no more than create a conflict with the circumstantial evidence referred to. It was, of course, as appellant argues, not necessarily the burden of appellant to show some other source of the fire and it is, of course, possible that some other source did exist and was in fact the cause of the fire. And it is further possible, as appellant further argues, that the open T could be explained by the destruction of the plug through the heat of the fire if a destructible plug was used, but these also are matters of conflict for resolution by the trier of fact.

[4] Appellant further contends that respondents were guilty of contributory negligence as a matter of law and they argue thus: The gas line to the new boiler from

which the gas allegedly escaped, through the T, into the storeroom was installed by respondents and the work was at all times under their control. The T was installed at their request. They maintained the floor furnace intruding into the storeroom. They caused the utility to install the meter so as to be ready for service and asked the utility on the day of the fire to turn on the gas "without ever bothering to find out whether the connection to the gas appliances in the apartment had been completed or to even look at the T"; they advised appellant the boiler would be ready to place in operation at the end of the week. Appellant, they say, had no part in any of this except that he asked respondents to have the utility turn on the gas, and they say that, despite respondents' knowledge that the gas would be turned on, respondents did not warn appellant that the T had been installed or that the line might be open and made no effort to check the line. These facts might have furnished, and we will consider they would have furnished, support for a finding of the trial court that there was here such concurring negligence of respondents as to bar their recovery. But when that has been said, all has been said that can be said concerning the situation in appellant's favor, and not enough has been said to reverse the judgment. The trial court found against the defense and this finding must be sustained, for the trial court could have reasoned as follows: Respondents could reasonably have relied in all that they did upon the efficiency and care of those who, through contract and otherwise, became charged with the proper installation and testing of the gas line. Respondents did not authorize appellant to turn on the gas. It was the duty of the utility to make the routine test at the time it turned the gas through its meter and respondents could reasonably assume that the routine test, if properly made, would detect any opening in the gas line. They had no reason to anticipate that appellant would take it upon himself to turn on the gas without authority. If, then, the T was open and remained open by reason of the negligence of appellant in failing to discover it was open the sole proximate cause of the ensuing loss was the negligence of appellant and the fact that the T was open was not a matter chargeable, in any sense, to any negligence on the part of respondents. If the court so reasoned, its finding that respondents were not guilty of contributory negligence finds ample support in the record.

The judgment appealed from is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

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111 Cal.App.2d 281

PEOPLE v. JACOBS.

Cr. 4746.

District Court of Appeal, Second District,
Division 2, California.
May 23, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of manslaughter, and she appealed. The District Court of Appeal, McComb, J., held that though prosecution introduced uncontradicted statement of defendant that she had not intended to hurt deceased, evidence authorized inference that defendant was not to be believed when she made such statement, and that she either deliberately stabbed deceased or in handling butcher knife failed to use due caution or circumspection.

Affirmed.

1. Criminal Law ⇨554

In manslaughter prosecution, statement of defendant that she did not mean to hurt deceased, introduced by prosecution as part of its case, was not, even though uncontradicted by direct evidence, so binding as to preclude jury from considering all the evidence to determine if there were other circumstances warranting finding of manslaughter. Pen.Code, § 192.

2. Criminal Law ⚷554

Where defendant admitted stabbing deceased and said that she did not intend to do it, but subsequently stated that she did not remember what had happened, inconsistent subsequent statement showed consciousness of guilt of homicide.

3. Criminal Law ⚷554

In manslaughter prosecution, wherein prosecution introduced uncontradicted statement of defendant that she had not intended to hurt deceased, evidence justified inference that defendant was not to be believed when she said she had not intended to hurt deceased, and that she either deliberately stabbed deceased or in handling butcher knife failed to use due caution or circumspection. Pen.Code, § 192.

4. Homicide ⚷2

If defendant either deliberately stabbed deceased or in handling butcher knife failed to use due caution or circumspection, she would be guilty of homicide. Pen.Code, § 192.

◆

Olin N. MacKay and Max Tendler, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of manslaughter after trial before the court without a jury, defendant appeals.

The case was submitted to the trial court on the transcript of the testimony taken at the preliminary hearing which disclosed the following facts:

About 6:00 p. m. on the night of May 30, 1951, Mr. and Mrs. Loomis Burlingame went to defendant's home where the Burlingames, defendant and her husband, Henry Jacobs, played cards and drank intoxicating liquor until about 8:30 p. m. There were no unusual arguments.

The Burlingames then went into the kitchen with defendant to get ready to leave and when they turned around Mr. Jacobs, who had been sitting in an armchair in the living room, was lying on the floor in that room, intoxicated. As the Burlingames left, Mrs. Burlingame walked around Mr. Jacobs and Mr. Burlingame stepped over him saying, "I won't step on you," to which Mr. Jacobs made no reply.

Defendant accompanied her guests to their car and after bidding them good night returned and reentered the house. She had been drinking and was under the influence of liquor.

Mr. Oliver, who lived opposite the Jacobs family, arrived home shortly before 8:30 p. m. the same evening. He heard loud talking which sounded like an argument among three or four people in the Jacobs' residence. At approximately 9:00 p. m. defendant entered Mr. Oliver's house and said, "I stabbed Henry, come help me." Mr. Oliver called the police and then went to the Jacobs' house where he found Mr. Jacobs lying on the floor near the front door. He saw a knife in the room.

Shortly thereafter the police arrived and defendant stated to them she had stabbed her husband but "I didn't mean it, I didn't mean it." A police officer asked her where the knife was and she pointed to a butcher knife with a six-inch blade lying on the arm of a sofa at the east end of the living room. The blade of the knife was contaminated with human blood, fatty tissue and skin. The knife was one she kept in a drawer in the kitchen. Later she told the police officers she had been drinking and did not remember what had happened.

Defendant had a horizontal wound in the back just to the left of the back bone under the left shoulder blade, and the autopsy showed he died as a result of it.

Question: Was there substantial evidence to sustain the trial court's finding that defendant was guilty of manslaughter?

Yes. Defendant argues that the prosecution having presented as a part of its case the statement of defendant that she did not mean to hurt her husband is bound by such evidence in the absence of proof to the contrary. (People v. Toledo, 85 Cal. App.2d 577, 581, 193 P.2d 953.) Therefore she argues there is an absence of proof that defendant was guilty of manslaughter because there is no evidence the homicide was

(1) voluntary—upon a sudden quarrel or heat of passion, or (2) involuntary—in the commission of an unlawful act, not amounting to a felony or the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection. (See Penal Code, section 192.)

[1] The rule that statements introduced by the prosecution at the trial of a defendant which justify a homicide are binding in the absence of proof to the contrary, has been further construed in People v. Salaz, 66 Cal.App. 173, wherein the court said at page 181 [1], 225 P. 777, at page 780, "No presumption of guilt weighed against the presumption of innocence. 'Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, *unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.*' Pen.Code, § 1105.

"But it does not necessarily follow that appellant's account of the killing, though uncontradicted by direct evidence, should control the jury. If there be any well-established circumstance in the case which may reasonably be regarded as incompatible with the theory of the defense that the killing was justifiable, then the jury, from a consideration of all the evidence, was warranted in finding that the act amounted to an unlawful homicide."

Under the foregoing rule the question presented is: Does the record furnish evidence of any circumstances which cannot reasonably be reconciled with the theory that defendant did not intend to stab her husband? It certainly does.

At the time defendant's guests left, decedent was lying on the living room floor in an intoxicated condition. After defendant announced she had stabbed her husband his body was found on the living room floor, in a position different from the one he had been in when the guests left, with a stab wound in his back from which he died. A butcher knife contaminated with blood, fatty tissue and skin, which defendant said was kept in the kitchen was found in the living room.

From this evidence the conclusion can reasonably be drawn that defendant secured the knife and plunged it into his back as he lay recumbent on the floor. Thereafter she went to her neighbor's and said she had stabbed her husband. Ten minutes later she stated to police she had stabbed him. Subsequently she told the officers she did not remember what had happened.

[2] From this evidence the judge could have reasonably concluded that after defendant had admitted stabbing her husband, she later made the statement to the police that she did not intend to do it in a deliberate attempt to exculpate herself. This conclusion is further supported by her subsequent statement that she did not remember what had happened. The statement that she did not intend to stab her husband is inconsistent with her statement that she did not remember what had happened and shows a consciousness of guilt of homicide and justified the trier of fact in disbelieving her statement that she did not intend to do it. (Cf. People v. Garcia, 2 Cal.2d 673, 679, 42 P.2d 1013; People v. Gibson, 64 Cal.App.2d 537, 539 [2], 149 P.2d 25.)

[3, 4] From the foregoing it is apparent the evidence justified the inference from defendant's testimony and her inconsistent statement that she was not to be believed when she said she did not intend to hurt her husband, and that she either (a) deliberately stabbed him, or (b) in handling the butcher knife she failed to use due caution or circumspection. In either event she would be guilty of homicide. (Cf. People v. Searle, 33 Cal.App. 228, 231, 164 P. 819.)

Affirmed.

MOORE, P. J., and FOX, J., concur.

111 Cal.App.2d 273

JAMES v. AMERICAN BUSLINES.

Civ. 18753.

District Court of Appeal, Second District, Division 2, California.

May 23, 1952.

Lonnie James sued the American Buslines, a corporation, for personal injuries sustained while riding as a passenger in defendant's bus. From a judgment of the Superior Court of Los Angeles County, Harold B. Jeffery, J., on a jury's verdict for defendant, plaintiff appealed. The District Court of Appeal, McComb, J., held that the evidence supported the jury's implied findings that the bus was not operated negligently before the driver saw an automobile approaching astraddle the center line of the highway and that he was confronted with an imminent peril and acted thereafter in a reasonably prudent manner for his passengers' safety under the conditions confronting him.

Judgment affirmed.

1. Appeal and Error ⚷930(1)

On appeal from judgment on jury's verdict for defendant, evidence must be viewed in light most favorable to defendant.

2. Appeal and Error ⚷989

A reviewing court will disturb jury's verdict for plaintiff only where there is no substantial conflict as to facts and reasonable persons can derive therefrom only an inference of defendant's negligence.

3. Negligence ⚷134(1, 11)

In action for personal injuries sustained as result of accident of such character that res ipsa loquitur doctrine applies, defendant cannot escape responsibility except on affirmative showing of definite cause for accident, in which no element of negligence on his part inheres, or such care by him in all possible respects as to lead necessarily to conclusion that accident could not have happened from want of care, but must have been due to some unpreventable cause, though exact cause is unknown.

4. Carriers ⚷320(1)

In action for personal injuries to passenger in defendant's bus, it was jury's sole province to determine from all evidence whether plaintiff's prima facie case, arising from application of res ipsa loquitur doctrine, was adequately met or balanced by defendant's showing of bus driver's conduct and circumstances of accident resulting in injuries.

5. Carriers ⚷320(15)

In action for injuries to passenger in defendant's bus, which skidded and turned over after swerving to right to avoid collision with approaching automobile astraddle center line of highway, whether bus was in position of imminent danger when driver first saw oncoming automobile was a fact question for jury.

6. Carriers ⚷320(15)

Whether bus driver, after finding himself in imminent danger of collision with approaching automobile astride center line of highway, was negligent in taking his foot off accelerator, swerving to right onto soft shoulder of highway, and slowing bus, which skidded and turned over when he attempted to return to pavement after passing automobile, was fact question for jury in action for resulting injuries to bus passenger.

7. Carriers ⚷318(4)

In action for injuries to passenger in defendant's bus, which skidded and turned over when driver attempted to return to highway pavement from soft shoulder after swerving to right to avoid collision with oncoming automobile astride center line of highway, evidence supported jury's implied findings that bus was not operated negligently before driver saw automobile approaching and that he was confronted with imminent peril and was not negligent thereafter, but acted in reasonably prudent manner for passengers' safety under existing conditions.

8. Appeal and Error ⚷996

On appeal from judgment on jury's verdict, District Court of Appeal is bound by jury's fact findings on evidence from which reasonable minds might draw different conclusions.

◆

Thomas L. Berkley, Clinton W. White and Charles E. Wilson, all of Berkeley, and

Hugh Wesley Goodwin, Fresno, for appellant.

McBain & Morgan, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for injuries resulting from the alleged negligence of defendant, plaintiff appeals.

[1] Viewing the evidence in the light most favorable to defendant (respondent) (In re Estate of Isenberg, 63 Cal.App.2d 214, 215, 217, 146 P.2d 424), the record discloses:

Plaintiff was a passenger on defendant's bus which was traveling in the State of New Mexico about 45 miles east of the city of Lordsburg on September 10, 1949. At the scene of the hereinafter described accident the road was a narrow two lane highway running in a general easterly and westerly direction. The hard surfaced portion of it was oil top, 18 to 20 feet wide, with a white line painted in the middle. On each side of the hard surfaced roadway was a shoulder 3 feet wide which was sloppy and muddy at the time.

Just before dawn, approximately 6:25 a. m., it was raining and the highway was slick and the sky was heavily overcast so the driver of the bus could not see beyond the beam of his headlights which projected 125 to 150 feet ahead of the bus. Lights on the bus were all in operation as were the windshield wipers.

The bus was traveling about 45 miles per hour when the bus driver saw within the range of his headlights an oncoming passenger car which had no lights lit, was black in color and was traveling between 40 and 70 miles per hour astraddle the center line of the highway. This car did not thereafter swerve either to the left or to the right and was still traveling astraddle the center line at the time it met and passed the bus.

When the driver first saw the oncoming car the bus was traveling on its own side of the road, the left side of the bus being about one foot south of the center line and the right side being about one foot north of the shoulder edge of the highway. Upon seeing the oncoming car, the bus driver immediately took his foot off the accelerator and swerved to the right, slowing the bus to about 30 miles per hour thus avoiding a collision with the west bound car. When the bus swerved to the right the wheels on the right side went off the pavement onto the soft shoulder and the driver lost control of the vehicle. The bus continued with two wheels off the pavement for about 150 to 200 feet and came back onto the pavement, went across to the north side of the road, turned completely around and when practically at a standstill turned over on its right side.

At the time the right wheels of the bus went onto the soft shoulder, the driver, seeking to retain control, attempted to pull the bus back onto the highway. In such attempt he did not apply his brakes but kept trying to get back onto the pavement by applying pressure to the accelerator. He testified he thought it was necessary for the safety of his passengers that he pull off the road, and also that it was the safest thing to do to try to pull the bus back onto the road in the manner above described.

[2] *Question: Was there substantial evidence to sustain the implied finding of the jury that the accident was not caused by defendant's negligence?*

Yes. The following rules are applicable:

1. It is only where there is no substantial conflict as to the facts, and from the facts reasonable persons can derive only the inference of defendant's negligence that a reviewing court will disturb a contrary verdict of the jury. (Collas v. Pasadena City Lines, 89 Cal.App.2d 93, 95 [2], 200 P.2d 77.)

[3] 2. Where an accident is of such a character that the doctrine of res ipsa loquitur applies, defendant cannot escape responsibility except upon a showing either (a) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or (b) of such

care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause although the exact cause is unknown. (Bourguignon v. Peninsular R. Co., 40 Cal.App. 689, 694 [2], 181 P. 669; Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 372, 168 P.2d 457.)

[4] 3. In an action for personal injuries sustained by plaintiff while a passenger in defendant's bus, it is the sole province of the jury to determine from all the evidence whether plaintiff's prima facie case arising from the application of the doctrine of res ipsa loquitur is adequately met or balanced by defendant's showing of the conduct of the driver and the circumstances of the accident. (Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 375 [8], 168 P.2d 457.)

[5] 4. Whether defendant's bus was in a position of imminent danger when the driver first saw the oncoming car was a question of fact for the determination of the jury. (Kehlor v. Satterlee, 37 Cal.App. 2d 116, 119, 98 P.2d 759.)

[6] 5. Whether, after defendant's driver found himself in a position of imminent danger, his conduct constituted negligence was a question of fact for the jury. (Burton v. Los Angeles Ry. Corp., 79 Cal. App.2d 605, 610 [5 & 6, 180 P.2d 367.)

[7] Applying the foregoing rules to the facts of the instant case it is evident the implied finding of the jury that the bus of defendant was not operated in a negligent manner prior to the time the driver thereof saw a car approaching him astraddle the white line was justified. Also, the facts supported the implied finding of the jury that the driver of the bus was confronted with an imminent peril and that his conduct thereafter did not constitute negligence, but that he acted in a manner which was reasonably prudent for the safety of his passengers under the conditions then confronting him.

[8] An examination of the record shows plaintiff does not question the rulings of the trial court either in the reception of evidence or in the instruction of the jury. Therefore, since there is presented for review simply a question of fact from which reasonable minds might draw different conclusions this court is bound by the findings of the trier of fact.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

109 Cal.App.2d Supp. 936

CAMBRIDGE v. WEBB et al.

C. A. 2171.

Appellate Department, Superior Court,
San Francisco County, California.
Feb. 28, 1952.

Action by Archibald Cambridge, Jr., as executor, against Raymond E. Webb, and others for unlawful detainer. The Municipal Court of the City and County of San Francisco, Roberta Butzbach, Judge pro tem, and Lenore D. Underwood, J., rendered judgment for plaintiff, and defendants appealed. The Appellate Department, Superior Court, Kaufman, P. J., held that where tenant had attempted to force landlord to make repairs which he was not obligated to make by withholding payment of rent due, and offer to pay rent was made only after three days unlawful detainer notice had expired, hardship of tenant, if any, was result of his own action, and court did not abuse its discretion in denying relief from forfeiture of lease on ground of hardship.

Judgment affirmed.

1. Landlord and Tenant 🔑103(1), 290

Legislature, by Code of Civil Procedure, has established complete set of rules governing rights of landlord and tenant in unlawful detainer action, including right of landlord to declare for forfeiture of lease, and right of tenant to make application pursuant to statute for relief based on hardship, and court has no authority to either enlarge or delimit such remedies beyond their statutory scope. Code Civ.Proc. §§ 1161, 1174, 1179.

2. Landlord and Tenant ⚿108(1)

Where landlord brought action of unlawful detainer by reason of nonpayment of rent by tenant, and forfeiture of lease was requested, tenant's remedy from forfeiture was to file application pursuant to statute for relief based on hardship, and court did not err in refusing to permit tenant to introduce evidence on question of hardship in unlawful detainer trial. Code Civ.Proc. §§ 1161, 1174, 1179.

3. Landlord and Tenant ⚿103(1)

Where a landlord has complied with terms of statute on unlawful detainer, he is entitled in a proper case to forfeiture of the lease. Code Civ.Proc. §§ 1161, 1174, 1179.

4. Landlord and Tenant ⚿108(1)

Where tenant had refused to pay rent for five months, and had endeavored to force landlord to make repairs when no obligation to repair existed, and offer of tenant to pay rent was forthcoming only after landlord's three-day unlawful detainer notice had expired, hardship of tenant, if any, was brought about by his own action, and court did not abuse its discretion in refusing tenant's application for relief on ground of hardship from forfeiture of lease. Code Civ.Proc. §§ 1161, 1174, 1179.

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Marcel E. Cerf, Robinson & Leland, San Francisco, for appellants.

Marvin E. Lewis, San Francisco, for respondent.

KAUFMAN, Presiding Judge.

This is an appeal from a judgment of the municipal court in favor of plaintiff and respondent and against defendants and appellants in an action for unlawful detainer.

A reading of the record discloses that the appellants were delinquent in their payment of rent; that the statutory unlawful detainer notice was sent to them. Thereafter, and during the trial of said action, appellants offered to pay all rent due together with costs and counsel fees. Respondents in their three-day notice and in their complaint requested a forfeiture of the lease. Thereafter the trial court entered judgment in favor of respondents forfeiting the lease and for unpaid rent and costs. Thereafter appellants availed themselves of the right to file an application for relief based on hardship under section 1179 of the Code of Civil Procedure and the trial court, acting under and pursuant to that section, denied appellants any relief on the ground of hardship.

[1] [1a] In our opinion, the statutes of the State of California set out a complete procedure in actions of unlawful detainer. Section 1174 of the Code of Civil Procedure provides that if the notice required by section 1161 of the Code of Civil Procedure states the election of the landlord to declare the forfeiture of the lease, then the judgment of the court shall declare such forfeiture. Section 1179 of the Code of Civil Procedure permits the court to give relief in the case of hardship.

[2] [2] Appellants contend that the lower court committed prejudicial error in refusing to allow them to introduce evidence on the question of hardship in the unlawful detainer trial, but we think the court was correct in its ruling on the ground that appellants' remedy was to proceed under section 1179 of the Code of Civil Procedure. Furthermore, appellants availed themselves of this remedy and did proceed under section 1179 of the Code of Civil Procedure. They had their hearing and their day in court and the trial court, in the exercise of its discretion, denied them any relief on the ground of hardship under that section.

A reading of the record before us does not disclose that the trial court abused its discretion in proceeding either under section 1174 or 1179 of the Code of Civil Procedure.

[3] [3] In our opinion, where a plaintiff landlord has complied with the terms of the statute on unlawful detainer he is entitled in a proper case, to a forfeiture of the lease. The rule of Roussel v. Kelly, 41 Cal. 360, is still the law in California, and applies to the facts of this case.

See, also, Downing v. Cutting Packing Co., 183 Cal. 91, 190 P. 455, where the

Supreme Court again substantially lays down the same rule as it previously had announced in the case of Roussel v. Kelly.

[1b] It is our view that the Legislature has set up a complete set of rules governing the rights of landlord and tenant in unlawful detainer actions. Also since the decision of the Supreme Court in Roussel v. Kelly, the Legislature has enacted section 1179 of the Code of Civil Procedure to permit the courts to grant relief on the basis of hardship.

Appellants' contention that the trial court should permit the same relief afforded by section 1179 of the Code of Civil Procedure during trial flies in the face of the proposition that the remedy sought to be enforced in the present action is provided for by statute, which definitely fixes and prescribes the rights and responsibilities of landlord and tenant, and it is not within the legitimate province of this court to enlarge the remedy or restrict or extend the rights of the parties clearly within its statutory provisions. If appellants' argument is sound that we can enlarge the terms of the statute, then it could be argued that we could likewise limit and restrict the terms of the statute. This, of course, we cannot do. Also in this case the appellants have availed themselves of the equitable provisions of the statute, Code Civ.Proc. § 1179, and they cannot be heard to say on appeal that they did not have a hearing and decision on their plea of hardship.

[4] [4] In our opinion the record contains sufficient evidence to justify the lower court's discretion in denying relief on the basis of hardship. The act of the tenant in endeavoring to force his landlord to make repairs where no obligation existed to make them, coupled with the tenants' refusal to pay rent for five months, and then only offering to pay the rent after the three-day unlawful detainer notice had expired, clearly shows that whatever hardship was suffered by the tenant was brought about by the tenants' own action. The trial court in balancing the equities must have given consideration to these facts and may have felt that it was inequitable for a tenant to attempt to force unwarranted repairs on a landlord by withholding payment of rent due.

The case of Altman v. McCallum, reported in 107 Cal.App.2d Supp. 847, 236 P.2d 914, is not factually here in point. To begin with, it involved a different section of the code and involved an equitable estoppel by reason of a concealment of the amount of rent owing. Also, it involved an improper serving of the three-day notice, and of the notice of intention to sell. Also, there was an acceptance of payments prior to the recording of the notice of default and intention to sell. Here no estoppel is involved, and under the facts of this case only a plea of hardship was involved, and as we have already indicated, appellants have had their day in court under that plea.

We find no prejudicial error in the record and accordingly the judgment and order of the lower court must be, and they are hereby affirmed.

DEVINE, J., concurred.

111 Cal.App.2d 464

In re PRIOR'S ESTATE.

PRIOR v. RILEY.

Civ. 14992.

District Court of Appeal, First District,
Division 1, California.
June 2, 1952.

Proceedings in the matter of the estate of Toney Prior in which Elwood Toney Prior, as executor, filed petition for partial distribution, and Barbara Marie Riley, as alleged beneficiary of testamentary trust, sought an accounting. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered judgment adverse to Elwood Toney Prior, and he appealed. The District Court of Appeal, Peters, P. J., held that where will created trust in specific amount, payable, with accumulations, to beneficiary when she reached age of 26, duties of trustee who was also executor commenced upon death of testator, and failure of executor to transfer fund to himself as trustee could not absolve him of his duties and responsibilities, including duty to invest, and interest was chargeable at rate of 7 per cent on amount of corpus.

Judgment affirmed.

1. Appeal and Error ⚿1039(13)

Where beneficiary of trust created by will for payment of specific sum with accumulations upon beneficiaries reaching age of 26 sought accounting in which she claimed right to interest on principal sum which had not been invested, when parties to controversy conceded that only issue involved was rate of interest, if any, to be allowed, and trustee-executor was aware that beneficiary was claiming a possibility of 7 per cent interest as well as asserted claim of four per cent interest, failure of beneficiary to amend her pleading to assert claim for 7 per cent interest in addition to asserted claim for 4 per cent interest could not have been prejudicial.

2. Trusts ⚿219(2)

Where will created trust of specific legacy, with amount thereof with accumulations to be paid to beneficiary when she reached age of 26, duties of trustee who was also executor commenced upon death of testator, and failure of executor to transfer fund to himself as trustee could not absolve him of his duties and responsibilities as trustee including duty to invest, and could not limit liability for interest to 4 per cent rate applicable to executors. Civ.Code, §§ 2261(1), 2262; Probate Code, §§ 28, 162.

3. Wills ⚿681(2)

A testamentary trustee is a devisee under the will, and takes as trustee thereunder at death of testator, and does not derive his title from decree of distribution but same merely declares title that accrued under by the will.

4. Trusts ⚿219(1)

A testamentary trustee who fails to comply with statutory duty to invest funds is liable in accordance with statute for interest on amount of principal sum. Civ. Code, §§ 2261, 2261(1), 2262.

5. Trusts ⚿363

Probate court has jurisdiction over testamentary trusts and trustees, and although it may not give a personal judgment against trustee upon which execution might issue, court has power to determine amount due beneficiary, with interest and to charge trustee accordingly.

6. Trusts ⚿375(2)

Decree of probate court determining amount due beneficiary of testamentary trust, and charging the trustee accordingly is enforceable by contempt, or by securing a judgment at law thereon. Probate Code, §§ 1120–1122.

7. Trusts ⚿366(2)

Either the trustee of a testamentary trust or the beneficiary thereof may invoke special jurisdiction of probate court for purpose of determining amount due beneficiary. Probate Code, §§ 1120–1122.

8. Trial ⚿109

Where executor-trustee petitioned for partial distribution by distribution of specific legacy, and exceptions disclosed that bequest was testamentary trust, and raised issue of whether corpus was ever distributed to trustee, and petitioner urged in opening statement that he was before court as trustee, petitioner could not thereafter urge that he was not before court as trustee, but as executor, and that interest due upon failure to invest was limited to statutory amount applicable to executors. Civ.Code, §§ 2261, 2261(1), 2262.

9. Trusts ⚷219(2)

Where will created trust of specific legacy, with amount thereof and accumulations to be paid to beneficiary when she reached age of 26, when executor who was also trustee had failed to transfer corpus to himself as trustee or to invest same as required by statute, and estate was not distributed prior to time for distribution to beneficiary of trust, 7 per cent interest due upon corpus for failure to invest would be allotted 4 per cent against estate and the remaining 3 per cent against trustee as such. Civ.Code, §§ 2261, 2262.

◆

Young, Rabinowitz & Chouteau, San Francisco, for appellant.

R. L. Husted, San Francisco, for respondent.

PETERS, Presiding Justice.

Elwood Prior, executor and trustee of the estate of Toney Prior, appeals, in both capacities, from a decree of partial distribution ordering him as executor or as trustee to render a full accounting, and to pay to Barbara Marie Riley her $5,000 legacy, plus 7 per cent simple interest, starting one year after the death of the testator. His basic contentions are that the Probate Court should have required him to pay but 4 per cent interest on the legacy and not 7 per cent, and that the court had no jurisdiction over him as trustee.

There is no dispute as to the facts.

Toney Prior, by his will executed in 1934, named his son, the appellant, executor, to serve without bond. The residue of the estate was bequeathed in equal shares to the testator's widow and to appellant. There were three specific bequests to Maude Riley and to her two children of $5,000 each. The bequests to the two children were in trust, appellant being named as trustee. It is the trust to one of these children, Barbara Marie Riley, that is here involved. Barbara was but eleven years old when the will was executed. The trust provision bequeaths $5,000 to appellant to hold in trust to pay that sum, "with accumulations" to Barbara when she shall reach the age of twenty-six.

The testator died on April 25, 1935, and the will was admitted to probate in May, 1935. Appellant was appointed executor, and has continuously acted in that capacity. The estate was appraised at $97,966.67, all separate property of the deceased, consisting primarily of stock in the Prior Estate Company, interests in certain promissory notes, a loan, and the stock in trade of a drug store.

Barbara became twenty-six on March 22, 1949. Three days later appellant filed a petition for partial distribution. This petition alleges that all creditors of the estate, taxes, and the $5,000 bequest to Mrs. Riley have been paid. It requests permission to pay to Barbara the $5,000 due her, less inheritance tax, and to withhold until payable, the $5,000 bequest to the other child of Mrs. Riley. The appellant waives his executor's fees, admits that the money involved in the two trust bequests was not invested, offers on his behalf and on behalf of his mother to pay 1½ per cent interest on the two trust bequests starting one year from the death of the testator, alleges that he and his mother are the sole persons interested in the residue of the estate, and avers that both waive an accounting.

Barbara, as legatee and beneficiary of the trust, filed exceptions to this petition. In this pleading she sets forth the trust provision of the will, points out that appellant, in his petition for partial distribution, admitted that he had not invested the funds, avers that the reason for non-investment does not appear, that it does not appear whether the funds to pay her bequest were ever paid to the trustee, that the trustee and executor are the same person, and that it does not appear whether the funds were not invested as the result of the negligence of Prior as executor or as trustee. She also averred the need for an accounting to determine the actual income earned by the estate, and that she does not understand the offer to pay her 1½ per cent interest on her bequest, and states that she is entitled to either 4 per cent interest on such bequest or to the entire income earned by her bequest. She prays for a hearing, demands an accounting, and, based on such accounting, prays that "the exact amount due her be computed and ordered to be paid."

The hearing was held on June 15, 1950. From the very inception of that hearing appellant insisted that he was before the court as trustee as well as executor, contended that he held the funds to pay Barbara's bequest as trustee, and urged that, as trustee, he was not liable for interest. In his opening statement counsel for appellant outlined his understanding of the nature of the proceeding. He pointed out that he understood that Barbara was claiming either 4 per cent or 7 per cent interest on her bequest, and that the issue was whether Barbara was "entitled to interest—any interest at all—and, if so, at what rate." He then stated:

> "My contention is that Elwood Prior was in a trustee capacity, acting as trustee. It is true that he never distributed the $5,000.00 from the estate or from himself as executor to himself as trustee—he never went through that futile and useless movement. Nevertheless, he is made trustee under the will, and is entitled to be treated as a trustee, and his obligations are those of a trustee and not an executor. * * * So I contend that throughout this period he was in a trust position.
>
> "I further contend that a trustee does not have to invest money. * * * He didn't invest, and there are no accumulations."

Appellant also urged that Barbara was estopped from claiming interest because of the claimed acquiescence of her counsel in not investing the fund. Counsel for Barbara, in his opening statement, denied that she had been represented by counsel, pointed out that the bequest to appellant as trustee for Barbara was made "with accumulations," and stated that the sole issue was whether Barbara was entitled to 4 per cent interest on her bequest under section 162 of the Probate Code, or 7 per cent under sections 2261 and 2262 of the Civil Code.

[1] Two things are quite clear from these opening statements. First, counsel for appellant, in spite of the fact that Barbara had asked in her pleading for but 4 per cent interest, was well aware that she was claiming a possibility of 7 per cent interest. While it would have been better practice to have amended the pleading to so provide, no prejudice was suffered by this failure, inasmuch as both sides conceded at the very inception of the hearing that the rate of interest issue was the only problem involved. Second, counsel for appellant not only conceded that appellant was before the court as trustee as well as executor, but was insisting that his liability had to be determined by the law applicable to trustees.

The sole witness (except for establishing the age of Barbara and her brother) was appellant. He testified that the only source of funds of the estate was dividends on the stock of the Prior Estate Company, that such dividends amounted to between $400 and $500 a month; that it took him about five years to accumulate the money for Barbara's trust fund; that he deposited all such dividends in a commercial bank account (which does not draw interest) in his name as executor; that within two years of the hearing he had withdrawn $5,000 from the account and deposited it in a commercial bank account in his name as trustee for Barbara; that he was acting as "executor and trustee." He conceded that he had never filed an account in the estate, nor ever had distributed to himself as trustee the bequest in trust for Barbara. He gave as his reasons for not investing the money that there was no investment provision in the will, that he wanted to safeguard the money in the interest of the minors, and that no demand for him to invest had ever been made.

On this evidence the court found that the bequest to Barbara was now payable; that it "was agreed and stipulated by counsel that the only question at issue in this proceeding is the amount of accumulations or interest to be paid" to Barbara; that the executor kept the $5,000 "in his possession as Executor and never at any time transferred said sum into his name as Trustee, as provided in said will, and that said sum was never invested for or on behalf of said legatee, but that said sum was kept in a checking or commercial account by said Executor and the Court further finds that said Executor was negligent in retaining said funds without investing same as required by Paragraph 1, Section 2261 of the Civil Code of the State of California."

The court concluded that an accounting should be had, ordered $5,000 paid to Barbara forthwith, and further ordered that appellant "as such Executor or Trustee" pay to Barbara 7 per cent simple interest on her bequest starting one year after the date of the death of the testator. The court reserved the power to make further orders in the matter after the accounting was rendered.

In his opening brief appellant calls attention to section 162 of the Probate Code which provides that: "Legacies are due and deliverable one year after the testator's death, and bear interest from that time * * * at the rate of 4 per cent per annum * * *." He then makes but one contention, namely, that under the findings he was held liable as executor, and that as executor his liability is limited to 4 per cent interest.

[2] Appellant has clearly misinterpreted the findings. The court found, in accordance with the evidence, that appellant had failed to have this bequest distributed to himself as trustee, and kept the money in a commercial account in his name as executor, and that appellant in so doing, was negligent in failing to invest such funds as required by section 2261 of the Civil Code. That section is in the chapter of the Civil Code entitled "Trusts for the Benefit of Third Persons" and in the article entitled "Obligations of Trustees". It is perfectly clear that by referring to this section the court was referring to appellant as trustee, as well as executor. This is made crystal clear by the terms of the judgment—"It is further ordered, adjudged and decreed that said Elwood Toney Prior, as such Executor or Trustee" pay to Barbara the $5,000, and 7 per cent interest.

Section 2261(1) reads as follows: "In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital. Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, and stocks, preferred or common which men of prudence, discretion and intelligence acquire for their own account."

Section 2262 of that code provides: "If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is willful."

[3] It is clear that even though the appellant as executor failed to have the legacy transferred to himself as trustee, he cannot, by such neglect, absolve himself of his duties and responsibilities as trustee. Under section 28 of the Probate Code: "Testamentary dispositions * * * are presumed to vest at the testator's death." Under this section appellant's duties and responsibilities as trustee commenced upon the death of the testator. This was clearly illustrated in Estate of Wellings, 192 Cal. 506, 510, 221 P. 628, 630, where the court stated: "An executor appointed by will has the right to act unless there is some express provision of law disqualifying him. [Citing an authority.] A trustee under a will has even a more sub-

stantial right to be recognized by the court. He does not become a trustee by virtue alone of the decree of distribution, although his fuller and more complete powers and duties are thus devolved upon him. A testamentary trustee is a devisee under the will and takes as trustee under the will at the death of the testator. [Citing authorities.] He does not derive [his] title from the decree of distribution, which merely declares the title that accrued under and by the will, but from the will itself. [Citing authorities.] When an estate is devised to trustees it becomes their duty, having accepted the trust, to obtain control of the trust property. [Citing a textbook.] When the desire of a testator can be fully carried out only through trustees, their appointment as such implies a wish on the part of the testator that it be so done. [Citing an authority.]" See, also, Estate of O'Connor, 2 Cal.App. 470, 84 P. 317.

The same thought is expressed by section 177 of the Restatement of Trusts which provides: "The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust." Comment "a" under this section reads in part: "The trustee is under a duty to the beneficiary to take reasonable steps to enforce any claim which he holds as trustee against predecessor trustees (see § 223), or in the case of a testamentary trust against the executors of the estate, to compel them to transfer to him as trustee property which they are under a duty to transfer, or to redress any breach of duty committed by them."

[4] There can be but little doubt that a trustee-executor who fails to comply with the provisions of section 2261 of the Civil Code, is liable for interest under section 2262 of that code. That was the precise holding of Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561. There, as here, the testamentary trustee, who was also executor, failed to take over and manage the trust estate as trustee. He also mingled the trust funds with his own. For this last-mentioned misconduct the penalty of compound interest was imposed. The court stated, 124 Cal. at page 572, 57 P. at page 563: "The will constitutes the executors trustees, and there was never any settlement of the administration, and distribution of the estate to the trustees. Annual accounts should have been rendered, and the estate managed as required of executors. As the administration was left open because of the trust, Woodward was, of course, responsible as trustee, and should have kept the money invested for his beneficiaries. As he did not do that, but mingled the funds with his own, and even, under the findings, must have occasionally drawn them out of the bank for his own private purposes, I think he was properly charged with compound interest." See, also, a later appeal in this same case, Bemmerly v. Woodard, 136 Cal. 326, 68 P. 1017; Estate of Piercy, 168 Cal. 755, 145 P. 91.

The problem and its solution can be simply stated. Under the law, title to the trust fund vested in appellant as trustee upon the death of the testator. Under the will the trustee was required to pay $5,000 to Barbara together "with accumulations" upon her reaching the age of twenty-six. It was appellant's duty as trustee to secure the trust funds from the estate and to invest them. He was negligent in failing to secure the funds and in failing to invest them. Therefore, under section 2262 of the Civil Code he is liable for simple interest at the rate of 7 per cent.

In his closing brief appellant points out that his liability as trustee is personal, while his liability as executor is a liability of the estate, and contends that the Probate Court had no power in this proceeding to make an order binding him personally.

[5-7] There can be no doubt that the Probate Court has jurisdiction over testamentary trusts and trustees. The Probate Code expressly so provides. §§ 1120-1122, Probate Code. Under these sections the Probate Court has jurisdiction over testamentary trusts and trustees before distribution, and over the testamentary trustee for the purpose of passing on the acts of such trustee. In Estate of De La Montanya, 83 Cal.App.2d 322, 328, 188 P.2d 494, 497, the court stated: "Jurisdiction is given under Probate Code section 1120

which provides in part: 'When a trust created by will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of * * * passing upon the acts of the trustee * * *. The trustee may also petition such court, from time to time, for instructions * * *.' [Citing authorities.] The language is broad enough to give jurisdiction over all controversies arising between a trustee and a beneficiary where the method of operation or the good and sound judgment of the trustee is involved. [Citing authorities.]" See, also, Wells Fargo Bk. etc. Co. v. Superior Court, 32 Cal.2d 1, 193 P.2d 721; Estate of Loring, 29 Cal.2d 423, 175 P.2d 524.

It has been held that a trustee's accounts can be settled by the Probate Court, Shnell v. Brunton, 52 Cal.App.2d 226, 126 P.2d 135; and that the Probate Court can hold the trustee for his breaches and shortages, Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120; Estate of Evans, 62 Cal.App.2d 249, 144 P.2d 625. While it is true that the Probate Court cannot give a personal judgment against the trustee upon which an execution might issue, the court has the power, as it did here, to determine the amount due the beneficiary, with interest, and to charge the trustee accordingly. Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120. Such a decree is enforceable by contempt or by securing a judgment at law thereon. Willson v. Security-First Nat. Bk., 21 Cal.2d 705, 134 P.2d 800. Either the trustee or the beneficiary may invoke the special jurisdiction of the Probate Court here under consideration. Estate of Marré, 18 Cal.2d 184, 114 P.2d 586; Estate of Smith, 4 Cal.App.2d 548, 41 P.2d 565.

[8] Although the pleadings are not as clear as might be desired, there is but little doubt that the special jurisdiction of the Probate Court over testamentary trustees was invoked in the instant case. The proceeding started as a petition for partial distribution aimed at distributing the $5,000 bequest to Barbara. The exceptions disclosed that this was a testamentary trust, and raises the issue of whether the corpus was ever distributed to the trustee. In his opening statement, counsel for appellant not only conceded but urged that he was before the court as trustee. Under such circumstances it is now too late to urge that he was not before the court as trustee.

[9] In view of the fact that the estate was not distributed, it would appear that the estate and appellant as executor are liable for 4 per cent interest on the bequest. The balance of 3 per cent is chargeable against appellant as trustee, but is not chargeable against the estate. The findings, conclusions and judgment are amended to so provide. As so amended, the judgment is affirmed, respondent to recover her costs.

BRAY and FRED B. WOOD, JJ., concur.

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111 Cal.App.2d 406

PEOPLE v. BROWN.

Cr. 4772.

District Court of Appeal, Second District,
Division 3, California.

May 28, 1952.

Hearing Denied June 26, 1952.

An accused was convicted of attempted robbery by means of force and fear and the Superior Court of Los Angeles County, Charles W. Fricke, J., sentenced him to state prison 14 years and five months after revocation of probation which had been granted to the accused, and the accused appealed. The District Court of Appeal, Shinn, P. J., held that trial court had not lost jurisdiction to sentence defendant upon expiration of term of probation.

Judgment affirmed.

1. Criminal Law 🔑977(3)

Where a convicted defendant was subject to imprisonment for not less than one year nor more than 20 years, and imposition of sentence was suspended and defendant was placed on probation for ten years, and probation was revoked and bench warrant issued because defendant violated condition of probation, trial court did not lose jurisdiction to sentence defendant upon expiration of term of probation and court could sentence defendant 14 years and five months after revocation of probation. Pen. Code, §§ 664, 1203 et seq., 1203.3.

2. Criminal Law ⚷982

Where year term of probation granted to a convicted defendant had expired and where probation had been revoked for failure of defendant to report to probation officer, trial court could not set aside order revoking probation and could not extend probationary period.

3. Criminal Law ⚷982, 1001

Authority in a court to suspend a sentence or execution thereof in a criminal case and liberate defendant for a certain period is wholly statutory, and statute furnishes measure of power which may thus be exercised, and nothing which cannot be found in statute or which is not reasonably and fairly or necessarily within the reason or spirit or intent thereof can be imported into statute by courts.

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Sidney L. Gelber, San Fernando, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appeal by defendant from a judgment sentencing him to State prison. On April 23, 1936, in a trial to the court defendant was adjudged guilty of the offense of attempted robbery by means of force and fear. He was subject to imprisonment for a period of not less than one nor more than twenty years. Penal Code, sec. 664. Imposition of sentence was suspended and defendant was placed on probation for a term of ten years on condition that he serve the first six months in the county jail, obey all the laws and report regularly to the probation department. On June 14, 1937, in his absence, a report of violation of probation was filed, probation was revoked and a bench warrant was issued. The violation of probation consisted of defendant's failure, after March, 1937, to report monthly to the probation officer. On November 1, 1951, defendant was in court with counsel and was sentenced to the State prison for the term prescribed by law. It thus appears that defendant was sentenced 15 years and 7 months after he was placed on probation, and 14 years and 5 months after probation had been revoked. In the meantime defendant had married, had become the father of four children, and so far as appears in the record had not been found guilty of violating any law and did not even know that probation had been revoked.

Defendant contends that the court lost jurisdiction to sentence him upon the expiration of the term of probation. He outlines his argument as follows: The court has no jurisdiction under the probation laws, section 1203 et seq., of the Penal Code, to place a person on probation for a longer term than is prescribed as the maximum punishment for the offense of which he has been convicted; it is manifest throughout the scheme of probation that the legislature never intended for the court to retain jurisdiction of a person beyond the term fixed by the court as the probationary period; if the court can impose sentence at any time after the expiration of the term of probation, it can do so even after the expiration of the maximum time for which probation could be granted; during the term of probation, even though probation is revoked, the court can still change its order, but if, when probation has been revoked, the court cannot, after the expiration of the term, change the terms of probation and must sentence the defendant, the authorities can by mere inaction deprive the probationer of an opportunity to prove meritorious grounds for remaining on probation; it could not have been the intention of the legislature to provide that if probation is revoked within the prescribed term the probationer is subject during the remainder of his life to the imposition or execution of sentence.

Defendant relies upon section 1203.3, Penal Code, which reads in part as follows:

"The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. * * * *and in all* cases, if the court has not seen fit to revoke the order of probation *and impose sentence or pronounce judgment,* the defendant shall at the end of the term of probation or any extension thereof, be by the court discharged subject to the provisions of these sections." (Emphasis added.) While apparently conceding that during the term of probation the court may extend the term to the maximum period for which the person could be sentenced and thus retain authority to impose sentence within the extended time, defendant contends that where no extension is granted it is mandatory at the expiration of the term of probation for the court to discharge the probationer, if probation has not been revoked *and* sentence imposed.

[1] We must hold that the court had jurisdiction to impose sentence. Although defendant realizes that the Supreme Court in People v. Williams, 24 Cal.2d 848, 151 P.2d 244, decided the precise point to the contrary of his contention, holding that after probation has been revoked there is no limit of time within which sentence can be pronounced, he entertains the vain hope that we will not consider ourselves bound by that decision.

[2, 3] A further contention is that the court should have set aside the order revoking probation and extended the probationary period, when the only ground of revocation was defendant's failure to report to the probation officer. The court was without authority to do so. When the term of probation expired the court lost jurisdiction to vacate its former order. It was so held in People v. O'Donnell, 37 Cal.App. 192, at page 197, 174 P. 102, at page 104, where the court said: "The authority in a court to suspend a sentence or the execution thereof in a criminal case and liberating the defendant for a certain period is wholly statutory, and the statute itself furnishes the measure of the power which may thus be exercised. Nothing which cannot be found in the statute or which is not reasonably and fairly or necessarily within the reason or spirit or intent thereof can be imported into it by the courts." In the present case there was nothing for the trial court to do other than pronounce judgment, although defendant had already served a six months term in the county jail.

We regard this as a proper case in which to call the attention of the legislature to the present state of the law. Defendant served one jail term for attempted robbery and now goes to prison for from one to twenty years after probation was revoked because he failed to report to the probation officer for a period of two or three months. This is the actual condition, and the realistic as opposed to the legalistic view of the situation. Almost fifteen years after probation was granted defendant was sentenced to State prison. It might as well have been fifty years, since it would be possible, as the law now stands, for one in his old age to be sent to prison because he had failed in his youth to observe all the conditions of probation. The culprit may not even know that probation was revoked; neglect to report may have been his only failure to render full compliance; he may have led an exemplary life in the meantime, wholly unaware of his perilous position, and yet be beyond the pale of the court's mercy when the harsh hand of the law is placed upon him. And all this may result from the neglectful or wilful failure of the authorities to bring the offender to court while there is still authority to excuse his default and give him another chance. It is an extraordinary situation, and one that can be due only to an unfortunate oversight on the part of the legislature.

Jurisdiction to pronounce judgment or impose sentence, and to retain the probationary status, should be coextensive as to time. One who renders it difficult for the authorities to bring him to court after violation of probation can have no just cause for complaint if judgment is pronounced or sentence is imposed in his absence under section 1193 or 1203.2a, Penal Code.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

111 Cal.App.2d 524

In re CLAYTON'S ESTATE.

McMILLON et al. v. CLAYTON.

Civ. 18820.

District Court of Appeal, Second District, Division 1, California.
June 6, 1952.

Ethel Rowe Clayton filed a petition for probate of the will of Walter Clayton, deceased, and Quincy McMillon, and others, filed a contest. The Superior Court of Los Angeles County, sitting in probate, Philbrick McCoy, J., entered an order denying defendants' motion to vacate order admitting the will to probate and the contestants appealed. The District Court of Appeal, White, P. J., held that counsel for contestants was guilty of lack of diligence and that contestants' motion to vacate order was properly denied.

Affirmed.

See also 239 P.2d 105.

Wills ⚿355

Where proponent of will and contestants stipulated in open court that trial of issues involved would be held on specified date approximately 3½ months in the future, and during such time contestants could have taken proponent's deposition at any time, but did not do so, and counsel for contestants did not appear at trial and did not attempt to contact counsel for proponent with view to a continuance, contestants' motion to vacate order admitting will to probate, which motion was made on ground that order was taken through mistake, inadvertence, surprise and excusable neglect on part of contestants, in that contestants were led to believe that deposition of proponent would be taken prior to trial of contest, was properly denied. Code Civ.Proc. § 473.

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Walter L. Gordon, Jr., Los Angeles, for appellants.

Noel Edwards, Los Angeles, for respondent.

WHITE, Presiding Justice.

Ethel Rowe Clayton, respondent herein, claiming to be the widow of Walter Clayton, deceased, filed a petition for the probate of his will, whereupon the appellants herein, nephews of said deceased, filed a contest, alleging that the purported will was not executed by decedent as his last will and testament, that proponent was not the wife of decedent, and that his signature thereto was secured by fraud, duress and undue influence. On January 25, 1951, the trial of the issues thus raised came on for hearing, at which time it was continued to May 8, 1951, on which latter date the contestants failed to appear, and on the evidence presented by respondent the will was admitted to probate and respondent was appointed administratrix with the will annexed. Thereafter contestants and appellants filed a motion under section 473 of the Code of Civil Procedure to vacate and set aside the order admitting the will to probate and granting letters of administration with the will annexed, upon the ground that such orders were taken through mistake, inadvertence, surprise and excusable neglect. From the order denying their motion, contestants have appealed.

The rules applicable on appeal when a motion under section 473 of the Code of Civil Procedure has been made and granted or denied are so well settled in the law of this state, not only by earlier decisions but by more recent pronouncements of the Supreme Court and the District Courts of Appeal, that repetition or elaboration thereof is wholly unnecessary in the decision of this appeal.

The only showing made in support of the motion was by affidavit of contestants' counsel, the pertinent portions of which are as follows:

> "* * * That affiant prepared an affidavit to take the deposition of the respondent Ethel Rowe Clayton at his office on January 15, 1951. That a subpoena was served upon said Ethel Rowe Clayton and the deposition was duly set for the aforesaid date. That prior to the date for the taking of the deposition, respondent's attorney, Noel Edwards, called affiant on the telephone and stated that he would be out of the city on that date on a vacation

and requested of affiant that the deposition of Ethel Rowe Clayton not be taken on the date set as he would be caused a great inconvenience. That affiant informed said attorney that he could not safely proceed to trial without first taking the deposition of said Ethel Rowe Clayton. That said attorney stated that if the deposition went off calendar upon his return he would make his client available for the taking of her deposition prior to the trial of this matter. That affiant was led to believe and did believe that the said attorney would allow the deposition of his client to be taken prior to any trial of the contest of the will. That no deposition of said Ethel Rowe Clayton has ever been taken, nor has said attorney made or offered to make any arrangements for the taking of his client's deposition. That affiant was of the opinion and did believe that said attorney would not proceed to trial until the deposition of said Ethel Rowe Clayton had been taken.

"That on or about December 30, 1950, affiant received a letter from said attorney which contained the following language:

"'P.S. Confirming our telephone conversation it is our understanding that the deposition of Ethel Rowe Clayton will not be taken until after January 15, 1951.

"'N. E.'

"That despite the fact that the deposition of Ethel Rowe Clayton was not taken the respondent and her attorney proceeded to trial on May 8, 1951, and secured an order admitting the will to probate and for letters of administration, although a motion to vacate and set aside probate homestead was pending and set for hearing on May 22, 1951.

"That affiant is acquainted with the facts of the case and is of the opinion that said contestants have a meritorious cause of action for the contest of the will and that a different result will be obtained upon a trial of this matter."

The showing made in support of the motion was wholly inadequate. The affiant states that he was "led to believe" that the deposition of the proponent would be taken prior to any trial of the contest, but he does not state that counsel for the proponent led him so to believe, or why he (counsel for contestants) did not take steps to have the proponent's deposition taken within a reasonable time. Affiant does not state that he did not know that the contest was set for trial on May 8, 1951, or that he had been assured that a continuance would be consented to.

In ruling upon the motion, the trial court also had before it the counter-affidavit of counsel for the proponent of the will, from which we quote in part as follows:

> "That it was a well known fact to counsel for the contestants that the matter would be called on January 25, 1951, in Department 1 of the above entitled court and that the contest would not be tried for the reason that it was understood that date was set as a date for settlement only; that affiant and counsel for the contestants appeared in Department 1 of the above entitled court on the 25th day of January, 1951, when the court announced that said matter was for settlement and if not settled would have to go off calendar, whereupon, affiant informed the court that this was not the usual civil suit, but was for the probate of a will and if required to go off calendar by the rule requiring all cases not settled to go off calendar, that a new publication of the notice to probate the will would have to be made, whereupon the court announced that the rule would not be effective in this matter and asked for a stipulation that the matter be set down for a date agreeable to both parties at which time the cause could be tried; that affiant and counsel for contestants stipulated in open court that the trial of the will contest would be called for hearing on May 8, 1951, at 9:15 a.m., in Department 1 of the above entitled court; that in addition to the stipulation affiant as counsel for the proponent and counsel for the con-

testants, each, waived the notice of the hearing of the contest, all of which stipulation and waiver of notice were written down in the minutes of the Probate Department in Department 1 for January 25, 1951; that on January 25, 1951, when the court placed the matter on the calendar for hearing, the question of the time of the taking of proponent's deposition was not considered and that the counsel for the contestants could have taken the deposition of proponent Ethel Rowe Clayton at any time between January 25, 1951, and May 8, 1951; that counsel for the contestants was in no manner misled concerning the statement as to the taking of the deposition of the proponent Ethel Rowe Clayton nor was the deposition of the proponent considered on January 25, 1951, when the matter was set for trial on May 8, 1951; that the notation in the letter of December 30, 1950, from affiant to counsel for the contestants left the matter of the taking of the deposition of Ethel Rowe Clayton open after January 15, 1951, and contestants never at any time made any overtures regarding the deposition.

"That a motion to vacate and set aside the probate homestead, previously granted, was pending in Department 5 of the above entitled court on the 4th day of May, 1951; that on the 4th day of May, 1951, the motion to vacate the order granting the probate homestead was on the calendar and affiant and counsel for contestants were in court and at that time it was stated that the will contest was set for hearing on May 8, 1951, and that if the will were admitted to probate, there would be no need to hear the motion to vacate and set aside the probate homestead, and for that reason on stipulation of counsel for proponent and counsel for the contestants the matter of the vacation of the probate homestead was continued to May 22, 1951; that neither the contestants nor their attorney have been taken by any surprise, mistake or inadvertence and were fully advised at all times regarding the hearing of the contest of the will and that the neglect of counsel for the contestants cannot be classified as excusable neglect for which reason contestants are entitled to no relief under section 473, C.C.P.

"That the will of decedent was not the result of any threat, menace or undue influence of the proponent and that a new trial will not result in any different decision of the court; that at the expense of repetition affiant assures the court that all matters concerning the deposition of the proponent of the will occurred prior to the stipulation of January 25, 1951, in Department 1 of the above entitled court at which time notice of trial was waived. Affiant was willing at any time on any regular court day to appear with the proponent for the purpose of taking her deposition and the reason that the deposition of proponent was not taken was due to the lack of effort on the part of counsel for the contestants to obtain that deposition."

The affidavit of counsel for proponents stands uncontradicted either by counter-affidavit or by any of the allegations of the original affidavit of contestants' counsel in support of the motion for relief. It appears not only by the affidavit of proponent's counsel, but from the records of the superior court, that counsel for contestants stipulated in open court to the trial date of May 8, 1951. Knowing of said trial date, contestants nevertheless failed to proceed with the taking of the proponent's deposition. Further, on May 4, 1951, counsel for contestants stipulated in open court to a continuance of a proceeding to vacate the order granting a probate homestead for the express reason that the trial of the contest was to take place on May 8. Clearly, in the situation presented, it was not the duty of proponent's counsel to initiate the taking of his client's deposition, but it was the duty of contestants to proceed with due diligence to prepare for trial. Counsel for contestants did not appear at the trial, and he does not aver that he made any effort to contact opposing counsel with a view to a continuance, although he had actual knowledge of the trial date. The record herein discloses not excusable neglect, surprise or mistake, but a manifest lack of diligence. The trial court did not abuse its discretion in denying the motion for relief.

The order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

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111 Cal.App.2d 314

BURKE et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14950.

District Court of Appeal, First District, Division 1, California.

May 27, 1952.

Hearing Denied July 24, 1952.

Action by Harry A. Burke, and others, against the City and County of San Francisco, a municipal corporation, and Edmund Cassidy, and another, for wrongful death of Bessie Burke in an automobile collision. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered a judgment in favor of plaintiff against the City and County, and the defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that a judgment against the named individual defendant was premature and void as to him and that a $50,000 verdict in favor of all three plaintiffs was not excessive.

Judgment against City and County affirmed, and judgment against named individual defendant reversed with directions.

1. Judgment 🔑210

In wrongful death action against City and County and two employees, judgment against one employee during pendency of his motion for judgment notwithstanding verdict was premature and was therefore ineffective and void as to him. Code Civ. Proc. § 664.

2. Appeal and Error 🔑134(2)

Judgment against defendant during pendency of his motion for judgment notwithstanding verdict, although premature and hence void, was appealable. Code Civ. Proc. § 664.

3. Appeal and Error 🔑1078(5)

Where opening brief of City and County recited that it did not claim that portion of verdict with respect to surviving husband was excessive or that asserted errors affected it, but stated that brief was restricted solely to verdict in favor of surviving husband, adult son and adult daughter, appeal from that portion of judgment which awarded damages to surviving husband alone was deemed abandoned.

4. Death 🔑64

In wrongful death action by surviving husband, adult son and adult daughter, fact that no evidence was required to prove value of services of deceased mother of nontechnical nature since trier of fact could properly bring to bear its general knowledge in determining value was not a sound reason for excluding evidence on that subject.

5. Death 🔑103(4)

In wrongful death action by surviving husband, adult son and adult daughter, testimony as to value of decedent's services as housekeeper, when admitted, was for the trier of fact which could fix value from description of services performed, bringing to bear its own general knowledge, and trier was not necessarily bound by express evidence of value of services performed.

6. Trial 🔑53

In wrongful death action by surviving husband, adult son and adult daughter, husband's testimony as to his opinion of value of decedent's services as housekeeper was not objectionable as received by court upon erroneous theory.

7. Trial 🔑53

In wrongful death action by surviving husband, adult son and adult daughter, court's act in receiving opinion testimony of husband as to value of decedent's services as housekeeper upon erroneous theory, if it did so, would not be material since evidence was legally admissible.

8. Evidence 🔑487

In wrongful death action by surviving husband, adult son and adult daughter, husband's testimony as to opinion of value of decedent's services as housekeeper was not inadmissible on theory that it was not within enumerated exceptions to rule precluding witness from expressing opinion since exceptions are not thus narrowly confined.

9. Evidence 🔑474(17)

In wrongful death action by surviving husband, adult son and adult daughter, husband, who had been married 28 years and was thoroughly familiar with what went on in the home, was well qualified to give opinion as to value of decedent's services as housekeeper.

10. Evidence 🔑501(7)

Mere estimate of value based upon pure speculation cannot qualify as legally admissible evidence.

11. Appeal and Error 🔑971(1)
Evidence 🔑471(1), 500

There is no general rule which permits witness to substitute opinion for facts, but to permit or refuse to permit such questions rests largely in trial court's discretion, and discretion will not be reviewed unless it is plain that court's ruling in admitting evidence worked injury.

12. Evidence 🔑487

Where surviving husband gave his opinion as to value of deceased wife's services as housekeeper, and defendant neither cross-examined him nor tendered any evidence of its own on the subject, court properly permitted husband to testify concerning such value.

13. Death 🔑104(6)

It was proper for the court to advise jury in wrongful death action to take into consideration the increase in cost of living and decreased purchasing power of the dollar, although it would have been better to have omitted reference to fact that purchasing power was less as compared with ten years ago.

14. Appeal and Error 🔑1067

In wrongful death action, failure to give to jury instruction to take into consideration increase in cost of living and decreased purchasing power of the dollar would not necessarily be erroneous.

15. Death 🔑81, 88

Factor to be considered in cases involving damages for loss of member of family is that, although damages must be measured by pecuniary loss to plaintiff, trier of fact is not limited to proof of loss in dollars and cents, but may properly consider pecuniary value of loss of such noneconomic interests of family as loss of comfort, society and protection.

16. Death 🔑81, 88

In wrongful death action by surviving husband, adult son and adult daughter, elements of damage such as loss of comfort, society and protection for all three, not just for husband, were properly included.

17. Death 🔑95(1)

In wrongful death action by surviving husband, adult son and adult daughter, loss to all three of comfort, society and protection, although not measurable with mathematical precision, could be compensated by substantial sum.

18. Appeal and Error 🔑1004(3)

As a matter determinable in exercise of sound discretion, amount of damages fixed by jury and approved by trial court upon motion for new trial will not be disturbed on appeal unless evidence shows that award is so disproportionate to any reasonable limit or compensation as to indicate that it was result of passion, prejudice or corruption on part of triers of fact.

19. Death 🔑99(4)

$50,000 in lump sum to surviving husband, adult son and adult daughter for death of 47 year old wife and mother, who had life expectancy of 23.08 years and was in good health, took care of home, received $35 a month income, accompanied husband upon hunting, fishing and camping trips, and took care of grandchild was not excessive.

Dion R. Holm, City Atty. of City and County of San Francisco, Lawrence S. Mana, Deputy City Atty., San Francisco, Cal., for appellants.

Boyd, Taylor & Reynolds, San Francisco, Cal., for respondents.

FRED B. WOOD, Justice.

This action was brought by Harry A. Burke, Donald L. Burke, and Hazel E. Stack, the surviving husband the adult son and adult daughter of Bessie Burke, against the City and County of San Francisco, Edmund Cassidy and Charles Peterson, employees of the city and county, for damages for the death of Bessie Burke resulting from an automobile collision. Included in the complaint was a count for personal injuries and property damage sustained by Harry Burke.

At the conclusion of the trial and before submission of the cause to the jury, the defendants moved for a directed verdict, which was granted as to Peterson and denied as to the other defendants.

Verdicts were rendered (1) in favor of the three plaintiffs, against Cassidy and the city and county, in the sum of $50,000, and (2) in favor of Harry Burke, against Cassidy and the city and county, in the sum of $1,158.21.

Thereupon, Cassidy moved for judgment notwithstanding the verdict, predicated upon the failure of the plaintiffs to present and file their claim for damages as required by section 1981 of the Government Code. Upon suggestion of counsel for the plaintiffs it was ordered that the motion be argued at a later date to be fixed by stipulation. Upon the following day and prior to the argument of this motion, the clerk of the court entered judgment upon both verdicts.

Both defendants moved for a new trial. The motions for new trial and for judgment notwithstanding the verdict were argued at the same time. The court denied the motion for new trial and granted Cassidy's motion for judgment notwithstanding the verdict.

Both defendants appealed from the judgment and the whole thereof.

[1, 2] The judgment against Cassidy during the pendency of his motion for judgment notwithstanding the verdict was prematurely entered, C.C.P. sec. 664, 2nd sentence, therefore ineffective and void as to him. Shapiro v. Equitable Life Assur. Soc., 76 Cal.App.2d 75, 99, 172 P.2d 725. This is not like Reed v. Cortez, 88 Cal.App. 2d 416, 423–424, 198 P.2d 911, in which such an entry, though erroneous, was deemed nonprejudicial in view of the subsequent denial of the motion upon evidence which fully supported the denial. The judgment against Cassidy though void is appealable, see 2 Cal.Jur. 184, "Appeal and Error," sec. 40, and should be reversed, with directions to the trial court to enter judgment in favor of Cassidy notwithstanding the verdict.

[3] The city and county's appeal from that portion of the judgment which awarded damages to Harry Burke only, is deemed abandoned. In its opening brief upon this appeal the city and county, reciting that it does not claim that portion excessive or that the asserted errors affected it, stated "this brief is restricted solely to * * * the verdict for $50,000 * * *."

In support of its appeal from the $50,000 award the city and county claims (1) error in permitting Harry Burke to testify concerning the value of the decedent's services as housekeeper, (2) error in an instruction concerning the depreciated value of the dollar, and (3) that the verdict is excessive.

(1) *Concerning the testimony as to the value of decedent's services as housekeeper,* it appeared that the family home was a seven-room house and that the decedent, who was in good health, did the housework and the washing and cooked the meals. No help was employed. Her husband did the plumbing and painting, took care of the yard, and helped with the washing on his days off. The daughter, whose five-year old child decedent cared for, worked at her profession as a trained nurse and spent her week-ends with her parents, assisting her mother with the housework about two days a week.

Asked what in his opinion it was going to cost him to replace his wife's place in that home insofar as the housework and general maintenance of the institution was concerned, eliminating therefrom any charge for the care of the child, Harry Burke said, "Yes, I have an opinion, between $225 and $250 a month."

[4, 5] Defendants advance three reasons why this opinion evidence should not have been admitted. Their first is that no evidence to prove the value of services of a non-technical nature is required, for the trier of the facts may properly bring to bear his general knowledge in determining the value of such services. That is true but it is not a sound reason for excluding evidence on that subject. When such evidence is admitted the trier of the facts "may fix the value from a description of the services performed bringing to bear his own general knowledge and is not necessarily bound by express evidence of the value of the services performed." In re Estate of Reinhertz, 82 Cal.App.2d 156, 160, 185 P.2d 858, 861, 186 P.2d 755, which involved services in making household repairs, and evidence of the value thereof was introduced. In Cowdery v. McChesney, 6 Cal.Unrep. Cas. 315, 58 P. 62, the exclusion of opinion evidence as to the reasonable value of services as housekeeper and nurse was deemed prejudicially erroneous. In Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281, the court overruled a contention that the expert testimony given was legally insufficient to prove the value of services rendered in the care of a decedent during her declining years, saying: "The expert testimony was properly received, but such testimony was not necessary. The circumstances of the amount and kind of services actually rendered were in evidence, and the value of the services was for the trial court to determine." 10 Cal.App.2d at page 95, 52 P.2d at page 283.

[6, 7] Defendant objects that the trial court admitted this opinion testimony upon an erroneous theory. It does not appear that the court limited itself to a particular theory for the admission of this evidence, nor would that be material if the evidence was legally admissible.

[8] The defendant claims it was not admissible under any possible theory because the subject matter of the testimony was not within any of the exceptions to the rule which precludes a witness from expressing an opinion; i. e., not the case of a property owner testifying as to its worth, not a question of service, art or trade lying outside the common experience of men, and not a matter of practical necessity as when the things observed are too complex or too subtle for conveyance to court or jury except by way of opinion. The exceptions to that rule are not thus narrowly confined. Admission of opinions of neighbors as to the reasonable value of board, lodging, and washing furnished (without first proving there was no market value therefor), was approved in Warder v. Hutchison, 69 Cal.App. 291, 299, 231 P. 563. The admission of testimony showing the reasonable value of similar services was approved in Colwell v. Gardner, 126 Cal.App. 403, 410, 14 P.2d 825. Defendant seeks to distinguish the Warder case upon the ground that a neighbor might well be disinterested but that here the plaintiff was making a self-serving statement. That is a distinction without a difference. A Plaintiff may testify as to the value of her own services as bookkeeper, saleswoman, and clerk. Rosenow v. Wiener, 11 Cal.App. 294, 296, 104 P. 839. Such a witness is no less interested than was the plaintiff in our case. A husband was deemed qualified to express an opinion as to the value of his wife's household services in Murphey v. Blankenship, Tex.Civ.App., 120 S.W.2d 309, 313.

[9] Defendant suggests there was no showing that the husband was qualified to give an opinion. As to that, the trial judge, upon the hearing of the motion for new trial, pertinently remarked "Who would be better qualified to give an opinion as to what it's going to cost him to replace the services of a 24-hour-a-day housekeeper than the man who has been living with the person who has been replaced?" They had been married twenty-eight years and the witness was thoroughly familiar with what went on in the home.

[10–12] Defendant further claims that this opinion evidence was on an ultimate fact to be decided by the jury, citing Hastings v. The Uncle Sam, 10 Cal. 341. That was an action for damages for breach of an alleged contract to transport the plaintiff and his family to New York by way of Nicaragua. The asserted breach was that defendant conveyed plaintiff and his family to the Isthmus of Panama where they suffered from the diseases of the climate and were detained 16 days. A witness was permitted over objection "to give his estimate of the value of plaintiff's services per day. These the witness placed as high as one hundred dollars; and, as ground for his opinion, stated that the plaintiff was a speculator, possessed of a large property, money invested in stocks, rents, and other sources of income, and frequently made from one to five hundred dollars a day. The witness was unable to stake the value of the plaintiff's services in any other capacity or employment." 10 Cal. at pages 341–342. That decision signifies that a mere estimate of value based upon pure speculation cannot qualify as legally admissible evidence. Defendant also invokes Fleming v. Albeck, 67 Cal. 226, 7 P. 659, an action for libel. The complaint neither alleged special damage nor stated a cause for special damage. A witness was asked what in his opinion would be the fair amount of money in compensation for plaintiff's damages. That, of course, was the ultimate issue for the jury, not a witness, to decide. In Stuart v. Dotts, 89 Cal. App.2d 683, 201 P.2d 820, a police officer who did not qualify as an expert was allowed to testify that in his opinion the plaintiff in an accident case was not in a crosswalk when struck. This opinion was based upon observations made by the witness at the scene of the accident after it occurred and upon conversations which the witness had had with certain persons who saw the accident. The impropriety of the allowance of such an opinion in evidence is obvious. It bears no similarity to the opinion of a husband concerning the value of his wife's services as a housekeeper. Similarly different from the question here under consideration were the questions asked of putative experts in Wilkerson v. City of El Monte, 17 Cal.App.2d 615, 621, 62 P.2d 7901 (was the condition at a street intersection a dangerous one?), and Moore v. Norwood, 41 Cal.App.2d 359, 106 P.2d 939 (could the plaintiff have avoided the accident?). We must bear in mind that "there is no general rule of evidence which permits a witness to substitute opinions for facts. Such a rule would lead to the utter confusion and confounding of the administration of justice. The true rule is simple, and, so far as this state is concerned, well established: To permit, or to refuse to permit, such questions is a matter resting largely in the discretion of the trial court, which discretion will not here be reviewed, unless it is made plain that the court's ruling in admitting the evidence has worked an injury. Generally speaking, the admission of the answer to such a question cannot work an injury where a fair latitude upon cross-examination is allowed; for under such cross-examination the facts are certain to be adduced. It will be found frequently that an appellate tribunal upholds the rulings of the trial court in sustaining an objection to such questions, but the cases are far less numerous where it has felt compelled to reverse the inferior tribunal for permitting them." Nolan v. Nolan, 155 Cal. 476, 480–481, 101 P. 520, 522. In Rosenow v. Wiener, supra, 11 Cal. App. 294, 104 P. 839, in respect to plaintiff's testimony as to the value of her own services, the court observed that "if defendant was dissatisfied therewith, he could have introduced testimony upon the same point, but he neglected to do so, and the plaintiff's evidence stands uncontradicted." 11 Cal. App. at page 296, 104 P. at page 840. In the instant case, the defendant neither cross-examined the plaintiff on this phase of his testimony nor tendered any evidence of its own upon the subject.

(2) *The questioned instruction on the depreciated value of the dollar* was in these words: "You are instructed * * * that this court takes judicial notice of the fact that the purchasing power of the dollar is less as compared with ten years ago. You are therefore instructed to consider this as an established fact in this case. The value

of the sum awarded to plaintiff is to be measured, not by the number of dollars named in the verdict, but in their comparative ability to furnish the necessaries of life."

[13] Defendant recognizes it is proper for a reviewing court to take into consideration the increase in the cost of living and the decreased purchasing power of the dollar when considering whether or not a money verdict is excessive. It claims, however, it is not legally proper to advise a jury it may take those factors into consideration. With the latter view we do not concur. If the reviewing court may consider such factors it would seem eminently fitting for the trier of the facts to do so. This was indicated recently in Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 195 P.2d 427. In considering whether or not a certain verdict was excessive, the court said: "It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral [citations], and *the trier of fact should take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained* as the result of the injuries suffered." 32 Cal.2d at page 187, 195 P.2d at page 434; emphasis added. When the jury is the trier of the fact, it would seem quite proper for the court to bring this factor to the attention of the jury. We are not without precedent. An instruction that "In determining money value of damages, you are entitled to consider the present depleted value of a dollar and its lessened purchasing power" was approved by the Supreme Court of Wisconsin in Dabareiner v. Weisflog, 253 Wis. 23, 33 N.W.2d 220, 223, 12 A.L.R.2d 605. In so doing, the court said "It is rather startling to suggest that the court ought to withhold an instruction from the jury so that it might remain ignorant of its rights and duties in the case submitted to it." 33 N.W.2d at page 223. As to the wording of the instruction, the court observed that while the trial court "might have omitted from the instruction the words 'depleted' and 'lessened' in order that the instruction have more universal application, the inclusion of those terms was not prejudicial error since there is a clearly lessened purchase power in the dollar at the present time." 33 N.W.2d at page 223. In the instant case it would have been better to have omitted the reference to the ten year period of depreciation that the instruction might have general application, but that statement was accurate (the loss occurred in 1949 and the instruction was given in 1950), and the effect of the last sentence of the instruction was to admonish the jury to use the present purchasing power of the dollar when measuring the damages in terms of money. Other recent decisions also approve instructing the jury on this subject. In New Amsterdam Casualty Co. v. Soileau, 5 Cir., 167 F.2d 767, 6 A.L.R.2d 128, the court held that the trial court in a personal injury case "correctly charged that in fixing the award the jury could consider the present purchasing power of the Dollar." 167 F.2d at page 771. In Burlington Transp. Co. v. Stoltz, 10 Cir., 191 F.2d 915, the court approved an instruction in which the trial court informed "the jury that it might also 'consider the present purchasing power of the dollar and award such damages, if any, as under all of the circumstances of the case may be just. * * *'" 191 F.2d at page 918. Observing that it has been held that a reviewing court may consider the present purchasing power of the dollar when passing upon the adequacy of a verdict, the court said "If the present value of the dollar is an element to consider in determining whether a verdict is adequate or excessive, it is proper in order to guide the jury in its deliberations that a proper instruction relating thereto be given." 191 F.2d at page 918.

[14] In conclusion upon this point, we note that a failure to give such an instruction would not necessarily be erroneous. See Lemere v. Safeway Stores, Inc., 102 Cal.App.2d 712, 728, 228 P.2d 296.

(3) *In claiming that the verdict is excessive,* defendant recognizes the principle that the award must be "so disproportionate to reasonable compensation for the

monetary loss sustained by the plaintiffs as to be explicable only on the ground that passion or prejudice was allowed to play a strong part in the rendition of the verdict." Jones v. Hedges, 123 Cal.App. 742, 755, 12 P.2d 111, 116, and that "the only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence." Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513, 520.

[15, 16] But here we have the loss of a member of a family, the wife of one plaintiff and the mother of the other two. "Another factor to be considered in cases involving damages for loss of a member of the family is that, although damages must be measured by the pecuniary loss to the plaintiffs, in fixing such loss the trier of the fact is not limited to proof of loss in dollars and cents, but may properly consider the pecuniary value of the loss of such non-economic interests of a family as loss of comfort, society and protection. [Citations.]" Holder v. Key System, 88 Cal.App.2d 925, 940, 200 P.2d 98, 106, holding not excessive an award of $45,000 to the widow and adult son and adult daughter of the deceased; of the three, only the widow was a dependent. As the verdict in the instant case was properly in a lump sum for the three plaintiffs, this element of damage for all three, not just for the husband, was included. The jury was properly informed as to this element of damage and the defendant has taken no exception to the instructions given thereon.

At the time of the accident, the decedent was 47 years old; her husband, 48; the son, 26; the daughter, 27. The decedent's life expectancy was 23.08 years; that of her husband, 22.36 years. Her health was good. Decedent and her husband had been married 28 years. They planned and built their home and had lived in it a number of years. In addition to taking care of the home, the decedent received $35 a month as secretary of a lodge. She accompanied her husband upon hunting, fishing, and camping trips.

The son lived with his parents. The daughter was a widow who worked as a nurse, spending the week-ends with her parents. Her daughter, under 4 years of age at the time of the accident, lived with the grandparents. The decedent gave the child a mother's care. Decedent was a devoted wife and mother.

[17] This presents a vivid picture of a member of a family who devotedly and without stint gave "comfort, society and protection" to her husband, son, and daughter, in the fullest and finest meaning of those words. And there is every indication that she would have continued to do so for an appreciable period of time but for her sudden taking. That loss to the husband, son and daughter can not be measured with mathematical precision in terms of money but the jury was entitled to award a quite substantial sum therefor.

Then there was the element of the husband's loss in respect to the housekeeping services, more precisely measurable in terms of money. We, of course, do not know how much the jury awarded, respectively, for the economic and non-economic factors. It is inferable that they awarded a substantial sum for each.

[18] In this case, as in Drotleff v. Renshaw, 34 Cal.2d 176, 208 P.2d 969, 971, the cases cited by defendant "furnish no criterion on the present record, for they involve various factual considerations of distinguishing significance" and "As a matter determinable in the exercise of a sound discretion, the amount of damages fixed by the jury and approved by the trial court [upon motion for new trial, in that case as in this] will not be disturbed on appeal unless the evidence shows that the award is so disproportionate to any reasonable limit of compensation as to indicate that it was the result of passion, prejudice or corruption on the part of the triers of fact." 34 Cal.2d at page 180, 208 P.2d at page 970. In our case the defendant would discount the weight and significance of the trial judge's approval of the amount of the verdict, when he denied the motion for new trial, upon the premise that such approval "was based upon inadmissible evidence as to the value of the services rendered by the decedent as a housekeeper." But that premise is unsound, as we have indicated. The evidence was admissible.

One of the defendant's cases is Hunton v. California Portland Cement Co., 64 Cal. App.2d 876, 149 P.2d 471, 150 P.2d 221, in which a verdict of the jury for $40,000 was reduced by the trial court to $18,000, and further reduced by the appellate court to $10,000. That case involved the loss of the services of a 17 year old son. It appeared that his then employment by his father was worth $1,200 a year to the father, which the trial judge upon motion for a new trial estimated would amount to $4,800 if the boy had lived to 21. In view of the depreciation of the dollar since the date of the accident, the trial judge concluded $18,000 would be the reasonable equivalent of $4,800. The appellate court apparently deemed that ratio excessive. It considered that an allowance of $3,000 or $4,000 for the boy's services during the remainder of his minority would have been liberal; that the evidence indicated that any contributions from the deceased for the support of the father in the latter's old age were remote and problematical and an allowance in excess of $3,000 or $4,000 therefor would hardly be supported by any evidence. Adding to these factors an amount representing the pecuniary loss of the comfort, society and protection of the decedent, the appellate court concluded that the largest amount which found support in the evidence was $10,000. The mere recital of those facts demonstrates the inapplicability of the decision in that case to the facts of the instant case. Lasater v. Oakland Scavenger Co., 71 Cal.App.2d 217, 162 P.2d 486, involved the death of a wife and mother. The reviewing court sustained an award of $14,000. The record disclosed no express evidence concerning the value of the wife's services as housekeeper. The reviewing court, for the purpose of a mathematical computation, used the sum of $100 per month as a reasonable measure of the value of such services. The defendant herein contends that, using $100 a month as a yardstick and increasing it to allow for the depreciation of the dollar since the decision in the Lasater case, the decision in that case demonstrates that the verdict in our case is excessive. We do not understand that the court in the Lasater case used $100 a month as a maximum figure. It was merely a convenient yardstick for purposes of illustration in considering a particular verdict. In Wood v. Keller, 72 Cal.App.2d 14, 163 P.2d 904, a wrongful death case, an award of $6,500 as general damages was sustained as supported by the evidence concerning the nature of the services rendered by the wife, apparently without express evidence of the value thereof. The court refused to consider the contention that the damages were excessive, because the appellant had failed to present that question to the trial court upon motion for new trial. In Potter v. Empress Theatre Co., 91 Cal. App.2d 4, 204 P.2d 120, a verdict of $50,000 in favor of the husband and the parents of a decedent, for her death, was reduced to $40,000 by the trial court, not by the appellate court. The latter court merely held that the reduced award was not excessive. The question whether or not $50,000 would have been excessive was not an issue before the appellate court. In Martin v. Mansfeldt, 100 Cal.App.2d 327, 223 P.2d 501, the court held that an award of $36,566.17 to the surviving husband could not be deemed excessive as a matter of law. It does not follow therefrom that a higher award, for a husband, or for him and an adult son and daughter, would have been deemed excessive.

[19] Under the circumstances and applying the principles expounded in the cases cited, we conclude that there is nothing in the present record compelling or suggesting the conclusion that the award of $50,000 to the three plaintiffs was excessive as a matter of law.

The judgment against the city and county of San Francisco is affirmed. The judgment against defendant Cassidy is reversed with directions to the trial court to strike it from the record and enter judgment in Cassidy's favor notwithstanding the verdict.

PETERS, P. J., and BRAY, J., concur.

111 Cal.App.2d 537

PHILLIPS et ux. v. ISHAM et al.

Civ. 8016.

District Court of Appeal, Third District, California.

June 6, 1952.

Proceeding by Fred Phillips and wife against Charles A. Isham and another for mandatory injunction to require defendants to remove encroachments from plaintiffs' property, wherein defendants filed cross-complaint. The Superior Court, Sacramento County, Jay L. Henry, J., denied plaintiffs the relief sought, and they appealed. The District Court of Appeal, Peek, J., held that in view of facts that defendants would have access to their lot through alley, denial of the relief sought, on grounds that injury and inconvenience to defendants from removal of encroachments would greatly exceed the loss and damage sustained by plaintiffs if the condition was allowed to continue, was improper.

Judgment reversed.

See also 105 Cal.App.2d 608, 233 P.2d 637.

1. Injunction ⚷1

Issuance of injunction is largely discretionary with the court and depends upon a consideration of all the equities between the parties.

2. Adjoining Landowners ⚷9(2)
Injunction ⚷51

Where carport built and hedge planted in good faith by defendants encroached upon triangular area of plaintiffs' lot to the extent of usurping four feet five inches of its 50 foot frontage, but, if area were returned to plaintiffs, defendants could not use their driveway and would have to use alley for access to their lot, mandatory injunction sought by plaintiffs for removal of encroachments was improperly denied on ground that injury and inconvenience to defendants from removal of encroachments would greatly exceed loss and damage sustained by plaintiffs if condition was allowed to continue.

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Nicholas H. Dubsick and William J. Whalen, Fresno, for appellants.

Chester F. Gannon and Cecil J. Bishop, Sacramento, for respondents.

PEEK, Justice.

This controversy arises out of the admitted encroachment by defendants upon plaintiffs' property. The judgment of the trial court required defendants to pay plaintiffs the sum of $250 within twenty days and that on compliance therewith defendants would be declared to be the owners of the land in question but in the event of default in such payment that plaintiffs have judgment quieting their title, that the encroachments be removed from their property and that defendants pay to them the sum of $1 as damages.

Plaintiffs' sole contention upon appeal, which appears to be well founded, is that under the facts as disclosed by the record the trial court erred in finding that the cost of removing the encroachments and the resultant injury and inconveniences to defendants would greatly exceed in comparison the loss and damage sustained by plaintiffs.

The facts pertinent to the question presented and which are not in dispute show that plaintiffs and defendants are the owners of adjoining lots numbered 23 and 24 respectively. The plat of the lots shows each to have a fifty foot frontage on Redwood Avenue. Taxes have been levied and paid according to the plat lines. Originally both lots were owned by the North Sacramento Land Company. Lot number 24 was sold to defendants in 1921. At the time of sale the agent of the land company pointed out to defendants the easterly boundary of the lot. Immediately thereafter defendants planted a hedge along the boundary as shown to them, and commenced the construction of a garage at the rear of the lot, likewise along the purported boundary. Mr. Isham described the garage as smaller than an ordinary one car garage, of frame construction and without a foundation. Following the completion of that structure they built their home, which was remodeled in 1923 by adding a room, a carport and the main entrance to the home. The carport which is of frame and stucco construction was not built as an integral part of the structure of the house but is merely attached thereto. Since that time the garage has been used as a shop.

When plaintiff purchased lot 23 in 1948 it was unimproved. They testified that although they looked at the property they did not ascertain the true boundary thereof until after plans had been drawn for the construction of two housing units, one for their own use and the other for rental. The larger of the two units was to be forty feet wide which, together with a five foot set back from each side boundary required by a city ordinance, necessitated the use of the entire fifty feet. The survey disclosed that a triangular area had been carved out of their lot by defendants; that is, while their lot measured the full fifty feet along the alley at the rear thereof, the width of the lot along the front as measured to the hedge planted by defendants, reduced plaintiffs' frontage to approximately forty-two feet four inches. This precluded plaintiffs from using the lot as they had contemplated and consequently compelled them to alter their plans by moving the foundation of the smaller unit and foregoing the construction of the larger unit. The survey also shows that defendants' garage or shop extends approximately two feet on to appellants' land, and that the greatest extent of the encroachment of the carport is approximately four feet five inches. Immediately upon discovery of the facts shown by the survey plaintiffs instituted this proceeding.

The evidence further shows that although the removal of defendants' carport would render the driveway too narrow to accommodate an automobile, access to their lot could be had by use of the alley at the rear. Whether or not there would be sufficient space for a driveway on the opposite side of the lot is not clear from the record. The only evidence concerning the cost of removal of the encroachments was given by plaintiffs' contractor, one C. C. McCurry, who testified that the approximate cost of such removal would not exceed $180.

Upon these facts the court found that the plaintiffs were the owners of said lot 23; that defendants' claim to the triangular strip in question was without right; that by reason of defendants placing said structures on plaintiffs' land the latter had been damaged in the sum of $250; that the cost of removing the structures and the resultant injury and inconvenience to defendants would greatly exceed in comparison the damage sustained by plaintiffs and that the defendants acted in good faith in erecting the encroachments in question.

[1] It is the general rule in this state that while the right to injunctive relief under proper circumstances is well established "its issuance is largely discretionary with the court and depends upon a consideration of all the equities between the parties." 1 Cal.Jur.2d 740. In other words, no hard and fast rule can be adopted which will fit all cases and hence each must be determined upon its own peculiar facts.

An examination of the various cases cited and relied upon by respondents in support of the judgment show factual situations far different from those presented in the present case. Here, as in Morris v. George, 57 Cal.App.2d 665, 135 P.2d 195, the defendants, without right, built partly upon the adjoining land of plaintiffs and the only evidence of the cost of removal of the same was substantially less than the loss of nearly eight feet from the frontage of plaintiffs' lot or approximately one-sixth of the street frontage. As this court stated, 57 Cal.App.2d at page 680, 135 P.2d at page 203: "It is only in cases where it would involve great difficulty and expense to relieve a trivial encroachment causing only slight damage that a court is justified in refusing a mandatory injunction where one party has invaded the property rights of another. Boundary lines are still boundary lines and an adjoining landowner may not without right build a concrete stop-gate in a ditch so that it extends over into and encroaches upon the property of his neighbor, and then prevent his neighbor from securing an injunction ordering its removal to the extent that it does encroach." See also Marcus v. Brody, 254 Mass. 152, 149 N.E. 673.

[2] The present case is not one in which a mandatory injunction can be denied on the basis that the injury and in-

convenience to defendants will greatly exceed the loss and damage sustained by plaintiffs if the condition is allowed to continue.

The judgment is reversed.

ADAMS, P. J., and VAN DYKE, J., concur.

111 Cal.App.2d 326

FRIEDMAN et al. v. ISENBRUCK et al.

Civ. 14976.

District Court of Appeal, First District, Division 1, California.

May 27, 1952.

Action by Irwin Friedman and others, against R. C. Isenbruck, Calibest Canning Company, Inc., and others, to recover rent allegedly due under terms of a written lease, wherein defendants in their answer prayed for an apportionment of rent claimed to have been prepaid and cross-complained for damages. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., held that defendants were entitled to an apportionment but denied recovery on defendants' cross-complaint and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that under the lease which contained a covenant to repair, defendants were under no obligation to rebuild a structure which, through no fault of defendants, was beyond repair and required complete destruction and subsequent reconstruction.

Affirmed.

1. Landlord and Tenant 🔑152(5)

A covenant to repair leased premises does not include an obligation to rebuild a structure destroyed through no fault of the lessee.

2. Landlord and Tenant 🔑152(5)

Under lease requiring lessee to keep premises in good order, condition and repair and to return premises at termination of lease in same condition, and providing that any partial destruction of premises should be repaired by lessor, lessee was not obligated in any way as respects a building which became unusable for purposes leased because of its condition at inception of lease and because of wind damage which rendered building unfit for repairs and necessitated its complete destruction and subsequent reconstruction. Civ.Code, § 1933, subd. 4.

3. Landlord and Tenant 🔑152(5)

The common-law rule that a covenant to repair imposes upon lessee the duty to rebuild a structure which was destroyed without fault of lessee applies only where the covenant to repair is unqualified.

4. Landlord and Tenant 🔑213(5)

In absence of a qualifying provision in a lease, where rent is paid in advance, a lawful surrender or termination during the prepaid period does not entitle the lessee to a proportional rebate, in view of fact that rent does not accrue from day to day, but accrues on the day it is payable.

5. Landlord and Tenant 🔑192(1)

The rule of nonapportionment of rent is applicable where the premises have been destroyed and the lease is thus terminated.

6. Landlord and Tenant 🔑213(5)

Where a lease is terminated after prepayment of rent because of fault of landlord, a constructive eviction takes place and tenant may recover prepaid rent on theory that to permit lessor to retain all prepaid rent would be to permit him to be unjustly enriched and to profit from his own wrong.

7. Landlord and Tenant 🔑214

Rule prohibiting an apportionment of prepaid rent only applies when covenant to pay rent in advance is unqualified.

8. Landlord and Tenant 🔑192(1)

Where lessors knew before execution of lease, which provided for apportionment of rent in event of partial destruction of premises and gave lessee, in such event, election to terminate, that building was in bad state of repair, and windstorm subsequently rendered building unusable for purposes leased, court could find that constructive eviction took place, permitting an apportionment of prepaid rent.

Charles M. Stark, Paul W. McComish, San Francisco, for appellants.

Harold B. Lerner, San Francisco, for respondents.

PETERS, Presiding Justice.

This action was brought by the lessors to recover from their lessee $7,500 rent claimed to be due and unpaid under the terms of a written lease. A non-suit was granted as to a second cause of action relating to a different subject matter, and no appeal has been taken from that portion of the judgment. The answer pleaded that the covenant to pay rent had been modified, that during the term of the lease the premises became unusable for the purpose for which they were leased, that the lessors had terminated the lease, and prayed for an apportionment of rent claimed to have been prepaid. The lessee also cross-complained for damages alleged to have been caused by the improper termination of the lease. On the lessors' cause of action, the trial court determined all basic issues in favor of the lessee, held that the rent had been prepaid and that the lessee was entitled to an apportionment, and granted the lessee a judgment for $3,750. No recovery was allowed on the lessee's cross-complaint. The lessors appeal.

The Facts:

On March 15, 1948, the parties entered into a three-year lease of certain real property located in Mountain View, California. The lease named Isenbruck as lessee, but granted him the right to assign to a corporation to be formed. The Calibest Canning Company, Inc., was thereafter organized and the lease assigned to it. Located on the leased property were two buildings, one a cannery, and the other a warehouse. The lease is entitled "Lease and Option to Purchase" and expressly provides that the lessee shall use the premises as "a cannery and food processing plant and for no other purpose." It provided a minimum rental of $15,000 per year. For the first year the rent was made payable in installments, $2,500 upon the execution of the lease, $2,500 in 60 days, $2,500 in 120 days, and the balance of $7,500 payable as canning progressed at so much per case. If canning exceeded a certain number of cases the lessors were to receive additional amounts. Admittedly, the lessee paid the first year's rent in precise conformity with the agreement, paying not only the $15,000 minimum, but also some $3,000 additional.

The lease provided that the $15,000 minimum for the second year was payable in full "on or before the 15th day of March, 1949." The present controversy relates solely to the rent for this second year.

In the first week of March, 1949, a meeting was had between representatives of the Calibest company and the lessors and their attorney. There is some conflict as to what then occurred, but this conflict must be resolved in favor of respondents. Admittedly the parties then discussed the possibility of Calibest buying the property, and a modification as to how the rent should be paid for 1949 was made. Friedman, one of the lessors, stated that he agreed to accept $7,500 on March 15, 1949, and $2,500 at thirty-day intervals until the balance was paid. Isenbruck, representing Calibest, testified that Friedman was anxious to sell the property because the rentals were subject to high taxes, while if he sold the property the profit could be treated as a capital gain. Stark, one of the attorneys for the lessors, according to Isenbruck, stated that in order to accomplish this result the existing lease "would probably have to be pretty well torn apart." It was suggested that Stark look over the lease to see what changes should be made. Isenbruck then called attention to the fact that the rent for 1949 would be due in a short time, and suggested, in view of the proposed revision of the lease, that $7,500 instead of $15,000 be paid on March 15, 1949. Friedman, according to Isenbruck, agreed, and further agreed that the balance should be payable as in the previous year, and that the whole matter would be discussed again about in April when Isenbruck and Alden, president of Calibest, returned from a contemplated eastern trip.

Under date of March 8, 1949, McComish, attorney associate of Stark's, wrote to Isenbruck referring to this meeting "regarding the revamping" of the lease agreement and stating that "it is taking us some time to assemble the necessary figures to the end that the agreement may be properly redrafted." The letter then called attention to the fact that the 1949 rent was due on March 15th, and "Mr. Friedman desires that at least $7,500.00 of the amount due be paid at this time." Isenbruck replied to this letter on March 9, 1949. In this letter he stated that he appreciated "that it would take probably a little longer than originally anticipated to redraft the agreement." In reference to the payment of rent, the letter states that payments, as agreed, will be made "on the same type of arrangements we had last year; we enumerate: $7500.00 to be paid March 15th; $2500.00 May 15th; $2500.00 July 15th; $2500.00 September 15th."

On March 12, 1949, Isenbruck sent to Friedman a check for $7,500, and a letter stating that such payment was "in accordance with our understanding." The letter also states that all reference to rents had been omitted from the check voucher because "to put it on may defeat the purposes, at a later date, of those certain changes being made in contract." Isenbruck and Alden then left on their eastern trip. It is a reasonable inference from this evidence that it was contemplated by all concerned that the 1948 lease would be canceled for a purchase agreement, and that any payments made on the 1949 rent would be applied on the purchase price as provided in the proposed new agreement. Certainly the evidence supports the finding that the parties agreed to modify the lease in reference to payment of rent for 1949.

Some reference should now be made to the physical condition of the cannery building. The lease contains a clause to the effect that by entry thereunder the lessee acknowledged that the premises are "complete and in good order, condition and repair." However, early in 1948 when the cannery was about to be opened, the cannery building needed some major repairs and alterations, which were made at the request of Thomas, superintendent of public works for Mountain View. These repairs were apparently made before the lessee took possession, and, although the record is not too clear, were apparently paid for by both the lessors and lessee.

Late in March of 1949 the cannery building was seriously damaged by windstorms. Thomas observed repairs being made to the building, without a permit from the city. He was convinced that the building was basically unsafe and should be removed rather than repaired. Thomas gave the superintendent of the cannery a written list of what had to be done to render the building safe, and stated that all such work had to be performed under city permits. Calibest was most anxious to operate at least until the materials on hand were canned. To secure this permission from the city, the superintendent of the cannery wrote to Thomas giving his estimate of how much time would be required to clean up present contracts, agreeing to make no repairs without city permits, and agreeing to make no new contracts for vegetables without city clearance.

The lessors had knowledge of what was going on, and knew that the city officials believed that the cannery building should be torn down. Early in April, Stark had a conversation with Thomas about conditions, and, as a result of this conversation, Thomas, under date of April 12, 1949, wrote to Stark outlining his views. This letter, referring to the cannery building, states:

> "At no time, even when new, has this building ever met any of the requirements of any building code or any of the common sense requirements of even 'country' construction. Numerous alterations through the years have further weakened the whole setup.
>
> "Last year, the present tenant was permitted to strengthen and brace the structure against collapse, which was imminent.
>
> "The recent windstorms have again reduced the entire structure to the point of collapse.

> "A portion of the building is constructed out over the entire sidewalk area of Jackson Street.
>
> "It is not the purpose of this department to create hardship for any person or firm in the orderly conduct of their daily affairs. We are willing to go along to the point of cleaning up the present tenant's contracts for vegetables, as outlined in his letter of April 7th, but not one day beyond that point.
>
> "This structure cannot be made safe. It must be abandoned and it must be torn down."

Sometime later, probably towards the end of April, Friedman also had a talk with Thomas in which Friedman requested that the cannery be permitted to operate until December 31, 1949, promising to tear down and remove the building at that time. Thomas stated orally that if Friedman would post a bond agreeing so to remove the building, and would insure the city against any liability, this could be worked out. This bond and this insurance policy were never furnished by Friedman, he explaining that he and his attorneys waited for the city attorney to draft the appropriate papers, but such was never done. At any rate, Friedman notified the lessee that it could operate until the end of 1949.

Towards the end of April, another windstorm further damaged the building. The city officials then posted the building with notices declaring that the building was unsafe for occupancy and that those who entered it did so at their own risk. There is some dispute over the date of posting but the trial court found, and the finding is supported, that the correct date was May 13, 1949. Both lessors and the lessee knew of the posting, and apparently the lessee knew some time prior to the posting that the city officials were going to declare the building unsafe. On May 12, 1949, a safety engineer for the insurance company writing the workmen's compensation insurance of Calibest examined the building. He testified that his examination disclosed that the building was so badly dilapidated that it needed new walls, a new roof, and new roof trusses and rafters, and that to make it usable it would have to be reconstructed completely. He recommended cancellation of the workmen's compensation policy, which was canceled by a notice dated May 19, 1949. On May 17, 1949, the insurance company carrying the public liability insurance for Calibest canceled its policy because of the condition of the premises. The broker for Calibest tried unsuccessfully to get other companies to carry the risks.

Calibest ceased canning operations on April 26, 1949, and on May 25, 1949, leased some other premises in a nearby city. By the middle of June, Calibest had removed all of its machinery to the new plant. It was stipulated that on June 15, 1949, Calibest tendered possession of the premises to the lessors and vacated them. On July 1, 1949, the lessors served the lessee with a notice to pay rent or to surrender the premises. The notice requested payment of $7,500, the balance claimed to be due on the 1949 rent. Calibest surrendered the keys to the plant on July 6, 1949, and the next day this action was started by the lessors.

The Findings.

The trial court found that the $7,500 paid on March 15, 1949, was paid pursuant to an oral agreement to modify the rental provisions of the lease as rent for six months in advance; that heavy winds damaged the cannery beyond repair and made it unsafe for occupancy; that about April 5, 1949, the public officials notified the lessors and lessee that the cannery was unsafe for occupancy and must be torn down, but would permit it to continue until the end of the year if the lessors would post a bond; that the lessors did not post such bond; that on May 13, 1949, the public officials posted the building as unsafe for occupancy; that shortly thereafter the compensation and public liability insurance of Calibest were canceled; that under state law it is unlawful to operate a cannery without compensation insurance and the employer must furnish a safe place for the employees to work; that after May 13, 1949, it became impossible for Calibest to use or occupy the premises for any purpose whatever, or to repair the building; that the parties stipulated that on June 15, 1949, Calibest tendered possession of the premises to the lessors and vacated them.

On these findings the court held that Calibest was entitled to a refund of all rent falling due after June 15, 1949, and gave judgment in favor of the lessee for $3,750, half of the $7,500 paid on March 15, 1949.

Was Calibest Under a Duty to Repair?

The lease contained a clause requiring the lessee to "keep and maintain the said premises * * * in good and sanitary order, condition and repair," and another clause to return them at the termination of the lease in the same condition. Another clause constituted an acknowledgement by the lessee that the premises on the first day of the lease were "in good order, condition and repair." Paragraph fourteen of the lease provided as follows: "That in the event of a partial destruction of the said premises during the said term, from any cause, the Lessor shall forthwith repair the same, provided such repairs can be made within sixty (60) days under the laws and regulations of State, County or Municipal authorities, but such partial destruction shall in nowise annul or void this lease, except that the Lessee shall be entitled to a proportionate deduction of rent while such repairs are being made, such proportionate deduction to be based upon the extent to which the making of such repairs shall interfere with the business carried on by the Lessee in the said premises. If such repairs cannot be made in sixty (60) days, the Lessor, may, at his option, make same within a reasonable time, this lease continuing in full force and effect and the rent to be proportionately rebated as aforesaid in this paragraph provided. In the event that the Lessor does not so elect to make such repairs which cannot be made in sixty (60) days, or such repairs cannot be made under such laws and regulations, this lease may be terminated at the option of the Lessee * * *. In the event that the building in which the demised premises may be situated be destroyed to the extent of not less than 33⅓% of the replacement cost thereof, the Lessee may elect to terminate this lease, whether the demised premises be injured or not. In the event of a total destruction of the premises, or of the building in which said premises may be situated, or in the event of any dispute between the Lessor and the Lessee relative to the provisions of this paragraph, they shall select an arbitrator * * *."

Appellants urge that, under the terms of the lease, the lessee acknowledged that the premises were in good condition at the inception of the lease and contracted to keep and return them in that condition. It is contended that the lessee failed to perform this duty to repair. It is then argued that a lessee, by failing to carry out its covenant to repair and allowing the premises to become unfit for occupancy, cannot be permitted to take advantage of its own wrong and thus become discharged from its obligations under the lease. If the premises upon which these arguments are based were sound, the legal conclusion stated would undoubtedly follow. Farber v. Greenberg, 98 Cal.App. 675, 277 P. 534; Egan v. Dowd, 32 Cal.App. 706, 164 P. 17. The difficulty with this argument is that the premises upon which it is based are unsound. It assumes that the lessee's covenant to repair was applicable to the condition here existing. Here the damage was caused by the fundamental nature of the building, and by windstorms. The damage was so extensive that the building, could not be repaired but had to be torn down and completely rebuilt. The appellants recognized that fact when they agreed with Thomas that they would remove the building by December 31, 1949, more than a year before the expiration of the lease. The insurance safety engineer testified that, to render the building fit for occupancy, new walls, a new roof, and new roof trusses and rafters would have to be constructed—in other words, all that could be used of the present building was the concrete floor.

[1, 2] While it is true that at common law and in some states an unqualified covenant to repair was interpreted to impose upon the lessee the duty to rebuild a structure which was destroyed without the fault of the lessee, see annotations 45 A.L.R. 12, 39; 106 A.L.R. 1358, 1364, and while that

was perhaps the early rule in California, Polack v. Pioche, 35 Cal. 416, this state no longer follows that harsh and unrealistic doctrine. In Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 P. 1024, the Polack case was distinguished and the more enlightened and modern rule adopted that a covenant to repair does not include an obligation to rebuild a structure destroyed through no fault of the lessee. There the structures involved were destroyed by an accidental fire. The court stated, 184 Cal. at page 576, 194 P. at page 1029: "To repair means to mend an old thing, not to make a new thing; to restore to a sound state something which has become partially dilapidated, not to create something which has no existence. [Citing a case.] When we speak of repairing a thing, the very expression presupposes a thing in existence to be repaired. If a workman undertakes to repair an article, he obviously contemplates making whole an existing article and not the manufacture of something new." After elaborating on these arguments at some length, the court concluded, 184 Cal. at page 578, 194 P. at page 1029: "It follows that the agreements to keep the premises in good repair and, at the end of the term, to surrender them in as good condition as they were in at the beginning of or during the term are not, and do not include, a covenant to replace a structure totally destroyed by fire without the fault of the tenant. [Citing cases.]"

That rule is here applicable. Here the building has become unusable for the purposes leased because of its condition at the inception of the lease and because of wind damage. The building cannot be repaired, but has to be torn down and completely rebuilt. That is not the obligation of the lessee. The lessee was under no obligation to rebuild. See § 1933, subd. 4, Civil Code.

[3] It should also be mentioned that, in the instant case, the obligation to repair does not include the obligation to rebuild even if the strict common law rule were applicable in this state, and that is that the common law rule only applies where the covenant to repair is unqualified. Here paragraph 14, above quoted, places the duty to rebuild in the case of partial destruction upon the lessors. Certainly if the lessors were obligated to rebuild in the case of the partial destruction of the premises, the parties could not have intended that the lessee had to rebuild after a total destruction. Paragraph 14 necessarily qualifies the covenant to repair.

Was the Trial Court Justified in Apportioning the Prepaid Rent?

[4, 5] It is a harsh but well settled rule that, in the absence of a qualifying provision in the lease, rent will not be apportioned, that is, where rent is paid in advance, a lawful surrender or termination during the prepaid period does not entitle the lessee to a proportional rebate. Rent does not accrue from day to day, but accrues on the day it is payable. Hindin v. Caine, 104 Cal.App.2d 238, 231 P.2d 83; Fahrenbaker v. E. Clemens Horst Co., 209 Cal. 7, 284 P. 905; Title Ins. & Trust Co. v. Amalgamated Oil Co., 63 Cal.App. 29, 218 P. 71. This rule applies where the premises have been destroyed and the lease is thus terminated. C. M. Staub Shoe Co. v. Byrne, 169 Cal. 122, 145 P. 1032.

[6–8] This rule of non-apportionment of rent is not without exceptions. Thus, if, after prepayment of rent, a lease is terminated because of the fault of the landlord, then a constructive eviction takes place, and the tenant may recover prepaid rent. This exception is predicated on the theory that to permit the lessor to retain all of the prepaid rent, would be to permit him to be unjustly enriched and to profit from his own wrong. Johnson v. Snyder, 99 Cal.App.2d 86, 221 P.2d 164. That exception may well be applicable here. The lessors knew, before the lease was executed in 1948, that the cannery building was in a bad state of repair. They tried to remedy this condition, but, after the windstorms had rendered the building unsafe for occupancy, they took no steps to reconstruct it. They even agreed with Thomas to tear the cannery building down by December 31, 1949. Had they posted the bond required by Thomas, the lessee could, in all probability, have continued to operate for the balance of 1949. While Friedman and his attorney testified that they were waiting for the city attorney to draft the necessary papers, the trial court was not bound by that testimony, and could have reasonably inferred that, had the lessors been a little more aggressive in performing their promises to Thomas, the building would not have been posted as unfit for occupancy on May 13, 1949. This lessee was engaged in the canning business—a business where contracts for materials to can had to be made in advance. Because of the cancellation of its insurance policies and the posting of the building, which effectively put it out of business, it was forced to cancel several carrot options that it possessed. All of this could have been prevented had the lessors performed their agreement with Thomas. Under such circumstances, it might well be held that the lessee was evicted through the fault of the lessors, and for that reason a constructive eviction took place, and an apportionment is permitted.

There is another reason why the trial court was justified in apportioning the $7,500 paid on March 15, 1949,[1] and that is that the rule prohibiting apportionment of rent only applies where the covenant to pay rent in advance is unqualified. Here the covenant was not unqualified. Paragraph 14, above quoted, expressly provides for an apportionment of rent in the event of a partial destruction of the premises, and gives the lessee, in such event, the election to terminate. It is inconceivable that, if an apportionment was intended where there is a partial destruction, the parties did not intend an apportionment where the premises became completely unusable through no fault of the lessee. It is broadly, and necessarily, implied that, in such event, an apportionment should result.

The portions of the judgment appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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111 Cal.App.2d 486

In re GILL'S ESTATE.

QUINN v. GILL.

Civ. 15206.

District Court of Appeal, First District, Division 2, California.

June 4, 1952.

Proceeding in the matter of the estate of Florence Ellen Gill, deceased, wherein Robert J. Gill was the proponent of the will of the deceased, and wherein Anne Claire Quinn was the contestant. The Superior Court of the State of California, in and for the County of Marin, Thomas F. Keating, J., entered an order admitting the will to probate, and the contestants appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding that deceased possessed testamentary capacity and that will was not the product of undue influence.

Affirmed.

1. Wills ⚷302(1)

Evidence sustained finding that there was due execution of will. Probate Code, § 50.

2. Wills ⚷386

Interest of proponent in having will probated and certain alleged inconsistencies in his testimony were matters to be weighed by trial court sitting without a jury.

3. Wills ⚷386

Where trial court, sitting without a jury in will contest, chose to believe testimony of proponent, the District Court of Appeal could not reweigh the testimony of the proponent on appeal.

4. Wills ⚷289

Presumption of due execution of will arose from presence of signatures of witnesses on will, and such presumption was entitled to be weighed against testimony of attesting witnesses that document they signed was not referred to as a will.

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[1] The court apportioned this payment by holding that the lease was terminated June 15, 1949, when a surrender was tendered by the lessee, and that three months' rent had accrued and that the other three months, or $3,750, should be refunded. The court might have found that the lease was terminated on May 13, 1949, when the building was posted. However, this point need not be discussed because the lessee has not appealed.

5. Wills ⚷55(1)

Evidence sustained finding that testatrix possessed testamentary capacity when she signed will the day before her death.

6. Wills ⚷166(1)

Evidence sustained finding that will was not the product of undue influence.

7. Wills ⚷386

On appeal from order admitting will to probate, the District Court of Appeal was required to accept as true the evidence which supported trial court's findings, from whatever source the evidence might have come.

A. E. Bagshaw, San Rafael, for appellant.

Rockwall & Fulkerson, San Rafael, for respondent

DOOLING, Justice.

Contestant before probate appeals from an order admitting the will to probate after a trial to the court sitting without a jury. Contestant is the surviving sister of the testatrix and the proponent and respondent, who is the sole beneficiary and executor of the will, is testatrix' surviving brother. The testatrix was a spinster with no nearer relatives.

On August 22, 1950 testatrix was taken to a hospital suffering from a severe heart attack. She was given digitalis and morphine at regular intervals thereafter and placed in an oxygen tent. On August 23 at about 1 p. m. she signed the will admitted to probate and on August 24 at 2 a. m. she died.

Three grounds are urged on appeal: (1) The finding of due execution of the will is not supported by the evidence; (2) The finding that the testatrix possessed testamentary capacity and was of sound and disposing mind is contrary to the evidence; (3) The finding that testatrix was not acting under the undue influence of respondent brother is not sustained by the evidence. We shall take these questions up in the order stated.

1. The Due Execution of the Will.

The will was witnessed by two employees of the hospital. They testified that they were asked by respondent to act as witnesses to decedent's will; that they went into her room and respondent said to the decedent: "Do you want these two ladies to witness your signature?" and that the decedent answered "Yes." The decedent signed the will in their presence and they signed as witnesses in decedent's presence and the presence of each other, whereupon decedent said "Thank you" and they left the room. They both testified that the document was not referred to as a will nor was the word will mentioned by the decedent or in her presence while they were with her.

Respondent testified that in the presence of the witnesses he said to decedent: "These two young ladies are coming in here to act as witnesses to your will. Do you wish them to act as witnesses?" Decedent answered: "Yes." After she finished signing it he said: "Is this your will?" and she again answered "Yes."

[1] It is clear that this was sufficient if believed to satisfy the requirements of Prob.C. sec. 50.

[2-4] Appellant argues respondent's interest and certain alleged inconsistencies in his testimony but those are matters to be weighed by the trial court and since the trial court has chosen to believe the proponent's testimony we cannot reweigh his evidence on appeal. Giving added weight to respondent's testimony is the presumption of due execution from the presence of the witnesses' signatures on the will. In re Estate of Pitcairn, 6 Cal.2d 730, 59 P.2d 90. This presumption is entitled to be weighed against the attesting witnesses' testimony. In Re Estate of Pitcairn the court said at pages 733-734 of 6 Cal.2d, at page 92 of 59 P.2d: "But in our opinion, if the presumption be recognized, it is seldom material to an appellate court whether the subscribing witnesses were unavailable, unable to remember, or *gave affirmative testimony adverse to the will.* A presumption is recognized in this state to be independent evidence which may be

weighed against positive testimony * * *." (Emphasis ours.) Cf. In re Estate of Cecala, 92 Cal.App.2d 834, 838, 208 P.2d 436.

2. The Testatrix' Testamentary Capacity.

Dr. Polland, a heart specialist, saw decedent only on the day of her admission to the hospital. He testified that she was very ill of a serious and apparently fatal heart ailment. That in his opinion she would get progressively worse and that because of her illness her mind was affected and she could not in his opinion at that time or until her subsequent death have been able to understand and carry in her mind her property or the objects of her bounty or to understand the acts that she was doing. Dr. Edwards, her attending physician, testified that from the time of her admission to the hospital decedent became progressively worse physically and mentally.

[5] However Dr. Polland admitted on cross-examination that decedent might have "retrenchment improvement at some time" and it is possible for "temporary relief" to occur. Dr. Edwards on the admission of decedent to the hospital observed decedent worrying about a nephew and his wife in Germany and about some property involvement with the O. P. A. and on the day the will was executed asked her questions about her condition which she answered rationally. Respondent testified that decedent asked him to prepare the will on August 22, that he asked her to wait until she got out of the hospital but she insisted, and that she read the will and expressed her satisfaction with it before signing it. The subscribing witnesses found her apparently rational and after they signed the will she thanked them in a loud, clear voice. She signed the will without assistance, and while she was accustomed to use the signature "Florence Gill" or "Florence E. Gill", in this instance she followed the spelling of her name in the document and signed it "Florence Ellen Gill", without assistance or prompting. The evidence, while conflicting, was ample to support the finding of testamentary capacity.

3. The Issue of Undue Influence.

[6] Respondent testified that he had assisted decedent financially for many years, and that she had always voluntarily stated that he would get her property when she died. She had made an earlier will, ineffective because not witnessed, leaving all her property to him and had written him a letter stating that she was leaving all her property to him. He further testified that she asked him to prepare a will just like the other invalid one, that he demurred and she insisted; that he prepared the will and she read it over and expressed her satisfaction with it. The trial court chose to believe this testimony which is ample to rebut any presumption of undue influence and to establish that the execution of the will was her free and voluntary act.

[7] The questions presented on appeal are all fact questions and the arguments of appellant as to the weight and credibility of the proponent's testimony cannot avail before an appellate court, which must accept as true the evidence which supports the trial court's findings from whatever source it may have come.

The order and decree appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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111 Cal.App.2d 350

PALERMO v. PYKE et al.

Civ. 18662.

District Court of Appeal, Second District,
Division 3, California.

May 27, 1952.

Hearing Denied July 24, 1952.

Action by Eleanor S. Palermo against Mac T. Pyke and others for rescission of an agreement for the sale of machinery and equipment in exchange for capital stock. From a judgment for defendant in the Superior Court of Los Angeles County, Paul

Nourse, J., the plaintiff appeals. The District Court of Appeal, Parker Wood, J., held that an agreement of rescission of the contract where it subsequently appeared that the seller did not own part of the machines was supported by a valid consideration and was binding upon the parties thereto including the plaintiff as assignee of the seller.

Judgment affirmed.

1. Evidence ⚷419(13)

Where agreement for rescission of sales contract recited that irreparable damage had been done to buyers of machinery and corporation by virtue of recited facts that seller did not own the machinery in part, recital was not a recital of consideration but that certain facts had caused irreparable harm to the buyers and under the statute recital was conclusive as to the fact that buyers had been damaged. Code Civ.Proc. § 1962, subd. 2.

2. Evidence ⚷419(13)

Where agreement for sale of machinery in exchange for corporate stock was rescinded by subsequent agreement because seller did not own the machines in part and it recited as part consideration that for the damage caused the buyers the seller sold the machines that actually belonged to him, provision was a recital of consideration but was not conclusive that in fact there was a consideration for the agreement and did not prevent assignee of seller from presenting evidence in action for rescission as to what in fact was the consideration or the extent of damage. Code Civ.Proc. § 1962, subd. 2.

3. Appeal and Error ⚷544(3)

In action for rescission, where plaintiff appealed upon the judgment roll from a judgment for defendants, record did not establish that appellant was prevented from proving no consideration for the agreement of rescission and no damage therefrom.

4. Exchange of Property ⚷11

Where seller agreed to sell machinery and equipment to buyers in exchange for capital stock of a corporation and subsequently an agreement of rescission was entered into when it was determined that seller did not own some of the machines and the agreement of rescission provided that irreparable damage had been done to the buyers and corporation by the acts of seller, evidence sustained finding that agreement of rescission was supported by a good and valid consideration and was binding upon the parties including the assignee of the seller. Code Civ.Proc. § 1962, subd. 2.

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Joseph Stell and George Appell, Los Angeles, for appellant.

William H. Levit and William C. Stein, Los Angeles, for respondents.

PARKER WOOD, Justice.

In this action for rescission the plaintiff appeals upon the judgment roll from the judgment in favor of defendants.

Plaintiff is the assignee of Oswald Palermo. In October, 1947, Oswald Palermo, who was in the business of manufacturing women's wearing apparel, and defendants Pyke and Nellis entered into a written agreement wherein Palermo represented that he owned certain machinery and equipment; wherein Pyke and Nellis represented that they owned all the issued capital stock of Cinema Modes, a corporation; and wherein Palermo agreed to sell said machinery and equipment to Pyke and Nellis for 10,000 shares of stock of Cinema Modes. It was also stated therein that Palermo understood that Pyke and Nellis intended to enter into commitments for leasing space in the name of Cinema Modes in reliance upon the performance of the agreement by Palermo; that in the event he failed to comply with the agreement he would indemnify them for all damage suffered; that Palermo would be elected the third director of Cinema Modes when he acquired said stock.

In November, 1947, the said parties entered into a written agreement which provided that the parties agreed that the inventory value of the machinery and equipment, namely, $18,463.09, had been reduced, for the purpose of said sale, to $15,119.36; and that the book value of the 10,000 shares of stock was $15,119.36. A bill of sale covering said machinery and equipment was made by Palermo and delivered to said buyers. A stock certificate representing 10,000 shares of Cinema Modes was made and delivered to Palermo. Pyke and Nellis transferred the machinery and equipment to Cinema Modes in settlement of their indebtedness to the corporation in the sum of $15,119.36.

On January 13, 1948, Palermo was arrested upon a charge of burglarizing a building of Caltex Corporation, his former employer, on March 1, 1947, and stealing therefrom 20 sewing machines and 4 cutting machines, which machines were a part of the machinery and equipment that he sold to Pyke and Nellis. Later he pleaded guilty and was sentenced to the penitentiary.

On January 15, 1948, Palermo, Pyke, Nellis and Cinema Modes entered into a written agreement, entitled "Agreement of Rescission," which recited in part that it had been ascertained by Pyke and Nellis and substantiated by Palermo that 21 sewing machines and 3 cutting machines which were a part of the machines and equipment sold by Palermo did not and do not belong to him; that others are claiming the machines and that Pyke, Nellis, and Cinema Modes are obliged to return the machines to the rightful owner of them; that "all of the parties hereto agree that irreparable damage and harm has been done to the said buyers and said corporation by virtue of the facts hereinabove referred to and for the first time now disclosed by the said Palermo and by others to said buyers and to said Cinema Modes, a corporation." After said recital in said agreement, it was provided therein that the agreement, made in October, 1947, which was the basis of the purchase and sale whereunder Palermo obtained the 10,000 shares of stock in Cinema Modes, and Cinema Modes by mesne conveyances obtained certain sewing machines and equipment, is "by these presents mutually irrevocably revoked * * * and rescinded, as though the same had never taken place * * * and all of the incidents of said Purchase and Sale Agreement, including the Bills of Sale involved and the transfer of said stock certificate, are also * * * rescinded and annulled"; and that "As consideration in part only, however, for the damage which the said Palermo acknowledges that he has caused the said buyers and the said corporation, the said Palermo hereby * * * sells, assigns * * * and delivers unto Cinema Modes, a corporation, the twenty-two (22) sewing machines which actually did belong to him * * * together with all of the other * * * equipment."

On August 15, 1949, Palermo assigned all his interest in the 10,000 shares of stock to plaintiff for the purpose of bringing an action for rescission of said agreement for rescission and to recover for said Oswald Palermo the said 10,000 shares of stock. In November, 1949, a notice of rescission of said agreement of rescission was signed by plaintiff and was served on Pyke, Nellis, and Cinema Modes.

In the complaint herein it was alleged that there was no consideration passing from defendants to Oswald Palermo for the agreement of rescission, and that in order to induce Palermo to execute the agreement of rescission the defendants and an attorney for defendants fraudulently represented to him (1) that if he did not execute it the business of Cinema Modes would suffer irreparable loss and his shares of stock would become worthless, and (2) that if he assigned the certificate for 10,000 shares of stock to Cinema Modes the certificate would be returned to him after the termination of the criminal proceedings. Also, it was alleged therein that by reason of said fraudulent representations plaintiff had been damaged in the sum of $18,493.09.

The court found, among other things, that Palermo had warranted in the purchase and sale agreement that he had good title to 20 sewing machines and 4 cutting machines and other personal property, and by reason of said warranty the defendants executed the agreement; Palermo did not at any time own said 20 sewing machines and 4 cutting machines and said warranty was false as to said property, but the warranty of title to the other machines and equipment was true; Palermo pleaded guilty to a charge of burglary and theft of the 20 sewing machines and 4 cutting machines and was sentenced to the penitentiary; Palermo, prior to his arrest, did not divulge to defendants or any of them the fact that he had committed said burglary and theft, and defendants had no knowledge thereof until said arrest; the stolen machines were of the value of $5,000; the owner of those machines demanded the return thereof and defendants did return them to the owner; by reason of the fact that Palermo did not own said machines and by reason of his failure to disclose to defendants that he had stolen them, the defendants were entitled to rescind the purchase and sale agreement; by reason of said breach of warranty of title and misrepresentation by Palermo, the defendants were damaged in the sum of $5,000, being the value of said machines; defendants did suffer further damage and injury by reason of the failure of Palermo to disclose to them prior to his arrest the fact that he had committed the burglary and stolen said machines; Palermo, in said agreement of rescission, agreed that defendants had been so injured and damaged by his breach of warranty, misrepresentation and failure to disclose facts as aforesaid; the recital of fact in said agreement of rescission that "irreparable damage and harm has been done to the said buyers and said corporation by virtue of the facts hereinabove referred to" is conclusively presumed to be true between the parties to said agreement, and said Oswald Palermo and plaintiff are estopped to deny the said agreement by Oswald Palermo that defendants had been so damaged as the result of said acts of Oswald Palermo; by reason of the facts found said agreement of rescission was supported by a good and valid consideration and is binding upon the parties thereto and plaintiff; at no time did defendants or anyone acting on their behalf fraudulently or at all state or represent to Palermo that if he did not execute the agreement of rescission the business of Cinema Modes would suffer an irreparable or any loss or that if he assigned the 10,000 shares of stock to Cinema Modes the shares would be returned to him after the termination of the criminal proceedings or at all; no fraudulent statements were made to Palermo at any time by any of said parties; Palermo read and understood said agreement of rescission before he executed it; the property, other than the 20 sewing machines and 4 cutting machines, had intrinsic value and said property was not returned to plaintiff; said 10,000 shares of stock are presently of the same value they were at the time of the assignment by Palermo to Cinema Modes.

Appellant (plaintiff) asserts that since defendants did not plead estoppel, the finding that appellant and Palermo are estopped to deny that defendants have been damaged as a result of the acts of Palermo is abortive. Respondents' reply thereto is in part that since a copy of the agreement of rescission was attached to the complaint as an exhibit, and since that agreement contained the provision that all parties agree that irreparable damage and harm had been done to the buyers and Cinema Modes by the acts of Palermo, the issue as to whether there was "estoppel by contract" was an issue at the trial without estoppel being pleaded by defendant. It is not necessary, by reason of the conclusions hereinafter stated, to decide whether under the circumstances here estoppel should have been pleaded.

[1, 2] Section 1962 of the Code of Civil Procedure provides that "The following presumptions * * * are deemed conclusive: * * *; 2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration". Appellant asserts that the court erroneously applied said section 1962, subdivision 2, to the recital in the agreement of rescission that Palermo had agreed that he had done irreparable damage and harm; and that the court erred in finding that the recital in said agreement that "irreparable damage and harm has been done to the said buyers and said corporation by virtue of the facts hereinabove referred to" is conclusively presumed to be true between the

parties to said agreement, and said Palermo and plaintiff are estopped to deny the said agreement by Palermo that defendants had been so damaged as the result of his said acts. Appellant argues that said recital as to irreparable damage was a recital of consideration and therefore was within the exception stated in said section 1962, subdivision 2, that said conclusive presumption did not apply to the recital of a consideration. The recital in the agreement was, as above stated, that "irreparable damage and harm has been done to the said buyers and said corporation by virtue of the facts hereinabove [in said agreement] referred to." That was not a recital of consideration but it was a recital of a fact, namely, that Palermo's burglary, theft, false warranty of title, and deceit had caused irreparable damage and harm to defendants. Such recital or agreement of the parties was conclusive as to the fact that defendants had been so damaged. It is to be noted that the court's finding, regarding estoppel, was that Palermo and plaintiff were estopped to deny the agreement by Palermo that he had so damaged the defendants—it was not a finding that they were estopped to show the consideration or the extent to which defendants had been damaged. It is true that a provision in the body of said agreement (paragraph 2) states that "As consideration in part only, however, for the damage which the said Palermo acknowledges that he has caused the said buyers and the said corporation, the said Palermo hereby * * * sells, assigns * * * and delivers unto Cinema Modes, a corporation," the 22 machines which actually belong to him, together with all the other equipment. That provision was a recital of a consideration but it was not conclusive that that in fact was the consideration for the agreement. The fact that in another part of the agreement there was a conclusive recital, to the effect that defendants had been damaged, did not preclude the plaintiff from presenting evidence as to what in fact was the consideration or what was the extent of the damage. In Lane Mortgage Co. v. Crenshaw, 93 Cal.App. 411, at page 424, 269 P. 672, at page 678, it was said: "The instrument being in writing imports a consideration, even without a recital thereof. The recitals in the instrument are conclusively presumed to be true as between the parties thereto or their successors in interest by a subsequent title (Code Civ.Proc., § 1962). This conclusive presumption does not apply to the recital of the consideration. However, the presumption would apply to the recital that 'said lease is valuable to the Hotel Company and was procured for it by the Lane Company, and said Lane Company has agreed to finance the construction of the building by loaning $200,000 * * *.' The further recital in said instrument that the said services and loan by Lane Company constituted the consideration for the lease and agency are not deemed conclusive under the Code section 1962, Code of Civil Procedure." It thus appears that the recital in the present case that "irreparable damage" was caused by Palermo, was a recital of fact and was conclusive; and that the further recital that damage was a consideration for the agreement is not conclusive and was open to question by appellant at the trial.

[3, 4] Appellant argues (1) that the finding that plaintiff was estopped to deny Palermo's agreement that defendants had been damaged "prevented" plaintiff from proving a want of consideration for the rescission agreement; and (2) that the said finding reflects the philosophy of the trial judge, which "precluded" plaintiff from establishing that no damage was suffered by the defendants. The findings, of course, were not in existence at the time of trial, and therefore it is clear that said finding did not prevent plaintiff from presenting evidence as to consideration. The assertion that the finding reflects the philosophy of the judge which "precluded" plaintiff from establishing that no damage was suffered is speculative. Those arguments of appellant imply that appellant was "prevented" and "precluded" from proving no consideration and no damage. It is to be remembered that this is an appeal upon the judgment roll. There is no record here as to whether appellant was so prevented or precluded. (In response to appellant's assertion that she had been precluded from presenting evidence as to consideration, counsel for respondents suggested at the argument on appeal, and also in respondents' brief, that the record be augmented by appellant, but appellant's counsel did not adopt the suggestion.) The court found, as above stated, that by reason of the facts found the agreement of rescission was supported by a good and valid consideration and is binding upon the parties thereto and plaintiff.

The contention of appellant regarding unjust enrichment is not supported by the judgment roll. By reason of the above conclusions it is not necessary to determine other contentions of appellant.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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111 Cal.App.2d 395

CROSS v. TUSTIN et al.

Civ. 14426.

District Court of Appeal, First District, Division 2, California.

May 28, 1952.

Rehearing Denied June 27, 1952.

Hearing Denied July 24, 1952.

Nancy Cross filed a petition for writ of mandate against John Tustin, personnel director, and others to restore plaintiff to position of senior personnel technician of Santa Clara County. The Superior Court, Santa Clara County, M. J. Del Mutolo, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that county ordinance providing for dismissal of probationary employee without hearing was not in conflict with County Civil Service Enabling Act, and hence dismissal of plaintiff was not entitled to hearing upon dismissal.

Judgment affirmed.

See also 96 Cal.App.2d 207, 214 P.2d 565.

1. Officers 🔑69.6

Under County Civil Service Enabling Act providing that employee may be dismissed after appointment or promotion is complete and providing for hearing upon same, service of probationary period is condition precedent to appointment becoming complete, and hence county ordinance providing for dismissal during probationary period without hearing, under which plaintiff was dismissed, was not in conflict with act, and no hearing was required. Government Code, §§ 31100–31113, 31108.

2. Mandamus 🔑167

Allegation in amended petition for writ of mandate to restore plaintiff to civil service position that in discharging her, appointing officer abused discretion, was conclusion of law which tendered no justiciable issue, and failure to deny allegation by answer was not admission of allegation.

3. Pleading 🔑252(2)

Original petition superseded by amended petition can perform no function as pleading and cannot be looked at to supplement issues tendered by amended pleading.

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Nancy Cross, in pro. per.

Howard W. Campen, County Counsel, Santa Clara County, Donald K. Currlin, Asst. County Counsel, Wade H. Hover, Deputy County Counsel, San Jose, for respondents.

DOOLING, Justice.

Appellant, Nancy Cross, appeals from a judgment of the superior court denying her petition for a writ of mandate to restore her to the position of senior personnel technician of Santa Clara County. The basic facts and issue in the case appear from the following oral stipulation entered into by the parties in open court as set out in the settled statement:

> "The defendants through their attorneys and plaintiff thereupon stipulated that it was true that the petitioner, Nancy Cross, was selected as Senior Personnel Technician of Santa Clara

County on December 6, 1948, by the appointing authority after having qualified for the position by passing a regular competitive examination, and that it was true that on March 2, 1949, prior to the termination of her probationary period, the plaintiff was dismissed from her position as Senior Personnel Technician by the appointing authority without charges having been filed against her; that it was true that the petitioner duly requested the Civil Service Commission of Santa Clara County for a hearing on her dismissal, and that said Civil Service Commission refused to grant plaintiff a hearing on her dismissal.

"It was also stipulated by the defendants through their counsel and by plaintiff in propria persona that the Santa Clara County Ordinance No. 154 as amended, establishing a merit or limited civil service system for Santa Clara County was passed and adopted the 30th day of September, 1940, and approved by a majority of the electors of the County of Santa Clara voting thereon at an election held on the 5th day of November, 1940; and that it is true that the Rules for the administration of the Civil Service System of Santa Clara County as established pursuant to said Santa Clara County Ordinance No. 154 as amended was approved by the Board of Supervisors of the County of Santa Clara.

"The defendants through their attorneys and the plaintiff in propria persona thereupon waived by oral consent in open court Findings of Fact on any issues raised by the pleadings and not covered by the stipulations."

Ordinance No. 154 referred to in this stipulation was passed pursuant to the County Civil Service Enabling Act. Stats. 1939, p. 2734 now codified as sections 31100–31113 of the Government Code. Sec. 31108 of that code reads as follows:

"Any ordinance adopted pursuant to this part shall include substantially the following provisions:

"(a) Any officer or employee in the classified civil service may be dismissed, suspended, or reduced in rank or compensation by the appointing authority *after appointment or promotion is complete* by a written order, stating specifically the reasons for the action. The order shall be filed with the clerk of the board of supervisors and a copy thereof shall be furnished to the person to be dismissed, suspended, or reduced.

"(b) The officer or employee may reply in writing to the order within 10 days from the date of its filing with the clerk of the board of supervisors. The officer or employee may within five days after presentation to him of the order appeal through the clerk of the board of supervisors to the civil service commission from the order. Upon the filing of the appeal, the clerk of the board of supervisors shall forthwith transmit the order and appeal to the civil service commission for hearing.

"(c) Within 20 days from the filing of the appeal the commission shall commence a hearing, and either affirm, modify, or revoke the order. The appellant may appear personally, produce evidence, and have counsel and a public hearing.

"(d) The findings and decision of the commission shall be certified to the department head or officer whose action was the subject of the hearing and forthwith enforced and followed by him."

We have italicized the words of this section "after appointment or promotion is complete" because upon their proper construction depends the determination of the basic issue on this appeal.

Ordinance No. 154 provides for appointments to be made in the civil service for a probationary period of six months. Section 4, par. 13 of that ordinance reads:

"Any appointing authority or officer shall have the right to dismiss any person in the classified service during the six months probationary period, if such person is not deemed by said officer satisfactory or competent to fulfill the du-

> ties of the position to which said probationer has been certified, and the employee so dismissed shall not have the right to a hearing before the Civil Service Commission, but, unless charges are filed against such employee as herein provided, such probationer may be retained upon the eligible list at the discretion of the Commission, and shall be eligible for certification to some other department."

In dismissing appellant during her probationary period the appointing officer acted pursuant to this section without filing any charges, and although appellant demanded a hearing before the civil service commission she was given none.

Appellant argues that once she was placed in the position her appointment was complete within the meaning of that language in sec. 31108, Gov.Code, above quoted and that the provision of sec. 4, par. 13 of Ordinance 154 providing for the dismissal of a probationary employee without charges and an opportunity to be heard is therefore invalid because in conflict with the statute. Respondents counter that the county may reasonably provide that the appointment shall not be complete until the expiration of a reasonable probationary period. In support of this argument respondents point out that provisions for the service of a probationary period in civil service positions before permanent tenure is attained by the employee are a commonplace of civil service systems, Wiles v. State Personnel Board, 19 Cal.2d 344, 347, 121 P.2d 673; Neuwald v. Brock, 12 Cal.2d 662, 670, 86 P.2d 1047, and that if appellant's construction is to be placed upon sec. 31108, Gov. Code, full civil service tenure must be accorded to every person placed in employment in a civil service position instantly and without possibility of providing for any probationary period.

In determining what the legislature had in mind in using the words "after appointment or promotion is complete" we are afforded the precedent of many other civil service provisions in the charters of both cities and counties in California. At least as early as 1899 the charter adopted for San Francisco contained the following provision:

> "At or before the expiration of the period of probation, the head of the department or office in which a candidate is employed, may * * * discharge him * * *. If he is not then discharged, his appointment shall be deemed complete." San Francisco Charter, sec. 10, Art. XIII, Stats.1889, p. 352.

Similar language is found in the Los Angeles County Charter of 1913, sec. 34(7): "The rules shall provide: * * * (7) For a period of probation not to exceed six months before appointment or promotion is made complete * * *", Stats.1913, p. 1494; San Jose Charter, sec. 107: "An appointment or promotion shall not be deemed complete until a period of probation * * has elapsed * * *", Stats.1915, p. 1904; Los Angeles City Charter, sec. 238: "If he is not thus discharged during the period of probation, his appointment shall be deemed complete", Stats.1921, p. 1820; Sacramento City Charter, sec. 49: "Appointment * * shall not be deemed complete until a period of probation * * * has elapsed * *", Stats.1921, p. 1938; Long Beach Charter, sec. 105: "An appointment * * * shall not be deemed complete until a period of probation * * * has elapsed * * *", Stats.1921, p. 2092; Los Angeles City Charer, sec. 109: "If he is not thus discharged during the period of probation, his appointment shall be deemed complete", Stats.1925, p. 1065; Alameda County Charter, sec. 36 (c): "To provide a period of probation * * * before appointment * * * is made complete * * *", Stats.1927, p. 2040; San Diego City Charter, sec. 118(r): "An appointment * * * shall not be deemed complete until a period of probation * * * has elapsed * * *". Stats.1931, p. 2908.

[1] From this enumeration it is clear that when the legislature used the language found in sec. 31108, Gov. Code, "after appointment or promotion is complete", it was following the design of an extensive legislative pattern in which those words had acquired a settled meaning in relation to civil service systems, as contemplating the service of a probationary period as a condition precedent to the appointment becoming "complete". We entertain no doubt of the

power of Santa Clara County in adopting Ordinance No. 154 to enact sec. 4, par. 13 providing for discharge without a hearing during the probationary period.

Appellant also attempts to argue an abuse of discretion in the case of her discharge. Whether by the stipulation entered into in open court waiving "Findings of Fact on any issues raised by the pleadings and not covered by the stipulations" all other issues were withdrawn from the court's consideration is the subject of dispute between the parties. We need not decide that question.

[2, 3] Appellant stands on the fact that an allegation in her amended petition that in discharging her the appointing officer abused his discretion is not in terms denied by the answer. This naked allegation is the pleader's conclusion of law, Scully v. State of California, 20 Cal.2d 178, 180, 124 P.2d 609; Meyer v. Board of Public Works, 51 Cal.App.2d 456, 470, 125 P.2d 50, which tendered no justiciable issue. Appellant's effort to bolster this conclusion by facts alleged in her original petition which was superseded by the amended petition on which the case went to trial must fail because the superseded petition can perform no function as a pleading and cannot be looked to to supplement the issues tendered by the amended one. 21 Cal.Jur., Pleading, sec. 146, pp. 213–214.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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111 Cal.App.2d 404

PEOPLE v. SORENSEN.

Cr. 2804.

District Court of Appeal, First District, Division 2, California.

May 28, 1952.

Prosecution for committing lewd and lascivious acts on or with the body of a child under 14 years old and contributing to a minor's delinquency. From an order of the Superior Court, Alameda County, Charles Wade Snook, J., denying defendant's petition for a writ of error coram nobis after conviction, he appealed. The District Court of Appeal, Dooling, J., held that any relief to which defendant was entitled because of assistant public defender's waiver of jury trial and consent to exclusion of public from trial, contrary to defendant's expressed wish, and failure to produce witnesses suggested by defendant, must be sought by habeas corpus, not by coram nobis.

Order affirmed.

1. Habeas Corpus 🔑29

Habeas corpus is proper remedy to attack collaterally a judgment of conviction obtained in violation of fundamental constitutional rights.

2. Criminal Law 🔑997

Any relief to which one convicted of crime is entitled because of assistant public defender's waiver of jury trial and consent to exclusion of public from trial, contrary to defendant's expressed wish, and failure to produce witnesses suggested by defendant, must be sought by habeas corpus, not by writ of error coram nobis.

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Edward M. Digardi, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Charles A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted on October 2, 1945 of violations of section 288 Penal Code and of section 702 Welfare & Institutions Code and is now confined in the State penitentiary. On August 1, 1951 he filed in the Superior Court in pro. per. a petition for a writ of error coram nobis and this appeal is taken from the order of that court denying his petition.

The court appointed counsel to represent the appellant on this appeal and such counsel urges the following points: From his petition it appears that appellant was denied a jury trial and a public trial by reason of the fraud of his counsel, and of any trial on the merits because of his counsel's failure to investigate the facts and produce witnesses suggested to his counsel by appellant.

[1] Since the decision in People v. Adamson, 34 Cal.2d 320, 210 P.2d 13 it appears to be settled that "habeas corpus * * * has become the proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights." 34 Cal.2d page 327, 210 P.2d at page 16.

[2] Appellant's petition is quite sketchy but it may be spelled out from it that the public defender through an assistant contrary to appellant's expressed wish waived a jury trial and consented to the exclusion of the public from the trial and failed to produce witnesses (neither the names of whom nor what they would have testified to being set out in the petition) suggested by appellant. If these facts if proved would entitle petitioner to any relief especially at this late date, People v. Adamson, supra, makes clear that that relief must be sought by *habeas corpus* and not by *coram nobis.*

Order affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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111 Cal.App.2d 295

THORNBURGH CONST. CO. v. COLLEGE HEIGHTS DEVELOPMENT (ONE) et al.

Civ. 18716.

District Court of Appeal, Second District, Division 1, California.

May 26, 1952.

Rehearing Denied June 16, 1952.

Hearing Denied July 24, 1952.

Action by Thornburgh Construction Co., a corporation, against College Heights Development, an association consisting of Sam Rais and others to recover corporate funds which defendant Thornburgh who was director and 70% owner of corporation's stock had deposited in his personal bank account and which with consent of defendant Rais, who was 30% owner, had allegedly been utilized for joint venture of such two defendants. The Superior Court of Los Angeles County, Charles E. Haas, J., entered judgment for plaintiff, and defendant Rais appealed. The District Court of Appeal, Hanson, J. pro tem., held that when purposes of corporation had been completed and recognition of separate existence of corporation from that of the two defendants who were sole owners would result in an injustice, such fiction would be disregarded and corporation would be recognized as alter ego of parties.

Judgment reversed.

See also Rais v. Thornburgh Construction Co., 244 P.2d 741; Thornburg v. Rais, 244 P.2d 741.

1. Corporations 🔑319(7)

In action by corporation against two of its directors who were sole owners of its stock in 70 percent and 30 percent ratio respectively, wherein it appeared that money of corporation had been deposited in personal account of director who was 70 percent owner and that some of it had been withdrawn without any corporate action for joint venture of directors, evidence was insufficient to sustain finding of trial court that moneys withdrawn by directors had been a loan.

2. Corporations 🔑312(3)

Where funds of corporation were deposited in personal account of director who was 70 percent owner of stock, money was in control of such director subject to an implied trust, and if he used any part of corporate funds for other than corporate purposes, he was guilty of conversion of trust funds.

3. Corporations 🔑312(3)

Where money of corporation had been deposited in personal account of director who was 70 percent owner of corporation, if director's personal bank account, despite withdrawals therefrom, still retained amount on deposit equal to that owed to corporation, then withdrawals were from director's own funds and not corporate funds.

4. Corporations ⚿312(3)

Where two directors of corporation were sole owners of stock in 70 percent and 30 percent ratio respectively, and funds of corporation were deposited in personal account of director who was 70 percent owner, recovery by corporation from such directors for moneys used by them for joint venture and not for corporate purposes, if allowable at all, must be on theory of moneys had and received.

5. Corporations ⚿312(3)

Where corporation brought action to recover its funds from two directors who were its sole owners in 70 percent and 30 percent ratio respectively, and money of corporation had been deposited in personal account of director who was 70 percent owner and some of it had been withdrawn without corporate authorization for joint venture on 50-50 ratio, and 70 percent owner contended that certain sum which he had retained was owed to him by joint venture, even if joint venture owed such sum it did not become liable to corporation, with resulting decrease of interest of 30 percent owner from 50 percent to 30 percent interest, for 70 percent owner's conversion thereof without same ever having been paid to joint venture.

6. Corporations ⚿319(7)

In action by corporation against two of its directors who were its sole owners in 70 percent and 30 percent ratio, to recover alleged advances, wherein it appeared that money of corporation had been deposited in personal account of 70 percent owner-director and that some of it had been withdrawn without corporate authorization for joint venture of directors on 50-50 ratio, and 70 percent owner contended that certain sum which he had retained was owed to him by joint venture, even if it be assumed that joint venture thereby become liable to corporation for 70 percent owner's retention, record did not establish that amount was in fact owed by joint venture to 70 percent owner-director.

7. Corporations ⚿1

Where corporation brought action against two of its directors, who were its sole owners in 70 percent and 30 percent ratio, for recovery of money of corporation which had been deposited in personal account of director who was 70 percent owner and part of which had been withdrawn without corporate authorization for joint venture of directors on 50-50 ratio, when purpose for which corporation had been organized was completed and when judgment against joint venture and 30 percent owner would inequitably decrease interest of latter director from 50 percent to 30 percent, corporation would be regarded as the alter ego of such two directors, or corporate moneys realized would be regarded as liquidating dividends in order to avoid inequitable result by recognition of fiction of separate corporate existence.

8. Corporations ⚿1

Where recognition of the fiction of separate corporate existence would foster an injustice or further a fraud, courts will refuse to recognize it, and it is not necessary to refusal of recognition that plaintiff prove actual fraud, but it is sufficient if recognition of the two entities as separate would result in an injustice.

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John W. Preston, John W. Preston, Jr., Los Angeles, for appellant.

Aaron Levinson, Albert E. Marks, Los Angeles, for respondent.

HANSON, Justice pro tem.

This case instituted by a corporation against two of its three directors (Thornburg and Rais) is most unusual in that it was promoted at the instance, and by the vote of Thornburg and that of the third director who not only did not own any stock in the corporation but was Thornburg's personal bookkeeper. In short, Thornburg owned 70% and Rais 30% of the outstanding capital stock. The action as instituted was *at law* to recover corporate funds in the sum of $100,975.92, which Thornburg had deposited in his personal bank account, but which he claimed had been expended by him, without any corporate action but, nevertheless, with the consent of Rais, to a joint venture in which he and Rais were engaged in equal ownership. The trial judge rendered judgment in favor of the corporation for the full amount it claimed and thereafter execution issued and was levied upon the joint venture property. Upon the execution sale the corporation bid in the property for approximately $26,489.67 less than its judgment and is now the owner of the joint venture property. It is at once apparent that through the technical legal procedure taken by Thornburg he has decreased the interest of Rais therein from 50% to 30%. Rais alone appeals from the judgment individually and in behalf of the alleged joint ventures.

It should here be added that the case before us is one of three separate cases all based largely upon the same set of facts. While all the cases were consolidated for trial, nevertheless separate findings, conclusions and judgments were entered in each. Accordingly, separate opinions are being filed in each of the cases.

In this particular case we are presented with three questions. The *first* is whether the corporation (whose capital stock was wholly owned by respondent Thornburg and appellant Rais) is to be classed as the *alter ego* of its two stockholders *after* the corporation had served the purpose for which it was formed.

The *second* question is whether the distribution by Thornburg of $100,975.92 from his personal bank account is, in whole or in part, to be classed as a loan or as a liquidating dividend by the corporation to Thornburg and Rais either jointly or severally.

The *third* question is whether any one or more of the four items, comprising the amount of the judgment of $100,975.92, i. e., one of $36,909.90; another of $5,725.29; another of $2,870; and still another for $55,470.73 were, *in any event,* recoverable by the corporation from the appellant Rais.

Early in 1946 the defendant Rais, along with two associates, purchased a 35-acre tract near Compton which they at once graded and subdivided into 178 residential lots with the view of constructing residences on only 162 of the 178 lots. Thereafter in November, 1946, these three individuals, each owning an undivided one-third of the acreage entered into a contract with respondent Thornburg, a licensed contractor and builder (hereinafter referred to as the "contractor"), wherein the latter agreed to build 162 homes on the 162 lots at *cost* plus 40% of the net profit obtained by the corporation upon sale. As it appeared to be more advantageous for appellant Rais and his two associates to operate as a corporate entity rather than as individuals they caused a corporation to be formed under the name of the "Thornburg*h* Construction Co." (hereinafter referred to as the "corporation") with authority to issue and sell preferred and common stock at one dollar per share. Shortly after this corporation was formed it was granted a permit to issue 30,000 shares of preferred stock to each of the three incorporators in consideration of their conveyance of the 162 lots to the corporation. In addition the corporation was authorized to sell 100 shares of its common stock at one dollar per share as follows: 40 shares to Thornburg, 20 shares to the appellant along with 20 shares to each of his two associates. The issuance of 40 shares of the common stock to Thornburg was intended to, and in fact superseded the provision in Thornburg's contract whereby he was to be paid, as his profit, 40% of the corporate profits upon a sale. Out of profits which shortly accrued, the corporation retired the outstanding preferred stock by a payment to the holders of $90,000 and interest. By reason of common stock purchases thereafter made by Thornburg and the defendant Rais from the original associates of Rais, Thornburg became vested with 70% of the outstanding common stock and Rais with 30% thereof. Likewise through purchases made from the associates of Rais by Thornburg and by Rais, they each became vested with an undivided one-half interest in the 16 lots which had not been and never were conveyed to the corporation.

Shortly after its formation in November, 1946, the corporation made arrangements with a mortgage company to borrow upon its notes a sum between $7,700 and $8,100 against each lot, secured by an individual trust deed thereon. Evidently as soon as a house was constructed on a lot the mortgagee issued its check to the corporation for the amount due it. Some of the checks were endorsed over to the contractor and where this was not done the corporation promptly issued its own check for an amount equal to the amount it received. As a result of the mortgage arrangement the corporation as early as January, 1948, not only had built a house on each of the 162 lots and received mortgage moneys on said lots totaling the sum of $1,131,800, but had sold the lots with the houses thereon, subject to the trust deed of record. By reason of these consummated sales the books of the corporation showed a net profit of $130,096.39. This entire amount was turned over to Thornburg and deposited in his personal bank account, with a duty on his part to account therefor to the corporation. Evidently in addition to this sum Thornburg had in his account the further sum of $509.92 belonging to the corporation which with the sum of $130,096.39 totaled $130,606.31. Out of this sum he paid in behalf of the corporation federal income taxes for the fiscal year 1947 and state franchise taxes for the fiscal years 1947 and 1948 in a total of $9,630.39 leaving $120,975.92 in his hands. As the corporation had credited on its books to Rais $10,000 and to Thornburg $10,000 as salaries and charged the amount to expense this total of $20,000 could properly have been paid by Thornburg out of the $120,975.92 in his hands had there been, and perhaps without, corporate action to that effect. This would have left $100,975.92 in his hands (of which $100,466 represented net profit) for which identical sum he and Rais were sued by the corporation. As by January, 1948, the corporation had sold all the 162 lots, subject to the mortgage of record against each, it evidently had fulfilled the purpose for which it was created. Aside from any contingent liabilities, such for instance as federal income taxes, it apparently had no reason for continuing its corporate existence and could have been liquidated. If it had then been liquidated Thornburg would have been entitled to 70% of the $100,975.92 or $70,683.14, and the defendant Rais to 30% of the $100,975.92 or $30,292.78. Be that as it may Thornburg proposed to Rais that the two should build multiple dwellings, to be constructed by Thornburg, on each of 14 out of the 16 lots in which they were equal owners; that each of the lots should be mortgaged for $13,000; that to the extent the cost of any multiple dwelling exceeded $13,000, the excess should be paid out of the profits which had accrued to the corporation then in the bank account of Thornburg. To this defendant Rais agreed. As a consequence 14 multiple dwellings were built on 14 of the 16 lots, each of which was mortgaged for $13,000. The checks of the mortgagee to evidence these loans made payable to Thornburg and Rais (and their wives) were endorsed by the payees and handed to Thornburg who deposited them in his own personal bank account. The total mortgage money thus received by Thornburg from the mortgages placed on the 14 lots aggregated $182,000. As these mortgage moneys were insufficient to pay the cost of the 14 multiple dwellings Thornburg claims he expended directly out of the corporation's funds resting in his own personal bank account the sum of $55,470.73. In addition to this sum he claims he also expended, in effect, $45,505.19 more of the corporation's money even though he retained it personally on the theory it was due him from the joint venture. The latter amount consisted of the following: (1) Thornburg's 1948 overhead expense $2,870; (2) apportionment of general overhead expense (evidently claimed as above) $5,725.29; 15% of the cost of constructing the 14 joint venture units $36,909.90, the latter being claimed under an alleged oral agreement with Rais. The 14 multiple dwellings were completed on April 29, 1948. But none of the charges aggregating $45,505.19 were ever entered in Thornburg's books of account except items $2,870 and $5,725.29. These items appear in sequence on the books, but apparently were not entered until after the multiple dwellings had been completed.

[1-3] The action instituted by the plaintiff corporation was strictly one *at law* to recover from the defendants Rais and Thornburg the sum of $100,975.92 upon an allegation that the corporation had "advanced" this sum to these two defendants. In what manner or upon what basis the sum

was "advanced" was not alleged. However, upon the trial the plaintiff corporation contended that the money had been lent by it to the defendants, whereas the defendant Rais contended it represented a liquidating dividend. The trial court held it was a loan. The difficulty with that finding is that there is no evidence to sustain it. The record shows conclusively that no corporate action whatever was taken to advance the money to the defendants by way of a loan, a liquidating dividend or otherwise. In fact the money was not under the control of the plaintiff corporation, but instead rested in the personal bank account of Thornburg. Hence, the money was in his control subject to an implied trust. The moment he used any part of it for other than corporate purposes he was guilty of conversion of trust funds. If Thornburg's personal bank account, despite withdrawals therefrom, still retained an amount equal to what he owed the corporation then it is plain the withdrawals represented his own funds and not the corporate funds belonging to the plaintiff corporation.

[4] As there was no express loan by the corporation to either Thornburg or Rais of its moneys, in the hands of Thornburg, it must recover, if at all on the theory of moneys had and received. We pass then to a consideration of what moneys belonging to the corporation were received by Rais or the joint venture.

The trial court, it appears, accepted the statement of the accountant for Thornburg that the "direct cost" of constructing the 14 multiple dwellings, *including the cost of the land*, was $237,470.73. The accountant did not specify what the land cost. However, it is undisputed that the 178 lots cost the three incorporators $90,000 and hence the 16 lots, on that basis, cost $8,089.60. As no part of the moneys belonging to the corporation, in the hands of Thornburg, were expended in the purchase of the 16 lots it would seem to follow that the $8,089.60 should be subtracted from $237,470.73 to get the *net* direct cost of constructing the 14 dwellings. Hence, such cost was, at most, $229,381.13. That the trial court was here of the same view as we are is shown by his memorandum of opinion wherein he stated "the *total* cost of the 14 [16?] lots with improvements was $282,975.92" (i. e., the direct cost of $237,470.73 plus the indirect cost claimed and which he allowed of $45,505.19). (Italics supplied.)

In another part of the memorandum of opinion the trial court said: "It is ordered that the original sale price of Lots 1 to 16 in Tract 14124 to Thornburg and Rais before the respective buildings were first started to be constructed on said respective lots should be and is hereby *decreed to be* their market value as of the time of such purchase, and that the interest of Mr. and Mrs. Rais consists of a one-half interest in said lots as they stood at the time and they are so appraised, and the interest of Mr. and Mrs. Thornburg consists of a half interest as they stood at that time, and they are so appraised." (Italics supplied.) But whether the true figure is $229,381.13 or $237,470.73 is of no materiality.

[5] If, however, we assume the direct cost of constructing the 14 dwellings was $229,381.13 we find by deducting the $182,000 in mortgage moneys applied to the cost that the moneys supplied by Thornburg from his bank account aggregated only $47,381.13. However, as the corporation sued to recover only the sum of $100,975.92 and not $120,975.92 it is apparent that it conceded it was not entitled to recover the $20,000 it had credited as salaries to Rais and Thornburg on its books. Hence we think we must assume that Thornburg applied this $20,000 to the "direct costs of construction" rather than using the corporation's moneys in lieu thereof. On that assumption only $27,381.13 of the corporation's moneys went into "direct construction costs." The sum of $45,505.19 which Thornburg states he retained out of the moneys due from him to the corporation were not paid over by him to the joint venture. Hence, even if the joint venture owed him that sum we think it did not become liable to the corporation for Thornburg's conversion of its funds to his own use.

[6] But even if we were to assume the contrary it was yet incumbent upon the plaintiff to prove that the sum was due

Thornburg from the joint venture. This was not shown. Thornburg's contention that he was entitled to a commission of 15% of the cost of constructing the 14 multiple dwellings rests wholly on his testimony that "I told Mr. Rais then if we built those buildings I was going to have 15% which would be added on to the cost of the building, and at the end I would be getting 7½% * * * Mr. Rais didn't say aye, yes or no * * *" to the statement. As there was no assent to the proposal, if it may indeed be classed as a proposal, no contract may be inferred. Rais, it may be added, denied that the conversation took place.

As there must be a reversal we are of the view it is unnecessary to determine whether or not plaintiff did or did not prove the joint venture was indebted to Thornburg as to the two other items included in the sum of $45,505.19, i. e., the item for $2,870 and the one for $5,725.29.

We come next to the question whether the sum of $100,466 (profit of $130,096.39 less salaries and taxes of $29,630.39) should or should not be classed as being in effect a liquidating dividend even though the corporation took no action declaring any such dividend.

[7] Upon the facts, which we have narrated, we think it clearly appears that neither Thornburg nor Rais were of the view that if they found it necessary to use any corporate moneys they would be borrowing it from, or that they would be liable in any respect to, the corporation. As the two men were the only stockholders we think the inference is plain that they entertained the average layman's concept that they were entitled to take the corporate profits without bothering in their capacity *as directors* to formally declare a dividend. No third person was harmed by their action. Moreover, it does not comport with common sense to say that these two men intended to borrow the moneys from the corporation or be classed as borrowers from it. Men are not inclined to borrow $100,000 where they have title to $100,000 available for their use and have no other use for it.

If in the case before us we should not regard the corporation as the *alter ego* of Thornburg and Rais, under the facts of the case, the result is that Rais is unmercifully defrauded as will presently be shown.

Thornburg, as has been pointed out was accountable, at most, to the corporation, and it so contended, for the sum of only $100,975.92 and not $120,975.92 as $20,000 of the moneys in his hands represented salary moneys payable by the corporation to Rais and Thornburg. Hence, out of the $100,975.92 Thornburg could have paid the federal income tax of $38,167.94, and, after doing so, he would still have had in his hands corporate moneys in the sum of $62,807.98 and in addition the salary moneys of $20,000. When Thornburg expended $47,381.13 for the direct construction costs of the joint venture we must assume he first applied the $20,000 in salary moneys in his hands. Had this been done only $27,381.13 of corporate moneys would have been used out of the $56,807.98 ($62,807.98 less $6,000 due Rais in commissions). Of this latter amount 30% would be payable to Rais or $17,042.39 and 70% to Thornburg or $39,765.59. As Rais was obligated to pay into the joint venture the sum of one half of $27,381.13 or $13,690.56 he would have been entitled to $3,351.83 from the corporation and in addition $6,000 from Thornburg or the corporation. In short, had the procedure as outlined been followed Rais would have ended up with no liability to the corporation and with $9,351.83 in cash to his credit. If, in a separate action, Thornburg could have recovered from him the items $2,870 and $5,725.29 or a total of $8.595.29 he would still have had $9,351.83 to apply to it. The moneys in the personal bank account of Thornburg were not earmarked in whole or in part as trust funds. No part of such funds were paid to Rais or traced to him. Instead they were used by Thornburg to reimburse himself for his own outlays in behalf of himself and Rais.

Upon the facts stated we are firmly of the opinion that the trial court should have found that the corporate moneys (if such they were) advanced to or paid in behalf of Rais were liquidating dividends or in the alternative it should have found that the corporation functioned only as the *alter ego* of the two stockholders and hence should not have entered a judgment against Rais.

[8] The facts we have narrated are clearly within the California rule "that where the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud the courts will refuse to recognize it. (Citing cases.) It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. (Citing cases.)" Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 522–523, 203 P.2d 522, 527.

For the reasons stated the judgment should be and it is reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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111 Cal.App.2d 968

Sam RAIS, Plaintiff and Appellant, v. THORNBURGH CONSTRUCTION CO., a California corporation, Edward L. Thornburg and Dorothy M. Thornburg, his wife, and Kenneth C. McLaren, Defendants and Respondents.

Civ. 18715.

District Court of Appeal, Second District, Division 1, California.

May 26, 1952.

Rehearing Denied June 16, 1952.

Hearing Denied July 24, 1952.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

John W. Preston, John W. Preston, Jr., for appellants.

Aaron Levinson, Albert E. Marks, for respondents.

HANSON, Justice pro tem.

This is an appeal by Sam Rais, who as a minority stockholder of the Thornburgh Construction Co., sought in behalf of the corporation and was denied an accounting by Thornburg, his wife, and Thornburg's bookkeeper, who was also a director of the corporation.

The case before us is a companion case to the basic case, Thornburgh Construction Co. v. College Heights Development (One), etc., Cal.App., 244 P.2d 735. The facts of the case are sufficiently recited in the basic case and hence need not here be repeated. In view of the conclusions we have arrived at in the basic case it is self-evident that the judgment in this case must as in the basic case be reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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111 Cal.App.2d 304

THORNBURG et al. v. RAIS et al. (two cases).

Civ. 18126, 18706.

District Court of Appeal, Second District, Division 1, California.

May 26, 1952.

Rehearing Denied June 16, 1952.

Hearing Denied July 24, 1952.

Actions by Edward L. Thornburg and another against Sam Rais and others for declaration of rights, duties and obligations with respect to certain lots on which joint venture of parties had constructed dwelling house. The Superior Court of Los Angeles County, Charles E. Haas, J., entered judgment for plaintiffs and order appointing receiver for joint venture, and defendants appealed. The District Court of Appeal, Hanson, J., pro tem., held that when funds in bank account of joint venture at all times were in excess of any sum payable on deeds of trust against its property and all other fixed charges, and it was not shown that joint venture property or its funds were in danger of being lost, or of being removed or materially injured, order appointing receiver was not warranted.

Order and judgment reversed.

Receivers ⚿14

Where funds in bank account of joint venture for construction of dwelling houses were at all times in excess of any sum payable on deeds of trust against the property and all other fixed charges, and it was not shown that joint venture property or funds were in danger of being lost, removed or materially injured, appointment of receiver was not warranted, Code Civ.Proc. § 564.

John W. Preston, John W. Preston, Jr., Los Angeles, for appellants.

Aaron Levinson, Albert E. Marks, Los Angeles, for respondents.

HANSON, Justice pro tem.

These two appeals are taken in a companion case to the case of Thornburgh Construction Co. v. College Heights Development (One), etc., No. 18716, Cal.App., 244 P.2d 735.

In this particular case instituted against Sam Rais and his wife Lois Rais, et al., the plaintiffs Edward L. Thornburg and his wife Dorothy M. Thornburg sought a declaration as to the rights, duties and obligations of the parties with respect to the sixteen lots mentioned in case No. 18716 which we shall hereafter refer to as "the basic case." In addition the complaint sought a dissolution of the joint venture involved in the ownership of the sixteen lots, a partition thereof in kind or by way of sale and the appointment of a receiver. The facts are sufficiently detailed in the basic case and hence need not here be repeated.

In the case now before us the trial court found, as it did in the basic case, that the joint venture had borrowed $100,975.92 from the corporation entity, the Thornburgh Construction Co.; that the sum mentioned consisted of $55,470.73 (moneys expended by Thornburg for direct construction costs upon the multiple dwellings), $5,725.29 (general overhead expense), $2,870 (general overhead expense), and $36,909.90 (representing the 15% commission). All these items were found to be due from the joint venture and payable by it. For the reasons sufficiently set forth in the opinion in the basic case this case must likewise be reversed and a new trial ordered.

There remains for further consideration the order appointing the receiver, from which order a separate appeal was taken in No. 18126 prior to the entry of judgment in No. 18706. This opinion will, however, suffice for both appeals.

At the time the receiver was appointed the 14 multiple dwellings had all been completed and all were rented. As the monthly rentals were collected they were deposited in a bank to the credit of Mr. Thornburg and Mr. Rais and could be withdrawn only by check bearing the signatures of both. The funds in the bank account at all times were in excess of any sums payable on the deeds of trust against the property and all other fixed charges. It was not shown that the joint venture property or the funds were "in danger of being lost, removed, or materially injured"—a prerequisite under Code of Civil Procedure, section 564, for an order appointing a receiver. Hence, the appointment of the receiver was not warranted.

The order appointing the receiver for the reasons stated must likewise be reversed.

Accordingly, it is ordered that the order in No. 18126 be and it is reversed and that the judgment in No. 18706 is likewise reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

111 Cal.App.2d 439

SANDRINI v. AMBROSETTI et al.
(two cases).

AMBROSETTI v. SANDRINI.

Nos. 4372, 4373.

District Court of Appeal, Fourth District, California.

May 28, 1952.

Rehearing Denied June 20, 1952.

Hearing Denied July 24, 1952.

Jim Sandrini brought an action against Elizio Ambrosetti, individually and as executor of the last will of Dominica Sandrini, deceased, and others, for partition and appointment of a receiver, and defendant as executor filed a cross complaint, and the action was dismissed as to the individual defendant, and the same plaintiff brought an action against Elizio Ambrosetti, as executor of the last will of Dominica Sandrini, deceased,

and others, for correction of deeds, and for other relief. The Superior Court of Kern County, Robert B. Lambert, J., rendered a judgment in the first recited action from which plaintiff appealed and rendered a judgment in the second recited action from which plaintiff appealed and defendant Elizio Ambrosetti, individually and as executor, cross appealed. The District Court of Appeal, Griffin, J., held that evidence justified finding that property acquired by plaintiff Jim Sandrini and by deceased, who was wife of such plaintiff, was acquired and held as community property and not as joint tenants.

Judgments affirmed.

1. Husband and Wife ⚷266

The husband and wife may agree with respect to character of property which they hold, and they may transmute their property from one status to another by agreement which ordinarily need not be executed with any particular formality.

2. Husband and Wife ⚷266

Notwithstanding property withheld by husband and wife as joint tenants, declarations in mutual will may constitute agreement between spouses fixing status of their property as community property.

3. Appeal and Error ⚷991

Where conveyance of property to husband and wife is in form a conveyance to them as joint tenants, form of conveyance creates rebuttable presumption of intent of husband and wife to hold property jointly, and where there is evidence that title is held in joint tenancy and also evidence that property was intended to be community property, it is for trial court to determine which line of evidence controls.

4. Appeal and Error ⚷991

Rule that where conveyance of property to husband and wife is in form a conveyance to them as joint tenants, form of conveyance creates a rebuttable presumption of intent of husband and wife to hold property jointly, and that where there is evidence that title is held in joint tenancy and also evidence that property was intended to be community property, it is for trial court to determine which line of evidence controls, is not applicable only to divorce actions and could be applied where a devisee was casting rights of a surviving joint tenant's claim to property.

5. Husband and Wife ⚷264, 266

Evidence justified finding that property acquired by husband and wife during their life time by conveyances indicating that they took as joint tenants was acquired and held as community property, that such acquisition was result of joint efforts of each, that title thereto was taken in joint tenancy without intent of converting community nature thereof into joint tenancy, that they orally agreed that all property, regardless of manner in which it was taken or extent of record, was to be considered as their community property, and that during their married life they agreed that each would have power of testamentary disposition over one-half thereof, regardless of manner in which title was held, and such property was not held by husband and wife as joint tenants.

6. Husband and Wife ⚷264

Evidence justified finding that personalty consisting of secure and unsecured note held in name of wife when wife died leaving husband surviving was community property, so that executor of deceased wife's estate would be required to account to surviving husband for one-half of such property and its proceeds.

7. Husband and Wife ⚷273(1)

Under statute giving management and control of community property to husband, husband who survived wife was entitled to have returned to him one-half of notes which were community property and which were secretly assigned by wife as a gift to two of her children. Civ.Code, §§ 161a–164, 172.

8. Husband and Wife ⚷14(3), 249

A community estate and joint tenancy can not exist at same time in same property.

◆

Johnston, Baker & Palmer, Bakersfield, for plaintiff, cross-defendants, appellant and cross-respondents.

Thomas W. Clarke, North Hollywood, Mack & Bianco, Bakersfield, for respondents and cross-appellants.

GRIFFIN, Justice.

In 1907, Jim Sandrini came to this country from Italy. He accumulated about $10,000. In 1920, he married Dominica Ciapponi, aged 31, a widow with three minor children, Josephine, aged 11, Anna, aged 5, and Charles, aged 3. The two youngest children were adopted by Jim. At that time Dominica possessed personal property of the approximate value of $2400. Their properties were commingled and thereafter used jointly. About that time they made mutual wills in favor of each other. Jim agreed to and did thereafter support the three minor children. Jim had very little education. His wife managed transactions involving the properties they acquired. After a short period of dairy operations in New Mexico they moved to the San Fernando Valley where they, on February 22, 1941, acquired a ranch and used their money as a down payment. The title thereto was taken in their names as joint tenants. The parties prospered through their joint efforts. A joint bank account was maintained and numerous properties were thereafter acquired. Dominica negotiated most of these transactions and Jim signed such papers as were necessary. He testified that he believed that all of their properties were so handled that in the event of the decease of one spouse, all the property would go to the other spouse.

In 1937, new wills were made by the parties. Jim testified he was told by his wife that she was leaving all of her property to him and that the will he signed left all his property to her in case of his death. The parties sold the San Fernando property in 1943, purchased a large ranch in Kern County and took title as joint tenants. The three children of Dominica married. A child named Jennie was born to Jim and Dominica. The dairy business prospered and many successful investments were made. A joint bank account was maintained.

In 1948, Dominica was killed in an automobile accident. After opening her safe the evidence indicates that the will made by Jim was destroyed by someone. Jim testified that it was discovered by him for the first time that his wife's will gave him only one dollar and the remainder of her property was bequeathed to her children in equal shares. Elizio Ambrosetti, husband of Josephine, was named as executor of the will. Jim also testified that sometime after Dominica's death he discovered that his wife had taken title to the properties they had acquired together, not only as joint tenants, but in their names as husband and wife, and in his wife's name alone; that his wife, during her married life, made two gifts of assigned securities and notes to her two daughters, Anna and Josephine, which notes were valued at $12,279.41.

The properties owned by Dominica and Jim at the time of her death, and the manner in which title was acquired are as follows:

Real and personal property held in joint tenancy	$176,798.19
Real and personal property held as husband and wife	210,713.06
Personal property consisting of secured and unsecured notes held in wife's name	61,239.32

Jim Sandrini, as plaintiff, commenced an action numbered 50461 in the lower court (and 4 Civil No. 4372 in this court on appeal) against Elizio Ambrosetti, individually and as executor of the last will and testament of Dominica Sandrini, and against the named children, setting out the several properties mentioned, other than the joint tenancy properties, and alleged that plaintiff owned an undivided one-half interest therein and that defendants owned one-half thereof, and asked that said properties be partitioned according to their respective rights, and that a receiver be appointed to collect the rents, etc. The action was dismissed as to the individual defendants. The executor answered, denied that the plaintiff was the owner of any portion of the property described, with certain exceptions, and claimed that the named children were entitled to such property subject to administration of the estate. An amended cross-complaint was filed by the executor and, by order of court, the three children were allowed to join in such proceeding.

Jennie refused to join as a cross-complainant and she was joined as a cross-defendant. They alleged therein that on May 30, 1948, the will of Dominica Sandrini was admitted to probate in proceeding No. 10029 in that court, and alleged the appointment of the executor; that one dollar was devised to Jim and the residue was bequeathed to the four children, share and share alike; that all of the described property, *including the property held by the parties as joint tenants,* was the community property of the parties; that as to the joint tenancy property, when the parties acquired it, and at all times thereafter, they agreed between themselves and understood it was and would be their community property, even though held as joint tenants, and that each would retain the testamentary disposition over one-half of it; that they received the income therefrom and treated it as community property; that plaintiff claims the same as his sole property as a surviving joint tenant; that such claim is without right, and that cross-complainants and Jennie Sandrini be declared the owners of an undivided one-half interest therein, subject to the administration of the estate.

By way of answer to the cross-complaint, plaintiff alleged that there were certain properties mentioned in the estate which were not the properties of the decedent, but were the properties of plaintiff; that the joint tenancy property was acquired as joint tenants with his wife, and not as community property, and that it was fully understood that it would be held in that manner so that upon the death of one party it would go to the other. It is further alleged that on February 28, 1949, the Superior Court of Kern County made an order determining plaintiff to be the surviving joint tenant of the real property described in the cross-complaint; that said order became final and is res adjudicata as to the issues involving the joint tenancy property.

As to this last claim, although the question is not raised on this appeal, the answer is contrary to plaintiff's contention, as indicated in Estats of Basso, 68 Cal.App.2d 294, 156 P.2d 476; and United States v. Pierotti, 9 Cir., 154 F.2d 758.

On April 14, 1950, plaintiff, Jim Sandrini, filed another action No. 52771 (Appellate Court No. 4 Civil 4373) against all of the named defendants. The amended complaint contains seven separate causes of action, four of which were later dismissed. After alleging the general facts related in the other action, it is alleged that plaintiff's wife, during her married life, and without his knowledge, had withdrawn money from the joint tenancy bank account, converted it into property which she placed in their names as husband and wife, not as joint tenants, and that she also placed property in her separate name; that he also discovered, after her death, that she invested $12,500 of the joint account funds in promissory notes which she gave and assigned to her two daughters.

In other causes of action, it is generally alleged that such property as was taken in plaintiff's wife's name, either individually or with plaintiff as husband and wife, was property intended by the parties to be held as joint tenants and that decedent deceived plaintiff by holding the property other than in joint tenancy. Plaintiff prayed that the deeds be corrected accordingly; that the two daughters be required to account to plaintiff for all money taken from the joint account and given to them by plaintiff's wife during their marriage, and to account for all income therefrom.

Defendants answered and contended that the property was either community property of the parties or separate property of the deceased, and never was intended to be held as joint tenants.

The two cases were consolidated for trial and the court found generally as to action No. 50461 that all of the real and personal property standing of record in the name of plaintiff and his deceased wife, whether as joint tenants or otherwise, was community property, and likewise as to personal property standing in the name of the wife alone; that as to the joint tenancy property it was orally agreed and understood between them that at all times it was, and was to be considered as, community property. It concluded that since all of the property mentioned was community property, one-half of it belonged to plaintiff and the remainder belonged to defendants, subject to administration, and ordered partition accordingly. It also ordered plaintiff to account to the executor for the rents, issues and profits of the property standing of record in joint tenancy, and ordered the executor to account to plaintiff for the one-half of the property standing of record in the name of the decedent alone.

As to action No. 52771 (4 Civil No. 4373) the court found against plaintiff on all counts except the one involving the notes assigned to the two daughters. It found that on January 28, 1947, the deceased wife did transfer, by way of gift to them, a note showing a balance of $6,279.41, and on February 21, 1947, another note with a balance of $6,000, which notes were community property of plaintiff and his deceased wife; that such gifts were made without the knowledge or consent of plaintiff and that therefore plaintiff was entitled to have returned to him one-half of such gifts, or $6,139.70, with interest. Judgment was entered accordingly.

Plaintiff appeals from the portion of the judgment denying him relief in action No. 52771. Defendant and cross-complainant, Elizio Ambrosetti, individually and as executor, appeals from that portion of the judgment in action 50461, which adjudges that plaintiff owns an undivided one-half interest in the personal property therein mentioned standing in Dominica Sandrini's separate name.

The first and main question presented is the sufficiency of the evidence to support the court's finding that the property held in joint tenancy was acquired and held by plaintiff and his wife as community property; that such acquisition was the result of the joint efforts of each; that title thereto was taken in joint tenancy without any intent of converting the community nature thereof into joint tenancy; that it was orally understood and agreed between them that all of their property, regardless of the manner in which it was taken or stood of record, was to be considered by them to be their community property; that during their married life it was agreed and understood that each would have the power of testamentary disposition over one-half thereof, regardless of the manner in which title was held.

Plaintiff testified generally that his wife transacted all details of the purchase and sale of the properties; that he trusted her to abide by the agreement they made at the time they were married and many other times during their married life that the property would be so held that in case his wife died it would come to him and in case he died it would go to her; that he did not know the distinction between joint tenancy and tenancy in common; and that he believed they made mutual wills in favor of each other.

Plaintiff's testimony was corroborated by his daughter Jennie, who testified she heard her mother say in plaintiff's presence that if anything happened to "me, when I die it will go to you (father) and when you die it will go to me (mother)". In addition to the form of the deeds being made in joint tenancy, there is the testimony of the real estate agent who handled two of the transactions, that Mrs. Sandrini requested that title be taken as joint tenants with her husband. Defendants endeavored to impeach this agent's testimony by showing he made a contrary statement on a previous occasion in the presence of three other persons when he stated that Mrs. Sandrini said nothing in respect to the manner in which title should be taken but stated that he "just assumed" that was the way she wanted it vested.

There is uncontradicted evidence in the record showing that when Mr. and Mrs. Sandrini acquired one piece of property with the son Charles, the instructions read that the Sandrinis were to hold their interests as joint tenants; that Mrs. Sandrini inquired as to its meaning and that she stated that she did not care how title stood so long as she would obtain one-half of their interest and her husband the other half; that the escrow agent then changed it and struck out the clause "as joint tenants". The deed is in evidence and so indicates.

There is also the testimony of the three elder children and of several other witnesses, that Mrs. Sandrini, in the presence of plaintiff, on many different occasions said that she and Jim had their property together, and "when she died half was going to her four children" and as to plaintiff's half, "he was to do with it what he wanted" and that Jim said "that was all right with him, 'I feel the same way about it' ", or that she said, when discussing the manner in which title was taken, "There is nothing to worry about, it is half yours and half mine".

One witness testified that when the attorney came to get into the safe and examine the deeds after Mrs. Sandrini's death, the attorney remarked: "Some of this belongs to the estate and some does not", and that "Jim said 'It don't make any difference, it is all ours. It is all mine and my wife's' "; that the attorney explained that under the will the wife's part was given to the four children and Jim said "Yes, I understand that. That is the way it was supposed to be". The record further shows that Jim joined with the executor in sharing one-half of the proceeds from the sale of crops from certain properties and in receiving interest payments on notes where title was held as husband and wife. Plaintiff denied that he was present or participated in any such conversations.

Plaintiff argues that there is nothing in the evidence indicating that Dominica Sandrini ever intended, by the general terms of the will, that any part of the specific property held in joint tenancy was to pass by her will; that in the absence of fraud or estoppel against the survivor, and where decedent had the sole management and control of the property which she herself had placed in joint tenancy, the right of survivorship of a surviving spouse in property held in joint tenancy by a husband and wife may not be defeated solely by oral evidence of an alleged agreement between the spouses based on extrajudicial statements, which are denied by the survivor; that Civil Code section 161 provides that a husband and wife may hold property as joint tenants, as tenants in common, or as community property; and that joint tenancy tenure is distinguished from community property tenure and that each joint tenant's interest is separate property, citing Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003; that property held in joint tenancy should not be placed in the estate of a deceased as joint tenant so as to be carried by her will, particularly when the deceased joint tenant was the manager of the property who, as between the joint tenants, was the one responsible for the use of the joint tenancy form in the first place; that under such circumstances the law requires quite substantial evidence in order to overturn formal instruments of title; and that there is not any substantial evidence present here, even if the testimony of the witnesses is accepted as true, and every reasonable inference capable of being drawn therefrom is indulged in. In support of these contentions he cites such cases as Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933; Walker v. Walker, 108 Cal.App.2d 605, 239 P.2d 106, and Socol v. King, 36 Cal.2d 342, 223 P.2d 627, 630, which sets out the applicable rules together with numerous citations holding that property acquired under the joint tenancy instrument may be shown to be actually community property according to the intention, understanding or agreement of the parties, but where no such intention, understanding or agreement exists, "a true joint tenancy is created by a conveyance to husband and wife in that form, although the property is purchased with community funds". See, also, Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055. He argues that this case is not a divorce action where the spouses are living and the court can weigh the direct testimony as to statements and admissions of intent; and that the law is such that the presumptions in favor of the joint tenancy instruments cannot be overcome by the evidence in this case.

The evidence indicates and the court found that the parties had no knowledge or understanding of the effect of taking title as joint tenants and rather indicates that both parties believed, at all times, that whatever property they admittedly acquired by their joint efforts during their lifetime would, upon their deaths, belong one-half to the husband's estate and one-half to the wife's estate, and that each would have testamentary disposition of his or her one-half. The confusion seemingly arose when it was discovered, after the wife's death, the title to the property stood in their names as joint tenants, as husband and wife, and in the wife's separate name, and that the wife's will bequeathed her one-half to her four children rather than to plaintiff.

[1, 2] It is well settled that a husband and wife may agree with respect to the character of the property which they hold, and that they may transmute their property from one status to another by agreement which ordinarily need not be executed with any particular formality, and it has been declared that notwithstanding the fact that property is held as joint tenants, declarations in a mutual will may constitute an agreement between the spouses fixing the status of their property as community property. Estate of Watkins, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1; Norton v. Estate of Norton, 41 Cal.App. 614, 183 P. 214; Chase v. Leiter, 96 Cal.App.2d 439, 215 P.2d 756.

An inference may be here warranted by the terms of Dominica Sandrini's will that plaintiff and his wife had entered into some agreement and had reached an understanding as to the character of the property they acquired and the manner in which it would be held so that plaintiff would receive one-half thereof and that the deceased would receive one-half and that her one-half would be subject to her testamentary disposition. Since there was no specific bequest of any particular property, the inference might reasonably be drawn that they were to consider all property as community property, regardless of the manner in which title was held, and that each would retain the testamentary power over his or her one-half interest. It provided for a bequest of one dollar to plaintiff and stated: "My husband and myself having heretofore divided our property between us".

In Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443, a trust was created involving joint tenancy property. The court held that declarations regarding the intent of the parties was admissible and that the trial court was warranted in concluding that all of the property was community property despite the use of the joint tenancy form in some of their holdings.

Plaintiffs rely principally upon the holding in Socol v. King, supra. There the court found that the joint tenancy prevailed and said where there is an oral or written agreement as to the ownership of the property or where such an understanding *"may be inferred from the conduct and declarations of the spouses,"* the terms of the deed are not controlling, but that where such circumstances do not exist, a true joint tenancy is created by a conveyance to a husband and wife in that form, although the property is purchased with community funds. It did hold, however, that when property is purchased with community funds and title is taken in joint tenancy at the request of the wife, the secret intention of the wife that the property shall remain part of the community property is not effective; that she cannot defeat her act by testimony of a hidden intention not disclosed to the other party at the time of the execution of the document.

It was held in Rogers v. Rogers, 86 Cal.App.2d 817, 195 P.2d 890, 892, that an executed oral agreement to the effect that all properties owned by the parties at the time of marriage or subsequently acquired by them should be community property was sufficient to change the character of the property from separate to community property even though the parties held the property as joint tenants; and that under such circumstances the court is not bound by the form of the deed alone. The evidence supporting the finding was predicated upon statements by the husband to his wife that "we were putting all our properties in this one property, so that it would be easily handled. * * * it was our community property. We would take it in joint tenancy. * * * She also told me that everything we had was community property, that it was our both, it belong to both of us, equal valuations * * * well, that everything was equally mine, that we had equal valuations on everything, everything was community property."

[3] It is true that the form of the conveyance creates a presumption of intent to hold the property jointly, but such presumption may be overcome by evidence of a contrary intent; and that where there is evidence that title is held in joint tenancy and also evidence that the property was intended to be community property, it is for the trial court to determine which line of evi-

dence controls. Perdicalis v. Perdicalis, 92 Cal.App.2d 274, 206 P.2d 650.

In Rogers v. Rogers, supra, the court stated that a trial court's finding will be reversed on appeal, in this respect, only where it is totally unsupported by evidence and the evidence compels a contrary finding as a matter of law.

From an examination of the several cases cited, what facts and circumstances are sufficient to overcome the presumption are as varied as the number of cases in which the problem has been presented. In Luminoso v. Luminoso, 75 Cal.App.2d 472, 171 P.2d 516, a divorce action, at the time of taking title as joint tenants, there was no discussion between the spouses as to the taking of title as joint tenants. One was ignorant of the form of the deed but they always talked of the property as community property. The evidence in that case was held sufficient, where the property was purchased with community funds. See, also, Buehler v. Buehler, 73 Cal.App.2d 472, 166 P.2d 608; and Perdicalis v. Perdicalis, 92 Cal.App.2d 274, 206 P.2d 650.

[4] Defendants argue that the rule only applies in divorce actions, where the parties are living and testify to a previous agreement between them, and cannot be applied to actions such as this where a devisee is testing the rights of a surviving joint tenant's claim to the property. We perceive no particular distinction or line of demarcation in the application of the principles enunciated, and conclude that the foregoing rules are not limited, in their application, to divorce actions. This same contention was made in Chase v. Leiter, 96 Cal.App.2d 439, 449, 215 P.2d 756, declaring certain property held in the wife's separate name to be community property. The court cited Estate of Watkins, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1; Estate of Sehabiague, 47 Cal.App.2d 793, 119 P.2d 30; and Estate of Wilson, 64 Cal.App.2d 123, 148 P.2d 390, where property was being purchased under a contract of sale by a single woman and after marriage she deeded it out to a third party, who in turn deeded it back to her and her husband as joint tenants. Later, the husband executed a deed of gift to his wife. After the wife's death, her heirs objected to the husband's petition for distribution of the property to himself as sole distributee. After reciting the evidence as to the manner in which the parties intended to hold the property the court in the Wilson case, 64 Cal.App.2d at page 126, 148 P.2d at page 392, said:

> "If the conclusion of the trial court had to be based upon the deeds alone, that is, if the nature of the Wilsons' interest in the property which was their home was determined entirely by the written instruments, appellants' contention would have a sound basis. But, as between Mr. and Mrs. Wilson and *those claiming through them,* the character of their interest in the property is not necessarily that which would follow from the form of the deeds." (Italics ours.)

[5, 6] In the case of Chase v. Leiter, supra, [96 Cal.App.2d 439, 215 P.2d 761] it is remarked:

> "Respondent contends that the rule that a husband and wife by agreement may change the form of their properties into community property has been followed only in divorce cases, with the single exception of Estate of Watkins, supra, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1. Such contention overlooks such cases as Estate of Sehabiague, 47 Cal.App.2d 793, 119 P.2d 30, and Estate of Wilson, 64 Cal.App.2d 123, 148 P.2d 390. * * * In the Wilson case the court said 64 Cal.App.2d at pages 126–127, 148 P.2d [390] at page 392: 'It is now too well settled to justify more than the citation of the authorities that in spite of the mold into which a deed would seemingly press a title, either because of the intent with which the deed was made [citation], or made and received [citation], or because of an oral agreement between a husband and wife, carried into effect, determining their respective interests in real estate [citations] property which, measured by the deed, would not be community property, nevertheless may be just that.'" (See, also, Estate

of Sill, 121 Cal.App. 202, 9 P.2d 243; and Estate of Wahlefeld, 105 Cal.App. 770, 288 P. 870.)

There is sufficient competent evidence supporting the finding of the trial court on this issue. It therefore follows that the evidence fully supports the court's finding that the property standing in the name of Dominica Sandrini alone was community property and that the executor should account to plaintiff for one-half of it and its proceeds.

[7] Under sections 161a–164 and 172 of the Civil Code, giving the management and control of the community property to the husband, plaintiff was entitled to recover the notes secretly assigned by Dominica Sandrini as a gift to the two preferred children, which property was properly found to be community property, and the trial court was authorized to order that one-half thereof be subjected to the administration of the estate. Salveter v. Salveter, 135 Cal.App. 238, 26 P.2d 836; McMullin v. Lyon Fireproof Storage Co., 74 Cal.App. 87, 239 P. 422; Henry v. Hibernia Savings & Loan Society, 5 Cal.App. 2d 141, 42 P.2d 395; Bank of Suisun v. Fiske, 65 Cal.App. 771, 225 P. 7; 3 Cal.Jur. Ten Year Supp. p. 618, sec. 105; 3 Cal. Jur. Ten Year Supp. p. 608, sec. 98.

[8] The remaining question involves the appeal of plaintiff from the order denying him relief demanded in action No. 4373, wherein the main contention is that the court erred in refusing to declare that it was the intention of the parties that the entire estate was to be held by them as joint tenants and that accordingly plaintiff was entitled to all of it by reason of the termination of that joint tenancy by the death of his wife. A community estate and a joint tenancy cannot exist at the same time in the same property. Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003. The finding heretofore made and discussed sufficiently disposes of this question since the court properly found the property was community property. The sufficiency of the evidence to support the contentions made by plaintiff pertaining to this count as well as the other counts involved was for the trial court to determine. It cannot be said that its finding on the subject was lacking in evidentiary support or was contrary to law. Estate of Harris, 9 Cal.2d 649, 72 P.2d 873; California Trust Co. v. Bennett, 33 Cal.2d 694, 204 P.2d 324; Civil Code secs. 683, 1091.

Judgments affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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111 Cal.App.2d 337

PEOPLE v. VAN VALKENBURG.

Cr. 2781.

District Court of Appeal, First District, Division 1, California.

May 27, 1952.

Rehearing Denied June 11, 1952.

Defendant was convicted in the Superior Court, City & County of San Francisco, Twain Michelsen, J., for unlawful possession of heroin and he appealed. The District Court of Appeal, Peters, P. J., held that the evidence was sufficient to justify the trial court in holding the accused for trial.

Affirmed.

1. Poisons ⚷9

In prosecution for unlawful possession of narcotics, it is necessary to show that defendant had knowledge of presence of narcotics, but such possession need not be exclusive, and may be shown by circumstances as well as by direct evidence, and may be constructive as well as physical. Health and Safety Code, § 11500.

2. Poisons ⚷9

Evidence, including testimony of narcotics officers to effect that heroin was found in mattress of bed of accused, in accused's shirt pocket and in and about room of accused, raised reasonable and permissible inference that heroin was accused's, even though his wife shared the room with him, and was sufficient to justify court in holding accused for trial on two counts for unlawful possession of heroin.

Health and Safety Code, § 11500; Pen. Code, § 995.

3. Criminal Law ⚿274

Where defendant in prosecution on two counts for possession of heroin withdrew his not guilty pleas at time his retained experienced lawyer was absent and defendant was represented by chief public defender who informed defendant that he was inexperienced in criminal trials, and defendant made no contention that he was coerced in withdrawing his not guilty pleas at any time until he had reason to believe that his motion for probation would be denied and that he was to receive consecutive and not concurrent sentences, trial court was justified in refusing to permit defendant to withdraw his pleas of guilty. Health and Safety Code, § 11500.

4. Criminal Law ⚿274

Pleas of guilty should be set aside where public officials, directly or impliedly, coerce or induce the pleas or overreach the will of the accused, but mere disappointment of accused in awarded sentence or reliance upon his own counsel's advice, are not sufficient to prove abuse of discretion in denying a motion to withdraw guilty pleas.

5. Criminal Law ⚿622(2)

In prosecution against husband and wife jointly and against husband alone for possession of heroin, where no motion for a severance of charges as between husband and wife was made and no showing was made as to why a severance should have been granted, the granting of a severance was within discretion of trial judge and his refusal to grant a severance did not constitute an abuse of discretion. Health and Safety Code, § 11500; Pen.Code, § 1098.

6. Criminal Law ⚿984

Sentencing to consecutive terms a defendant, who while on bail on charge of unlawful possession of heroin, again violated the law by having possession of heroin and subsequently jumped bail and became a fugitive from justice, was not an abuse of discretion. Health and Safety Code, § 11500.

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

PETERS, Presiding Justice.

By an information dated February 11, 1949, William Van Valkenburg, the appellant, and his wife were jointly charged with three violations of section 11500 of the Health and Safety Code. The charges are that on January 10, 1949, the unlawfully possessed heroin (count one), demarol (count two) and codeine (count three). In addition, appellant was charged with two gun law violations. Both pleaded not guilty and were admitted to bail. While on bail, by an information dated April 6, 1949, appellant alone was charged with another violation, the charge being that he was unlawfully in possession of heroin on March 22, 1949. He jumped bail, became a fugitive, and was not apprehended until early in 1951. He then pleaded not guilty to the second charge. Thereafter appellant, through his counsel, moved to set aside his pleas of not guilty to the two heroin counts (the first count of the first information and the only count in the second), which motions were granted, and pleas of guilty entered. The other two narcotic counts and the two gun law counts, on motion of the district attorney, were then dismissed. A month later appellant, through his counsel, moved to set aside his pleas of guilty and to reinstate pleas of not guilty to the two charges. The motions were denied, probation was denied, and appellant was sentenced to the state prison on the two counts, the sentences to run consecutively. The appellant appeals from the judgment and from certain orders of the trial court. He contends:

1. That the evidence at the preliminary hearings was insufficient to justify his commitment on either information;

2. That his motion to set aside his guilty pleas should have been granted;

3. That there should have been a severance; and

4. That the court abused its powers in sentencing him to consecutive terms. There is no merit to any of these contentions.

Was the Evidence at the Preliminary Hearings Sufficient to Constitute Probable Cause on the Two Charges of Possession of Heroin?

This point requires but brief consideration. Appellant was represented by counsel at both preliminary hearings. At the first preliminary hearing the evidence disclosed that two narcotic officers, on January 10, 1949, searched the apartment where appellant and his wife resided. They found a paper containing heroin between the mattress and the box springs. In response to a question by one of the officers, Mrs. Van Valkenburg claimed that this heroin belonged to her. Appellant remained silent. In a clothes closet in the pocket of a shirt which defendant admitted that he owned, another bindle of heroin was found. Appellant stated that he did not know how it had got into his shirt pocket. A hypodermic needle was found, and appellant appeared to be under the influence of narcotics. Codeine and demarol were also found in the room as was a gun, but the counts involving possession of these articles have been dismissed. On this evidence appellant and his wife were held for trial. Appellant moved in the Superior Court to set aside the information on the ground of insufficiency of evidence, and the motion was denied.

The preliminary on the charges contained in the second information was held on March 30, 1949. Narcotic officers testified to searching appellant's hotel room on March 22, 1949, in his presence, and finding a container of heroin in the toilet bowl, and also in finding heroin on the bathroom floor. More heroin was discovered in and about the hallway outside the hotel room. Defendant admitted ownership of the heroin found in his room, and admitted that he was a user.

[1, 2] Appellant claims that this evidence was insufficient to hold him on trial on either of the charges. Even if the evidence were insufficient, it is very doubtful if one who has later pleaded guilty, may raise this point on appeal. See People v. Wilson, 25 Cal.2d 341, 153 P.2d 720; People v. Outcault, 90 Cal.App.2d 25, 202 P.2d 602. However this may be, on the merits, it is obvious that the evidence produced at both preliminaries was amply sufficient to show "reasonable" and "probable" cause within the meaning of section 995 of the Penal Code. Appellant's argument is that, as to the charge in the first information, there is no evidence that he was possessed of the heroin, and that the only evidence is that of his wife who admitted ownership. Appellant forgets that heroin was not only found in the mattress of the bed occupied by him and his wife, which heroin his wife claimed to own, but was also found in the pocket of a shirt admittedly owned by him, and that concerning this heroin no admissions were made. While it is necessary, on a possession charge, to show knowledge on the part of the defendant, People v. Gory, 28 Cal.2d 450, 170 P.2d 433, such possession need not be exclusive, and may be shown by circumstances as well as by direct evidence, and may be constructive as well as physical. People v. Torres, 98 Cal.App.2d 189, 219 P.2d 480; People v. Brown, 92 Cal.App.2d 360, 206 P.2d 1095; People v. Graves, 84 Cal.App.2d 531, 191 P.2d 32; People v. Wong Fun, 39 Cal.App.2d 211, 102 P.2d 774. Certainly finding heroin in a mattress of the bed of the accused, or in his shirt pocket, or in and about his room, raises a reasonable and permissible inference that the heroin was his, even though another person, such as his wife, may share the bed or room with him. Such evidence is sufficient to justify the Municipal Court in holding the accused for trial. The evidence on the second information was clearly sufficient.

Should the Trial Court Have Permitted Appellant to Withdraw His Pleas of Guilty?

[3] The facts surrounding the entering of the pleas of guilty are as follows: In the Municipal Court, at both preliminary hearings, appellant was represented by attorney Arthur Klang. After his apprehension as a fugitive, appellant was also represented by Klang in some of the pro-

ceedings before trial in the Superior Court. Appellant's wife was separately represented by attorney Hennessy. On April 3, 1951, attorney Polonsky, an associate of Klang's, moved that Klang be permitted to withdraw as counsel on the ground that he had not been paid. The motion was granted, the chief deputy public defender was appointed to represent appellant, and the cases involving appellant and his wife were set for trial on April 30, 1951. On that date the prosecuting attorney informed the court that appellant had raised the money to pay and had paid Klang a fee, that Klang was again representing appellant, but that Klang had left the city on a trip and would not be back until sometime in June. The prosecuting attorney also informed the court that he had informed Klang, before his departure, that the state would have no objection to a continuance of the cases against appellant and his wife, but that the state would oppose a severance, and that appellant's wife might object to a continuance. Hennessy, attorney for Mrs. Van Valkenburg, informed the court that he had told Klang, before his departure, that he, Hennessy, had no objection to a continuance but that his client would have to be consulted and that she might object. The bail for both appellant and his wife had been fixed at a high figure. The trial court indicated that Mrs. Van Valkenburg had the right to refuse a continuance and that she was entitled to go to trial, and suggested to appellant that he secure other counsel with the understanding that Klang should return the unearned fee. Appellant objected to this procedure. Mrs. Van Valkenburg refused to agree to a continuance until Klang should return. The court then told appellant to get other counsel and again appointed the chief public defender to represent appellant, subject to any other association the appellant might desire to make. The court thereupon fixed May 14, 1951, as the date for trial on the charges contained in the first information.

On May 10, 1951, appellant appeared to plea to the second information. He pleaded not guilty. He was then represented by Polonsky. The court ordered this charge tried on May 14, 1951, together with the charges contained in the first information.

On May 14, 1951, appellant, represented now by Polonsky on all the charges, moved to withdraw his not guilty pleas to count one of the first information (joint charge with his wife of possession of heroin), and to the charge contained in the second information (possession of heroin). The motion was granted and appellant pleaded guilty to these two charges. Thereupon, upon motion of the prosecuting attorney, the gun law counts and the two counts charging unlawful possession of demarol and codeine were dismissed. Immediately counsel for appellant made motions for probation, which the court took under advisement.

Klang returned to the city sometime early in June. On June 14, 1951, he moved that appellant be permitted to withdraw his two guilty pleas on the ground they had been secured by coercion. Klang requested and was granted permission to file the affidavit of appellant in support of the motion. In this affidavit appellant recounts the facts substantially as they have been set forth in this opinion; avers that Polonsky informed the affiant that he was without experience in criminal trials; avers that when the court denied the continuance and set the cases for trial he knew he would have to proceed to trial with inexperienced counsel; that he was thus "coerced" by these circumstances to withdraw his pleas of not guilty and plead guilty to the two charges.

[4] The trial court was justified in refusing to permit the appellant to withdraw his pleas. No coercion or overreaching by the court, prosecuting attorney or other government official is charged. The essence of appellant's position is that he was coerced into pleading guilty because his retained experienced lawyer was absent, leaving behind only an inexperienced lawyer to represent him, because the state opposed a severance of the charges as between appellant and his wife, and because of the refusal to grant a continuance. At no time during the hearing of May 14th, or in any of the preceding hearings, did appellant

raise these points. The prosecuting attorney testified that the agreement on appellant's part to plead guilty to the two charges, and on the state's part to dismiss the other four charges, was worked out in conferences covering two or three days. During these conferences there was no intimation that appellant felt coerced. It is quite obvious that this concept of coercion only arose after appellant had reason to believe his motion for probation would be denied, and that he was to receive consecutive and not concurrent sentences. While pleas of guilty will and should be set aside where the public officials, directly or impliedly, coerce or induce the plea or overreach the will of the accused, People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; People v. Griggs, 17 Cal.2d 621, 110 P.2d 1031; People v. Campos, 3 Cal.2d 15, 43 P.2d 274; People v. Schwarz, 201 Cal. 309, 257 P. 71; People v. Odlum, 91 Cal.App.2d 761, 205 P.2d 1106; People v. Butler, 70 Cal.App.2d 553, 161 P.2d 401; People v. Outcault, 90 Cal.App.2d 25, 202 P.2d 602; People v. McGarvy, 61 Cal.App.2d 557, 142 P.2d 92, it is equally clear that mere disappointment of the accused in the awarded sentence, or reliance upon his own counsel's advice, are not sufficient to prove abuse of discretion in denying the motion. People v. Dabner, 153 Cal. 398, 95 P. 880; People v. Manriquez, 188 Cal. 602, 206 P. 63, 20 A.L.R. 1441; People v. Lennox, 67 Cal. 113, 7 P. 260; People v. Miller, 114 Cal. 10, 45 P. 986; People v. Griffin, 100 Cal.App.2d 546, 224 P.2d 47; People v. Butler, 70 Cal.App. 2d 553, 161 P.2d 401. The appellant has failed to prove an abuse of discretion.

Should There Have Been a Severance?

[5] No motion for a severance was made and no showing made as to why one should have been granted. It is true that the prosecuting attorney indicated that he would oppose such a motion, but that is no excuse for not making it. Under Penal Code, section 1098, the granting of a severance is placed within the discretion of the trial judge. No abuse of discretion here appears.

Was There an Abuse of Discretion in Sentencing Appellant to Consecutive Terms?

[6] The appellant urges that the trial judge was prejudiced against him because he was charged with narcotic offenses, and, as a result, gave him consecutive and not concurrent sentences. There is no evidence of such claimed prejudice in the record. The trial judge was entitled to consider the fact that while this appellant was on bail on the charges contained in the first information, he again violated the law by having possession of heroin, and that he then jumped bail and became a fugitive from justice. He was also entitled to consider the testimony of the narcotic officers at the two preliminary hearings. Whether the sentences should be concurrent or consecutive was for him to decide. No abuse of discretion appears.

The judgment and orders appealed from are affirmed.

BRAY, and FRED B. WOOD, JJ., concur.

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111 Cal.App.2d 359

PEREIRA v. PEREIRA.

Civ. 4358.

District Court of Appeal, Fourth District, California.

May 27, 1952.

Accounting action by Ethel Pereira against Manuel R. Pereira based upon alleged breach of terms of property settlement agreement. The Superior Court of Kings County, Clark Clement, J., found that defendant refused to deliver personal property valued at $250, that defendant received substantially more community income than plaintiff and was not entitled to allowance for alleged services rendered, that plaintiff received $340 more than her share of livestock, and that defendant was entitled to $194 credit for his interest in farm equipment, but did not set forth any of such sums in judgment rendered for plaintiff, specify amount of excess of community income, state excess to be equal to reasonable value of defendant's claimed services, if any, or make reference or accounting. Defendant appealed. The District Court of Appeal, Mussell, J., held that the action was not properly disposed of by mere statement of balance due plaintiff.

Judgment reversed.

1. Husband and Wife ⚷281

In accounting action based upon alleged breach of terms of property settlement agreement, where plaintiff's accountant was unable to determine whether all outstanding checks were accounted for or whether deposits represented income or borrowed money, evidence was not sufficient to support finding that bank funds, for which defendant allegedly had failed to account, amounted to $700.98.

2. Husband and Wife ⚷281

In accounting action based upon alleged breach of terms of property settlement agreement, evidence was not sufficient to sustain finding that cooperative gin held $1,128.34 in community money for cotton and cotton seed sold previous to 1950 crops, and that a cooperative association held $680.46 in community money, of which plaintiff was entitled to one-half, for cotton and cotton seeds sold previous to 1950 crop.

3. Husband and Wife ⚷281

In accounting action based upon alleged breach of property settlement agreement, where trial court found that defendant refused to deliver personal property valued at $250, that defendant received more of community income than plaintiff and was not entitled to allowance for services rendered, that plaintiff received $340 more than her share in livestock, and that defendant was entitled to $194 credit for farm equipment, but none of such items appeared in judgment for plaintiff, and no reference or accounting was made, action was not properly disposed of by mere statement of balance due plaintiff.

4. Appeal and Error ⚷717

Upon appeal in accounting action based upon alleged breach of terms of property settlement agreement, memorandum order for judgment included in plaintiff's closing brief was not part of record and, while it indicated reasoning by which trial court arrived at some of amounts set forth in judgment, it could not be substituted for the trial court's findings.

5. Trial ⚷404(1)

The trial court's findings constitute the actual decision of the court.

6. Appeal and Error ⚷110

Order denying motion for new trial is not appealable.

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Lopez, Gomes & Hyde, Fresno, for appellant.

Albert Peterson, Hanford, for respondent.

MUSSELL, Justice.

This is an action for an accounting based upon the alleged breach by defendant of the terms of a property settlement agreement entered into by the parties hereto on February 16, 1950, and a subsequent agreement relating thereto dated February 22, 1950. These agreements provided for the division of real and personal property consisting of 320 acres of ranch land, together with the buildings thereon, livestock, ranch tools, appliances, wagons, tractors, household furniture, funds in the Anglo California National Bank at Hanford, and many miscellaneous items of personal property.

The agreement of February 22nd recited, among other things, that the parties had divided the dairy stock and had selected the portion of the real property to be owned by each. This agreement also contained a recital that the plaintiff had accepted certain personal property, including household furniture and that plaintiff agreed to pay the sum of $625 difference in values of personal property divided and also provided that the plaintiff would pay to defendant the sum of $248 for his interest in the household furniture. The agreement also provided for a division of sheep and poultry, for a sale of horses and a division of funds derived from such sale and that the plaintiff should have the use of certain buildings until May 1, 1950, at which time she agreed to vacate the premises.

Plaintiff alleged in her complaint that the defendant had failed, refused and neglected to account for funds in the Anglo California National Bank at Hanford and for funds received by him from the 1949 cotton crop grown on the property and that defendant failed and refused to deliver to plaintiff certain personal property as provided in the agreement of February 22nd. The prayer of the complaint was that the defendant account for moneys in said bank, for moneys received from the cotton crop, and for the personal property which defendant failed to deliver in accordance with the agreement.

Defendant, in his answer, alleged that a full accounting had been made in March, 1950, and that he should be allowed the reasonable value of services in caring for and farming the property.

The cause was tried by the court without a jury and it found, among other things, that

1. The funds in said bank for which the defendant failed to account amounted to the sum of $700.98 and that the plaintiff was entitled to one-half thereof;

2. The defendant failed, refused and neglected to deliver to the plaintiff household effects and personal property and that the value thereof was the sum of $250;

3. The Central Valley Cooperative Gin holds community moneys, payable at later undetermined dates for cotton and cotton seed sold to said gin previous to the 1950 crop; that said moneys total $1,128.34, of which plaintiff is entitled to one-half or $564.17; that the California Cotton Cooperative Association holds community moneys payable at a later undetermined date for cotton and cotton seed sold to said gin previous to the 1950 crop, said moneys totaling $680.46, of which the plaintiff is entitled to one-half or $340.23;

4. The defendant has received substantially more of the community income than the plaintiff and that the defendant is not entitled to allowance for labor in any sum whatsoever;

5. The plaintiff through mistake, received more than her share of livestock; that the excess received by her amounts to $340; that certain of the farm equipment received by the plaintiff was not included in the division of the property and that defendant is entitled to a credit of $194 for his interest in said equipment.

The court concluded that the plaintiff is entitled to a money judgment against defendant in the sum of $654.54 and is entitled to $904.40 of the moneys held by the Central Valley Cooperative Gin and California Cotton Cooperative Association, payable after the 16th day of June, 1951, at undetermined dates. Defendant appeals from the judgment entered for these sums.

The principal question for determination here is whether the evidence is sufficient to support the findings and judgment.

[1] We are unable to find any substantial evidence in the record to support the trial court's finding that the funds in the Anglo California National Bank at Hanford amounted to the sum of $700.98 on February 16, 1950 (the date of the property settlement agreement). The testimony introduced by plaintiff was that of an accountant who testified from a memoranda made by him from various checks and bank statements received from the attorney for plaintiff, who apparently secured them for the attorney for the defendant, and it is evident that the witness was unable to determine whether all of the outstanding checks were accounted for or whether the deposits in the account represented income or borrowed money. He testified that the balance as of February 16, 1950, amounted to the sum of $815.73. An accountant, who testified in behalf of the defendant, testified that as of February 22, 1950, the adjusted bank balance was $379.62. Neither of these figures agree with the amount of the balance found by the trial court.

The court next found that the defendant failed, refused and neglected to deliver to plaintiff the household effects and personal property and that the value thereof was the sum of $250. The household effects and personal property are not listed or referred to in the findings. Furthermore, it does not appear that this sum was included in the judgment rendered.

[2] The trial court's finding number three herein is apparently based on the testimony of witness C. E. Patton, Jr., office manager of the Central Valley Cooperative Gin in Hanford and plaintiff's accountant, J. L. Spinetta. Mr. Patton testified as to payments made to defendant on the 1949–1950 cotton crop and stated that there were sums still to be paid from this crop from two sources, the Central Valley Cooperative and the California Cooperative Gin at Bakersfield; that he obtained information as to the funds held and to be paid by the California Cooperative by telephone and did not see these records. An objection was sustained to this hearsay testimony. The witness also stated that he did not know when withheld sums would be paid. The witness Spinetta admitted that he did not get a complete statement from the gin and that he arrived at certain figures from papers given to him by plaintiff's attorney. In this connection, it may be noted that the agreement of February 16, 1950, provided that the defendant would account for all money received from and after June 28, 1949, and the finding apparently included moneys payable from crops long prior to 1949. Furthermore the testimony does not show whether the 1950 cotton crop was obtained from property owned by plaintiff or property owned by the defendant. The record fails to disclose substantial testimony to support the trial court's finding number three.

Finding number four herein recites that the defendant has received substantially more of the community income than the plaintiff without specifying the amount or that the amount received equaled the reasonable value of the services, if any, rendered by defendant in caring for the property.

Finding number five recites that plaintiff had received $340 more than her share of the livestock and that certain of the farm equipment received by plaintiff was not included in the division of the property, and that defendant was entitled to a credit of $194 for his interest in said equipment. Apparently, neither of these items are included in the judgment.

[3] The record before us is such that we are unable to reconcile the findings with the judgment. There was no reference or account and the action was not properly disposed of by a mere statement of the balance due. Sears v. Rule, 27 Cal.2d 131, 149, 163 P.2d 443. It cannot be intelligently ascertained from the findings and judgment what the issues were as to the controverted items and how these issues were disposed of by the trial court.

[4, 5] In plaintiff's closing brief a document is set forth entitled "Memorandum Order for Judgment". This document is not a part of the record before us and while it indicates the reasoning by which the trial court arrived at some of the amounts set forth in the judgment, it cannot be substituted for the findings which constitute the actual decision of the court. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 781, 163 P.2d 756.

[6] The attempted appeal from the order denying motion for a new trial is dismissed. In re Estate of Dopkins, 34 Cal.2d 568, 569, 212 P.2d 886. The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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111 Cal.App.2d 424

HELLAR v. BIANCO et ux.

Civ. 8103.

District Court of Appeal, Third District, California.

May 28, 1952.

Rehearing Denied June 26, 1952.

Action against proprietors of public tavern for damages for libelous publication concerning chastity character of plaintiff. The Superior Court, Placer County, Sherill Halbert, J., entered judgment based upon order of nonsuit, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that if proprietors of tavern had knowingly permitted defamatory statement concerning plaintiff to remain on wall of men's toilet room despite reasonable opportunity to remove it, defendants were guilty of republication of libel.

Judgment reversed.

1. Libel and Slander ⚷28

Persons who invite the public to their premises owe a duty to others not to knowingly permit their walls to be occupied with defamatory matter, the theory being that by knowingly permitting such matter to remain after reasonable opportunity to remove same, the owner of the wall or his lessee is guilty of republication of the libel.

2. Appeal and Error ⚷927(3)

In reviewing a judgment based upon a nonsuit, plaintiff is entitled to the benefit of all favorable evidence and all reasonable inferences which may be drawn therefrom.

3. Libel and Slander ⚷101(3)

In action against proprietors of public tavern for damages for libelous publication with reference to plaintiff's character which appeared on walls of men's toilet room maintained at tavern, wherein it appeared that defamatory matter was placed upon the wall by a person or persons unknown, plaintiff had burden of introducing evidence tending to show that defendants had adopted the defamatory matter or republished it.

4. Libel and Slander ⚷28

Principal and Agent ⚷178(1)

Where certain writings defamatory of plaintiff's chastity character had appeared on wall of toilet room for men in public tavern operated by defendants, republication of such matter for which defendants would be liable occurred if proprietor had knowledge of defamatory matter and allowed it to remain after a reasonable opportunity to remove it, and knowledge of agent of defendants acting in scope of his authority, would for such purpose be imputable to defendants.

5. Libel and Slander ⚷123(1)

In action for damages against proprietors of tavern for libelous publications concerning plaintiff's character as chaste woman, wherein it appeared that such writings had been inscribed upon toilet room for men maintained by tavern proprietors for convenience of male patrons, whether bartender, who was agent of defendants, had knowledge of defamatory matter and whether defendants had negligently allowed defamatory matter to remain for such length of time as to be chargeable with its republication when plaintiff's husband and group of persons visited rest room and saw writing, was question for jury.

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Frances Newell Carr and Wray F. Sagaser, Sacramento, for appellant.

Darold D. DeCoe and Norman R. Samuelsen, Sacramento, for respondents.

VAN DYKE, Justice.

Appellant brought this action against respondents, seeking to recover damages for a libelous publication. At the trial she made proof as follows: Respondents were the proprietors of a public tavern and for the convenience of patrons maintained a toilet room for men on the wall of which there appeared on May 4, 1950 libelous matter indicating that appellant was an unchaste woman who indulged in illicit amatory ventures. The writer recommended that anyone interested should call a stated telephone number, which was the number of the telephone in appellant's home and "ask for Isabelle", that being appellant's given name. At about nine o'clock on the evening of that day a man, unknown to appellant, called the number and appellant answered. The caller requested permission to visit her and when in the course of the conversation it developed that a meeting could not be arranged he told her "there is some of the most terrible writing over here on the wall of the men's toilet about you, that is where I got your telephone number and your name." He suggested that she look into it and told her he was calling from respondents' tavern. Appellant informed her husband of the conversation and he called the tavern and talked with the bartender who was shown to have been in charge of the tavern during the absence of respondents. He told the bartender that his attention had been called to some writing on the walls of the men's toilet regarding his wife, that he would give the bartender just 30 minutes to take it off the wall and that he was coming out to investigate. The bartender replied that he was busy and alone and would remove the writing when he got around to it. Appellant's husband thereupon called a constable and after some delay arrived at the tavern where, in company with several people, including the bartender, he went to the toilet and found the libelous matter still on the wall. Falsity of the libel was shown and its defamatory nature is conceded. In fact it was shocking. The husband, constable and other persons present when the group went to the toilet and found the defamatory writing still upon the wall were shown to have understood the appellant was person referred to in the writing and the writing itself was sufficient to be understood by anyone knowing about it that it was written concerning her. Peterson v. Rasmussen, 47 Cal.App. 694, 698, 191 P. 30. After introduction of the foregoing proof, appellant rested her case and upon motion of the defendants was nonsuited. She appeals from the judgment thereafter entered and based upon the order of nonsuit.

[1–5] Appellant contends that from the facts shown publication by respondents could be sufficiently inferred and therefore that the nonsuit was improper. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." Restatement of the Law of Torts, Sec. 577. Persons who invite the public to their premises owe a duty to others not to knowingly permit their walls to be occupied with defamatory matter. See Burns v. Dean, 1 King's Bench 818, wherein it was held that the proprietors of a club were liable for allowing a defamatory statement to be put upon their walls in a position in which it could be read by any one who came into the club. The theory is that by knowingly permitting such matter to remain after reasonable opportunity to remove the same the owner of the wall or his lessee is guilty of republication of the libel. Respondents urge that there is no proof that they knew of the existence of the libelous matter and therefore that appellant failed to make proof sufficient to warrant submission of her cause to the jury for its determination. With this contention we do not agree. It is of course the rule that in reviewing a judgment based upon a nonsuit the plaintiff is entitled to the benefit of all favorable evidence and all reasonable inferences which may be drawn therefrom. The defamatory matter was placed upon the wall by a person or persons unknown and it was therefore necessary for appellant to introduce evidence tending to show that respondents adopted the defamatory matter or republished it. Republication occurs when the proprietor has knowledge of the defamatory matter and allows it to remain after a reasonable opportunity to remove it. While there is in the record no evidence of actual knowledge on the part of the defendants the knowledge of an agent, while acting in the scope of his authority, is imputed to the principal. Civ.Code Sec. 2332; 2 Cal.Jur.2d 855; Dressel v. Parr Cement Co., 80 Cal.App.2d 536, 540, 181 P.2d 962; Westman v. Clifton's Brookdale, Inc., 89 Cal.App.2d 307, 311, 200 P.2d 814; Hale v. Depaoli, 33 Cal.2d 228, 231, 201 P.2d 1, 13 A.L.R.2d 183. From the testimony given the jury could have found that the bartender, to whom appellant's husband imparted knowledge of the existence of the slanderous matter and of its location, was in general control of the establishment, with the duty of supervising the premises, including the rest rooms. While he was not told of the exact terminology of the writing, undoubtedly because neither appellant nor her husband had been given that terminology by the stranger who called appellant on the phone, yet the bartender was told enough about the defamatory nature of it to put him upon inquiry and to charge him with the duty of removing the writing from respondents' wall. This knowledge of the bartender, acquired within the scope of his authority, is chargeable to the respondents. It was also a question for the jury whether, after knowledge of its existence, respondents negligently allowed the defamatory matter to remain for so long a time as to be chargeable with its republication, occurring when the husband and the group with him visited the rest room and saw the writing.

The judgment appealed from is reversed.

ADAMS, P. J., and PEEK, J., concur.

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111 Cal.App.2d 344

AMERICAN MOTORISTS INS. CO. v. MOSES et al.

Civ. 18821.

District Court of Appeal, Second District, Division 2, California.

May 27, 1952.

Hearing Denied July 24, 1952.

Action for declaration of rights and obligations under a policy of automobile liability insurance by the American Motorists Insurance Company, a corporation, against Claude F. Moses and others and R. W. Simpson and others. From an adverse judgment in the Superior Court of Los Angeles County, Arnold Praeger, J., Robert W. Simpson and others appealed. The District Court of Appeal, Fox, J., held that the policy covering the operations of insured as a truckman did not furnish protection for insured involving the truck while it was carrying passengers for hire.

Judgment affirmed.

1. Insurance 🔑146(2)

The words in an insurance policy are to be taken in their plain, ordinary and proper sense.

2. Insurance 🔑146(1)

In construing a contract of insurance manifest intention of parties is normally decisive.

3. Insurance 🔑435.26

An automobile liability policy in which insured was listed as a "truckman" and as handling merchandise exclusively for one concern and subsequent endorsement stating insured was self-employed as a truckman to enable him to do general hauling of furniture or merchandise did not cover liability imposed on insured as result of an accident while engaged in business of transportation of passengers for hire.

See publication Words and Phrases, for other judicial constructions and definitions of "Truckman".

4. Insurance 🔑155

Under an automobile liability policy covering the operations of insured while engaged as a "truckman", understanding of insured that term "truckman" meant hauling of merchandise or personal property and not hauling of passengers was relevant to show there was neither uncertainty, misunderstanding or mistake as to the coverage provided by the policy.

5. Evidence 🔑20(1)

It is common knowledge that hazard incident to transportation of passengers by motor vehicles is far greater than that involved in hauling merchandise and consequently commands a higher premium insurance rate.

6. Insurance 🔑435.4

An occasional or temporary use of a motor vehicle to carry passengers will not avoid liability on a liability policy.

◆

Samuel P. Young, Los Angeles, for appellant Robert W. Simpson.

William Jerome Pollack, Los Angeles, Harry T. Shafer, Compton, for all other appellants.

Crider, Runkle & Tilson, Los Angeles, for respondent.

FOX, Justice.

This is an action for a declaration of rights and obligations under a policy of automobile liability insurance. The policy was issued to the owner, defendant Moses, with whom defendant Campbell was associated as a partner or joint venturer, on a Dodge stake body truck, effective June 28, 1950. On August 24, 1950, the insured truck, which was then being operated by defendant Campbell, was involved in an accident in which a number of persons who were riding as passengers for compensation sustained physical injuries. As a result of such injuries claims were presented to plaintiff. On the theory that such transportation of passengers was a risk not covered by the policy, plaintiff denied liability and thereupon instituted this action seeking a declaration that it had no liability under said policy to any of the injured parties. From a judgment in favor of the plaintiff certain of the defendants who were passengers have appealed. However, defendant Moses, who was the named insured, has not appealed.

In the original policy the insured was listed as a "truckman" employed by Miller Brothers, who were manufacturers of toilet seats. As a consequence there was attached "Local Truckman Endorsement" which parenthetically was explained to mean "Handling exclusively for one concern." This endorsement provided the insurance on the truck did not apply while it was used in hauling for a charge property for any person or organization other than Miller Brothers. To complete the insurance setup, there was attached to the policy when originally written endorsement number one in compliance with the requirement of the Public Utilities Commission of the state in order to enable the insured to obtain a license to operate "as a motor carrier of property." Hauling merchandise for Miller Brothers only did not prove satisfactory to Moses and Campbell, so on July 20 a "Change of Declaration" was attached to the policy, stating insured was self-employed as a truckman, that is, they were no longer hauling exclusively for Miller Brothers. This expansion of their hauling enterprise called for a premium increase of $96.60. Defendant Moses explained the purpose of this change was to enable them to do "general hauling" which would enable them "to do moving" and haul "furniture or merchandise," but not passengers, for the public generally.

Under the heading of exclusions, it is provided the policy does not apply while the vehicle is used as "a public or livery conveyance," unless such use is specifically declared and described in the policy and a premium charged therefor. No such use was ever declared, nor was any premium ever paid to cover it. During the latter part of July, Moses and Campbell, in addition to the transportation of merchandise of various kinds, commenced the transportation of agricultural laborers to rural areas for harvesting work. These trips started from an assembly point at Eighth and San Pedro Streets, Los Angeles, where the workers had been told to gather by the Federal Farm Labor Bureau. Moses and Campbell conducted this phase of their operation by arrangements made in advance by employers in need of day laborers. They then arranged with the Federal Farm Labor Bureau to send laborers to the designated street, where defendants Moses and Campbell would pick them up in the insured vehicle to transport them to the work area. Campbell would shout to the assembled group something about the place where the work was located or the type of harvesting, and all those interested would clamber aboard the truck until it was filled to capacity.

The first workers transported were carried for a charge of $1.00 per day each, and the job lasted for about a week. For a period of approximately three weeks thereafter the insured vehicle carried merchandise only. At this time onion harvesting work became available at the ranch of one Feldman in San Fernando Valley, and Campbell reverted to the arrangement above described for carrying workers to the Feldman ranch at a charge of 75¢ a day for each worker transported. In addition Campbell received the further sum of 10¢ from said Feldman for transporting each of the said persons to the ranch. The rancher would pay defendants Moses and Campbell for such farm labor furnished him, and said defendants would pay each laborer for his work, after deducting the charge of 75¢ for transportation to and from Los Angeles. Generally, on return trips from San Fernando Valley defendants Moses and Campbell would haul approximately 50 sacks of onions, picked up at Feldman's ranch, back to Los Angeles in addition to the laborers.

On August 24, 1950, with about 26 passengers aboard and Campbell driving, the Dodge truck collided with another motor vehicle while en route to the Feldman ranch under the hiring and transportation arrangement above described. As a result of the collision, certain of the passengers received physical injuries. Included among these was defendant Simpson, who had made four prior trips with defendant Campbell to Feldman's onion ranch and who had paid Campbell 75¢ for the first round trip only. Thereafter, and on the date of the accident, he had been carried without charge pursuant to an agreement that he would endeavor to secure from ranchers in the vicinity commitments for the future transportation of agricultural laborers by Campbell from Los Angeles to their ranches.

The trial court found that the "transportation of passengers for hire constituted a part of the business" of Moses and Campbell in connection with which they used the Dodge truck. In construing the policy the court also found that the term "truckman" meant, and that defendant Moses understood it to mean, the handling of merchandise or personal property and not the hauling of passengers, and that plaintiff at no time was notified by defendant Moses of any intention to haul passengers for hire on the insured truck.

Moses and Campbell started out hauling merchandise exclusively for a particular concern. They took out an insurance policy that provided coverage for that limited type of trucking and paid the premium provided for such a risk. The endorsement initially placed on the policy to enable them to comply with the requirements of the Public Utilities Commission and thus get a license to operate "as a motor carrier of property" further emphasizes the fact that they only intended to haul property and that the policy only covered such a risk. When the deal with Miller Brothers did not work out they undertook to expand their clientele in the trucking business by hauling furniture and merchandise for other people. Such enlarged business naturally involved greater hazards and consequently a higher insurance rate. Moses advised plaintiff of this contemplated change in the scope of their trucking operations. He filed a change of declaration wherein he stated he was self-employed as a truckman, and paid the increased rate. There was no subsequent change in either declaration or rate.

[1-3] The finding of the trial court that the term "truckman" meant "the hauling of merchandise or personal property and not the hauling of passengers" and that Moses so understood it becomes important. Such a definition of "truckman" is one of common use. In Webster's New International Dictionary, second edition (1947) the term is defined as a person "whose business it is to convey goods on trucks." The words in an insurance policy are to be taken in their plain, ordinary and popular sense. 14 Cal. Jur. § 29, p. 451; Hyer v. Inter-Insurance Exchange, etc., 77 Cal.App. 343, 246 P. 1055; Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P. 273. Since Moses, who was buying the protection, knew what the term "truckman" meant, we have both parties to this insurance contract with a common understanding of what the coverage was. In construing a contract of insurance "the manifest intention of the parties is normally decisive." Ohran v. National Automobile Ins. Co., 82 Cal.App.2d 636, 645, 187 P.2d 66, 71. The primary object is to ascertain and carry out that intention. New York Life Ins. Co. v. Hollender, 38 Cal.2d 73, 81, 237 P.2d 510. Consequently the policy, according to its provisions and the understanding of both parties to the contract, only covered risks incident to the hauling of merchandise.

Appellants, however, say the foregoing finding is not supported by the evidence. The first part of this finding is simply a declaration of that which is a matter of common acceptance; the latter part is amply supported by the testimony of the insured, defendant Moses.

[4] Appellants also contend that what Moses understood the term "truckman" to mean was immaterial. Under many circumstances this might be true, but here it is relevant because it shows there was neither uncertainty, misunderstanding nor mistake as to the coverage provided by the policy.

[5] In this connection it must not be overlooked that the court found, on substantial evidence, that about one month

prior to the accident defendants Moses and Campbell commenced the transportation of passengers for hire in the insured truck to ranches in the vicinity of Los Angeles and that "such transportation of passengers for hire constituted a part of the business of said defendants" and that they continued said business to and including the time of the accident. The transportation of passengers for hire is a highly specialized phase of the transportation industry, and requires excellent equipment and skilled personnel. It is in fact a business within an industry. It is a matter of common knowledge that the hazard incident to the transportation of passengers is far greater than that involved in hauling onions or other inanimate cargo and consequently commands a higher premium rate. To say that this substantially increased risk was covered by this policy would be to write a new contract for the parties, and include a coverage which they did not contemplate, and for which nothing was paid.

It is also to be noted that this transportation of passengers for hire was *a part of the business* of Moses and Campbell. It was not just an isolated departure from their usual trucking operations. It was not just a pleasure trip, nor a matter of convenience to them. They were engaged in this transportation enterprise as a business venture with the hope of making a profit out of the use of the truck. This is emphasized by the fact that they were carrying defendant Simpson without charge but with the understanding that he would solicit other ranchers to make use of their transportation of farm laborers.

[6] Counsel for appellants cite a number of authorities involving liability insurance policies on automobiles classified in the insurance policy as "business or pleasure," containing exclusion clauses prohibiting use as "a public or livery conveyance" in which the courts allowed recovery on the policy despite the fact that passengers were carried for a monetary consideration. They particularly rely upon McDaniel v. Glens Falls Indemnity Co., 333 Ill.App. 596, 78 N.E.2d 111; Pimper v. National American Fire Ins. Co., 139 Neb. 109, 296 N.W. 465; Allor v. Dubay, 317 Mich. 281, 26 N.W.2d 772. In each of these cases it is noteworthy that the insured was engaged in an activity within the coverage of the policy, and had merely accepted passengers to defray expenses of a journey he would have undertaken anyway, or was engaged in a "share the ride" plan to and from work. The taking of passengers was incidental and subordinate to an accepted use of the automobile and was a matter of convenience to the insured. In the instant case, the court in effect found that the carrying of passengers became an additional part of defendant Moses' business at the time of the accident and such enlargement of his trucking activities was outside the use contemplated by the parties. Other cases have held that an occasional or temporary use of a vehicle to carry passengers will not avoid liability on the policy, Stanley v. American Motorists Ins. Co., Md., 73 A.2d 1, nor will occasional or intermittent employment of the vehicle in a line of endeavor other than that stated in the declaration relieve the insurer from liability. Farmers Automobile Inter-Insurance Exchange v. Calkins, 39 Cal.App.2d 390, 103 P.2d 230. However, we find here a continued use of the vehicle in a manner not covered by what the parties understood to be meant by the term "truckman" nor one that is covered by the popular meaning ascribed to that word. Under these circumstances, where the conveyance of passengers had assumed an important part of Moses' business activity prior to the accident, and the carriage of merchandise had been relegated to a mere incidental part of this transportation of paying passengers, it must be held, in line with the determination of the trial court, that this expanded use was outside the protection afforded by the policy.

Counsel have argued in their briefs at some length whether the use to which Moses had put the insured vehicle constituted a "public or livery conveyance" and hence within the exclusionary clause prohibiting such use. Our conclusions render it unnecessary for us to consider this question.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

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111 Cal.App.2d 431

LUKE v. MERCANTILE ACCEPTANCE CORP. OF CALIFORNIA et al.

Civ. 4363.

District Court of Appeal, Fourth District, California.

May 28, 1952.

Stanley Luke sued the Mercantile Acceptance Corporation of California and others for conversion of an automobile. From a judgment of the Superior Court of Fresno County, Milo Popovich, J., on a jury's verdict for plaintiff, defendants appealed. The District Court of Appeal, Mussell, J., held that the evidence supported the jury's finding that defendants unlawfully converted the automobile, but that the jury's award of $2500, plus interest, as exemplary damages, was excessive and unsupported by testimony.

Judgment reversed as to the provision for exemplary damages, with direction to retry such issue, and otherwise affirmed.

1. Sales 🔑482

In action for conversion of automobile, sold by defendants under conditional sales contract to one whose equity therein plaintiff subsequently purchased, evidence supported jury's finding that defendants unlawfully converted automobile by repossessing it for non-payment of balance due on a note given one of defendants by original buyer.

2. Automobiles 🔑20

The equitable owner of automobile in his actual and lawful possession when forcibly taken from him by acceptance corporation, to which automobile dealer sold contract for conditional sale thereof to one whose equity therein such owner subsequently purchased, was entitled to bring action in conversion against such corporation and dealer, though plaintiff had not secured transfer of registration certificate to him.

3. Sales 🔑467

The seller's title to property covered by conditional sale contract is for security only, to assure payment of purchase price, and carries none of ordinary incidents of ownership.

4. Sales 🔑467

The buyer of property under conditional sale contract has right to possession and use thereof to complete exclusion of seller, subject only to seller's remedies in case of buyer's default in payment of purchase price, and buyer is beneficial owner of property in both practical and legal sense.

5. Sales 🔑467

The buyer's interest in property covered by conditional sale contract may be conveyed subject to seller's rights.

6. Sales 🔑476

The seller's reserved title to property covered by conditional sale contract is discharged on buyer's tender of balance due on purchase price.

7. Sales 🔑467

The buyer of property under conditional sale contract has full right of possession and use thereof, unless he defaults in payment of purchase price, and he may secure title to property by performing his obligation to pay such price, without further assent by seller, whose sole interest is in receipt of price.

8. Sales 🔑477(6)

An acceptance corporation receiving and acknowledging payments on purchase price of automobile under conditional sale contract, assigned to corporation by seller, from one to whom buyer sold his equity in automobile, and authorizing purchaser of such equity to make payments pending formal assignment of contract to him, waived right to declare forfeiture of automobile, though some payments were made after due dates thereof.

9. Army and Navy ⚷34

An acceptance corporation's repossession of automobile from one who purchased equity therein of person in military service as buyer thereof under conditional sale contract assigned by seller to corporation, without appropriate court action under Soldiers and Sailors Civil Relief Act, was unauthorized and supported action against corporation and its assignor for conversion of automobile. Soldiers and Sailors Civil Relief Act of 1940, § 301(1), 50 U.S.C.A. Appendix, 531(1).

10. Trover and Conversion ⚷25

In action for conversion defendants' concert of action and unity of design, if required to hold them jointly and severally liable, may be inferred from nature of their acts, parties' relation, respective interests, conduct and declarations, and other circumstances.

11. Sales ⚷482

In action against acceptance corporation, a partnership and members thereof for conversion of automobile, sold by partnership under conditional sale contract to one whose equity therein plaintiff subsequently purchased, evidence that defendants were closely associated in automobile financing business, and that corporation was attempting to enforce payment of original buyer's note to one of partners, showed concert of action between defendants to force payment of note by repossessing automobile, so as to render them jointly and severally liable for conversion thereof.

12. Sales ⚷482

In action for conversion of automobile, instruction to jury that if one of defendants repossessed automobile from plaintiff, not because of default in payment of purchase price thereof under conditional sale contract between defendant and one whose equity in automobile plaintiff subsequently purchased, but for purpose of enforcing plaintiff's payment of original buyer's note to one of defendants against will and without consent of plaintiff, such conduct constituted unlawful conversion entitling plaintiff to punitive, as well as compensatory, damages, was erroneous.

13. Damages ⚷87(1)

A plaintiff is never entitled to exemplary damages as a matter of right.

14. Damages ⚷215(1)

Granting or withholding of award of punitive damages is wholly within jury's control and may not legally be influenced by court's direction that a plaintiff is entitled to such damages in any case, even if there is clearest proof of malice in fact.

15. Sales ⚷482

A jury's award of $2500, plus interest, as exemplary damages for conversion of automobile in addition to award of compensatory damages of $580.82, including total amount paid by plaintiff for buyer's equity in automobile under conditional sale contract, monthly payments by plaintiff on contract, and sums paid by him to motor vehicles department and for a battery and repairs, was excessive and unsupported by testimony.

16. Damages ⚷94

Exemplary damages must bear reasonable proportion to actual damages sustained.

17. Appeal and Error ⚷1005(1)

Where trial court approves jury's award of exemplary damages, reviewing court will hesitate to declare amount awarded excessive, unless court must say, on consideration of entire record, including evidence, that award was result of passion or prejudice.

18. Appeal and Error ⚷1178(6)

An order by reviewing court for retrial of limited issue of exemplary damages by trial court or by jury, properly instructed on subject, is authorized, where issue can be separately tried without such confusion or uncertainty as would amount to denial of fair trial.

◆

Ralph Robinson, Fresno, for appellants.

Louis W. Caporale, Jr., Fresno, for respondent.

MUSSELL, Justice.

A jury trial in this action for damages for conversion of an automobile resulted in a verdict for plaintiff in the sum of $580.82 compensatory damages, and $2,500 exemplary and punitive damages. Defendants appeal from the judgment entered against them for these amounts. They assert that the evidence was insufficient to support the verdict and judgment and that the court erred in the admission and exclusion of evidence and in its instructions to the jury.

On September 2, 1949, defendants, who were engaged in the business of selling used cars, sold a used 1949 Ford automobile to one Diego Martinez. Martinez traded in a 1941 car as down payment and a contract of conditional sale was executed by the Barnett Car Company and Martinez. The contract recited a balance due on the 1949 Ford of $1,570.56, payable in monthly installments of $65.44 for 24 months. Martinez owed a balance of $451.08 on the 1941 car which he traded in and stated that he expected to receive funds from the government with which he would pay this balance. He then executed and delivered a promissory note for $451.08, to A. J. Barnett, payable on March 2, 1950. The note bears the following notation:

> "It is further agreed that this note is secured by 1941 Ford, Motor #98BA58426 subject to Mercantile Acceptance Co lien and that no assignment of interest or equity will be accepted unless this note is first paid in full."

The note was not made a part of the conditional sales agreement and was not referred to therein. Barnett Car Company sold and assigned the contract of conditional sale to defendant Mercantile Acceptance Corporation on or about September 2, 1949, and retained the promissory note. The 1949 Ford was delivered to Martinez and the monthly payments on the contract were thereafter made by him until April 1950 and thereafter by Plaintiff Luke to Mercantile Acceptance Corporation to and including the payment on July 1, 1950.

On or about April 25, 1950, plaintiff Luke purchased the equity of Martinez in this car, giving him a check in the sum of $290 and $10 in cash. At the time of this transaction Martinez informed Luke that there was a balance of $1,047 owing on the car under a conditional sales contract held by Mercantile Acceptance Corporation, which contract called for monthly payments of $65.44. However, Martinez did not inform Luke of any claim of the Barnetts with reference to the automobile and Martinez did not mention the promissory note which he had given Barnett.

On April 29, 1950, Martinez and Luke went to the office of the defendant Mercantile Acceptance Corporation to formally transfer and assign the Martinez equity to Luke. Martinez and Luke talked to one Cliff, whom they presumed to be the manager in charge. Cliff informed them that he did not have time to prepare the equity assignment and asked them to return later. Luke then asked Cliff if he, Luke, should "go ahead" and make the payments before the transfer was formally made and Cliff informed him that it was "all right" to make the payments. No mention was made by anyone of any claim in favor of the Barnetts or as to the promissory note held by them. Luke then made three monthly payments to Mercantile Acceptance Corporation on the following dates: May 6th, June 3rd and July 1st, 1950.

At the time he made the May payment, Luke called Cliff's attention to the fact that the receipt was made out to Diego Martinez, whereupon Cliff said "Go ahead and make the payments under that name" and stated that it would be "all right" pending the formal transfer of the equity to Luke on their records. Luke then informed Cliff that he, Luke, was the new equitable owner of the car and no objection was then made to Luke as such owner or to his possession and use of the automobile.

On the morning of August 5, 1950, Luke went to the office of the acceptance corporation and tendered the August payment on the contract. The cashier refused to accept it and referred Luke to Mr. Basham, the manager of the defendant acceptance corporation, who informed Luke that Martinez owed the Barnett brothers $428 and that Luke would have to "straighten this out" with the Barnett company. Basham did not then claim that the August payment was "late" or that there was any default under the terms of the sales contract and told Luke that he should see the Barnett company and make the "necessary arrangements."

Luke then talked to defendant Jess Barnett, who stated that he wanted his money and that he had men out to pick up the car. Luke asked for time to see Martinez about "straightening out" the Barnett claim. Barnett said "I can stop my men, but I can't stop Mercantile's men." Luke then drove the car to a service station, and while it was being serviced, one Linn, who stated that he represented the Mercantile Acceptance Corporation, repossessed the automobile despite the strenuous objection of Luke.

On August 12th Luke and his attorney went to see Basham and were informed by him that he had picked the car up for Barnett and that he "didn't pick it up for nonpayment." Basham informed them that under the Soldiers' and Sailors' Relief Act they had no right to pick up the car because Martinez was "in the service" and that if they would get Mrs. Martinez to sign for the car, he would return it to them; that he had already checked on Luke's credit and was ready and willing to finance the car with him. He also stated that Luke had better "straighten out" the Barnett claim if he wanted the car; that he was interested in securing collection of the promissory note and that he was collecting the note for Barnett.

Basham testified that on August 5th he asked Luke if he had any of the necessary documents signed by Martinez and further told him that these documents were necessary for a transfer to Luke; that he supplied Luke with the necessary forms, including a power of attorney to sign Martinez' name to the legal owner's certificate; that he asked Luke and his attorney for some proof of their title and stated that they had no documents of any nature relative to the automobile and that he would have to have the white registration certificate out of the automobile. He further testified that they were looking for the automobile after they received notice that Martinez had gone into the Marine Corps; that Mrs. Martinez told them that Martinez had sold the car to someone and that she did not know his name or where he was located; that the reason his company repossessed the automobile was because they knew that the car was no longer in the possession of Martinez; that they did not know who had possession of it, and for that reason they had no insurance; that the car was repossessed because the August payment was late; that the Mercantile Acceptance Corporation had a very heavy investment in the automobile and that they were trying to protect their interest in the car.

Some time in August, after the repossession, Luke located Martinez, who was in the Marine Corps, and obtained his signature to a bill of sale and thereupon filed this action. On August 14, 1950, the Barnett Car Company filed a claim and delivery action against Martinez and Mercantile Acceptance Corporation and the automobile was returned to Barnett Car Company under a writ of possession issued in said action.

[1–7] The evidence was sufficient to support a finding that defendants unlawfully converted the automobile involved. Plaintiff purchased the equity of Martinez in the car for a valuable consideration and possession was immediately transferred to the plaintiff. The fact that plaintiff was the equitable owner of the car, coupled with his actual and lawful possession thereof at the time it was forcibly taken from him, entitled him to bring an action in conversion, even though he had not then secured a transfer of the registration certificate. Pendell v. Thomas, 95 Cal.App. 33, 34–35, 272 P. 306. As was said in Bowden v. Bank of America, 36 Cal.2d 406, 413–414, 224 P.2d 713, 717:

> "In a conditional sale, the title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary

incidents of ownership. The buyer has the possession and use of the property to the complete exclusion of the seller, subject only to the seller's remedies in case of default. Both in a practical and a legal sense the buyer is the beneficial owner. * * * Likewise, the buyer's interest may be conveyed subject to the rights of the conditional seller. * * * The reserved title of the conditional seller is discharged upon a tender of the balance due by the buyer, * * *. The buyer has the full right of possession and use unless he defaults, and may secure title by performance of his obligation without any further assent by the seller. The sole interest of the seller is in the receipt of the price, and his reserve title cannot be used for any other purpose."

[8] In the instant case, Martinez and Luke went to the office of the acceptance corporation and there tendered the August payment on the contract. This payment was refused not because it was a late payment, or because Luke was not a satisfactory credit risk (for the acceptance corporation had checked on Luke's credit and found it was good) but because the corporation was interested in collecting the money due on the Barnett promissory note. In this connection, it should be noted that the acceptance corporation had received and acknowledged payments on the contract made by Luke and had authorized him to make these payments pending a formal assignment of the contract. While the evidence shows that some of the payments on the contract were made after the due date thereof, the right to declare a forfeiture, under the circumstances here presented, was waived by the acceptance corporation. Redd v. Garford Motor Truck Co., Inc., 205 Cal. 245, 270 P. 447; Johnson v. Kaeser, 196 Cal. 686, 239 P. 324.

[9] The evidence is clear that at the time the car was repossessed, Martinez had entered military service and was entitled to the benefits of the provisions of Section 301, Subparagraph 1, of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 531(1), which provides as follows:

> "No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price, or a deposit or installment under the contract, lease, or bailment, from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due or for any other breach of the terms thereof occurring prior to or during the period of such military service, except by action in a court of competent jurisdiction."

The prohibitions against repossession apply to both the conditional buyer and his assignee Luke and repossession is prohibited not only for nonpayment but "for any other breach" of the terms of the contract. Under the conditions shown, it is quite clear that the repossession of the automobile in question without appropriate court action was unauthorized and supported an action in conversion. Apparently, the defendants recognized this for they offered to return the car, after repossession, to Mrs. Martinez if she would "sign for the car."

[10, 11] Appellants argue that there was no evidence of "concert" between Mercantile Acceptance Corporation and the Barnett Car Company and that to recover damages resulting from a conversion, it is necessary that there be a concert of action between the defendants in order to hold them jointly and severally liable. Concert of action and unity of design may be inferred from the nature of the acts done, the relation of the parties, their respective interests, their acts, conduct and declarations and other circumstances. The record discloses that both Mercantile Acceptance Corporation and the Barnett

brothers were closely associated in the automobile financing business and that the acceptance corporation was attempting to enforce the payment of the Barnett note; that the officers of the corporation referred Luke to defendant Jess Barnett, who apparently knew that employees of both the acceptance corporation and the Barnett Car Company were endeavoring to locate the car. It appears that both said defendants were actively engaged in trying to force payment of the Barnett note by repossession.

It is next contended that the court erred in the admission and exclusion of evidence. We have examined the instances cited and can find no reversible error in the rulings made in this respect.

[12-15] It is next contended that the court erred in its instructions to the jury. One instruction is as follows:

> "If you find from a preponderance of the evidence that the defendant, Mercantile Acceptance Corporation of California, at the time set forth in the plaintiff's complaint, repossessed from the plaintiff, Stanley Luke, the automobile in question not by reason of any default in payment under its conditional sales contract, but for the purpose of enforcing the payment by the plaintiff of the note held by the defendant Barnett Car Company against Diego Martinez, then I instruct you that if such taking and repossession was against the will and without the consent of said plaintiff, such conduct on the part of said defendant constituted an unlawful conversion, and would entitle the plaintiff to punitive as well as compensatory damages against said defendant."

By this instruction the jury was informed that certain conduct on the part of the defendant constituted an unlawful conversion and would entitle the plaintiff to punitive damages against said defendant. The instruction was clearly erroneous for a plaintiff is never entitled as a matter of right to exemplary damages. Brewer v. Second Baptist Church, 32 Cal.2d 791, 800, at page 801, 197 P.2d 713, at page 719. As was there said:

> "The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded."

This erroneous instruction may well have affected the jury in its determination to award the sum of $2,500, plus interest, as exemplary and punitive damages. Under the circumstances, the award made for such damages was excessive and not supported by the testimony.

The conduct of the defendants in attempting to compel plaintiff to assume and pay the indebtedness covered by the Barnett note does furnish some basis for holding that defendant exhibited a malicious purpose. However, there does not appear to have been any oppression to the detention of the car, nor does it appear that any hardship was imposed upon plaintiff other than has been or can be compensated by the compensatory damages allowed. The jury awarded plaintiff compensatory damages in the sum of $580.82, which sum included the total amount paid by plaintiff to Martinez, three monthly payments made by plaintiff on the contract, $15 paid to the Department of Motor Vehicles, $17 for a battery and $7.50 for repairs.

[16] As was said in Booth v. People's Finance, etc., Co., 124 Cal.App. 131, 144, 12 P.2d 50, 55:

> " 'There is no fixed rule as to the proportion between actual and exemplary damages in cases where exemplary damages are recoverable,' it is nevertheless held that the exemplary damages must bear a reasonable proportion to the actual damages sustained."

See also Wilkinson v. Singh, 93 Cal.App. 337, 345, 269 P. 705.

[17] In Finney v. Lockhart, 35 Cal.2d 161, 164, 217 P.2d 19, the court stated that this rule is only for the purpose of guarding against excess; that there is no fixed

ratio by which to determine the proper proportion between the two classes of damages; that after an award has been approved by the trial court, the reviewing court will hesitate to declare the amount excessive unless upon consideration of the entire record, including the evidence, it must be said that the award was the result of passion or prejudice.

[18] In view of the erroneous instruction given the jury and the unreasonable proportion borne by the excessive exemplary damages to the actual damages sustained, we conclude that there should be a retrial of the issue of exemplary damages by the court or by a jury properly instructed on the subject. An order for the retrial of this limited issue is authorized where, as here, the issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial. Brewer v. Second Baptist Church, supra, 32 Cal.2d at page 801, 197 P.2d 713.

The judgment is reversed insofar as the decree provides for the recovery of the sum of $2,500 as exemplary and punitive damages and the trial court is directed to retry this issue. In all other respects, the judgment is affirmed. Plaintiff and defendants are to bear their own costs on this appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

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111 Cal.App.2d 497

PEOPLE v. JOHNSON.

Cr. 2798.

District Court of Appeal, First District, Division 2, California.

June 4, 1952.

Hearing Denied July 3, 1952.

The defendant was convicted in the Superior Court of the State of California in and for the County of Santa Clara, Wm. F. James, J., of possession of narcotics, and he appealed. The District Court of Appeal, Nourse, P. J., held that evidence did not entitle defendant to an instruction on entrapment.

Affirmed.

1. Witnesses ⇨379(1), 397

Out of court statements of one who later becomes a witness in criminal prosecution may be used for impeachment, but they are not evidence of the facts contradicting the sworn testimony of the witness.

2. Poisons ⇨9

Evidence sustained conviction for possession of narcotics.

3. Criminal Law ⇨814(8)

In prosecution for possession of narcotics, evidence was insufficient to entitle defendant to an instruction on entrapment.

4. Criminal Law ⇨723(5)

In prosecution for possession of narcotics, a reference to defendant as a member of the Negro race was not misconduct.

5. Criminal Law ⇨941(1)

Denial of motion for new trial on ground of newly discovered evidence consisting of an affidavit was not error, where same evidence as that contained in affidavit had been given at trial by defendant, so that affidavit was merely cumulative.

John E. Thorne, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., Winslow Christian, Atty. Gen., N. J. Menard, Dist. Atty. County of Santa Clara, Margaret Morten, Deputy Dist. Atty., San Jose, for respondent.

NOURSE, Presiding Justice.

This appeal is from an order denying defendant's motion for a new trial.

Defendant was tried to a jury on four separate counts charging possession of four distinct varieties of narcotics. Some weeks before the arrest of defendant a drug store in the city of Santa Clara had been burglarized and a large quantity of narcotics was taken. When the arresting officers entered the home of the defendant he had in his possession several bottles and containers holding narcotics which he told the officers had been recently left with him by one Bowe. On the following day the officers made further search of defendant's home and, under his direction, found a box containing more narcotics hidden in his basement. Defendant's only explanation of his possession was that the narcotics had been brought to him for "identification."

Later on the same day two boys were arrested and charged with the burglary of the drug store to which charge they subsequently pleaded guilty. Both were minors, one eighteen years of age, the other nineteen. While awaiting trial in the county jail one of these boys named Bowe made a written statement, witnessed by the other, in which he said that he "understood" that arrangements had been made with the San Jose police department to trap defendant by delivering to him the stolen narcotics and then to notify the police so that an arrest could be made while the narcotics were in defendant's home. At the trial the two boys testified that they had been forced to sign the statement, that it had been dictated in the county jail by the defendant, and that Bowe and his co-signer had been threatened with bodily harm by the defendant and his friends who surrounded him while the statement was dictated and written.

[1-3] No issue can be made as to the sufficiency of the evidence showing possession of the narcotics. The only claim in that respect is that defendant was the victim of an entrapment. In proof of that defense he relies wholly upon the statement of the prisoner made in the county jail. But such statement was wholly repudiated by the signer in open court. It was for the jury to determine when that witness was speaking the truth. Since the jury believed his testimony as a witness there is no ground for the claim that the evidence of guilt was insufficient nor that there was evidence of entrapment. Out of court statements of one who later becomes a witness at the trial may be used for impeachment but they are not evidence of the facts contradicting the sworn testimony. He must hold that the evidence was sufficient to support the conviction and that since there was no substantial evidence of entrapment the proposed instruction on that issue was properly refused.

[4] The charges of misconduct based upon reference to defendant as a member of the Negro race are too trivial for comment.

[5] On his motion for a new trial defendant tendered an affidavit by another prisoner in the county jail at the time the "entrapment" statement was written and signed. The affiant denied that any pressure had been used on Bowe to force him to sign the former affidavit. The same testimony had been given at the trial by defendant and hence this affidavit was merely cumulative. No error exists in the order denying a new trial on this ground.

The order is affirmed.

GOODELL and DOOLING, JJ., concur.

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111 Cal.App.2d 357

PEOPLE v. MARKS et al.

Cr. 4763.

District Court of Appeal, Second District, Division 3, California.

May 27, 1952.

Rehearing Denied June 9, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Harold W. Schweitzer, J., of registering bets on the results of horse races or purported horse races and he appeals. The District Court of Appeal, Vallée, J., held that the evidence sustained conviction.

Affirmed.

1. Gaming 🔑**96**

In prosecution for registering bets on results of horse races, prosecution need not prove that a horse race had actually been run. Pen.Code, § 337a, subd. 4.

2. Gaming ⚿98(3)

Evidence sustained conviction for registering bets on results of horse races or purported horse races. Pen.Code, § 337a, subd. 4.

3. Criminal Law ⚿556

In prosecution for registering bets on results of horse races, prosecution was not bound by statement of defendant to officers that pieces of paper were his system for selecting horses where there was proof to contrary. Pen.Code, § 337a, subd. 4.

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Matthews & Bowler and Robert P. Dockeray, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant Bastone was convicted by the court without a jury of a violation of subdivision 4 of section 337a of the Penal Code, registering bets on the results of horse races or purported horse races. He was sentenced to the county jail, the sentence suspended, and he was granted probation. He appeals from the order denying his motion for a new trial. The only error assigned is that the evidence is insufficient to sustain the judgment.

On June 13, 1951, two police officers were admitted to a residence in Los Angeles by one Marks. A few minutes later defendant approached the front door; he was met by Mrs. Marks who had a conversation with him. Defendant then turned to leave the house. As he did so he was overtaken by one of the officers who identified himself. The two officers took defendant to his automobile which was parked across the street. A racing form for that day was found in the back seat of the car. Defendant was taken into the Marks' house and there required to remove the contents of his pockets. He removed sixteen small pieces of paper.

The pieces of paper were betting markers and owe sheets and were all in defendant's handwriting. Each piece of paper bore initials which indicated the name of a better, numerals indicating the date, the number of a horse race, the number of a horse, the amount bet on the horse, and the amount the horse paid to win, place, or show. Some of the pieces of paper also bore numerals showing the amount won or lost by betters.

When defendant removed the pieces of paper from his pocket an officer asked him what they were. He said they were his selections of horses. When asked what the initials were he said they indicated a type of system he used. He was asked to explain the system. He said he could if he had a racing form. He was given a racing form and said, "Well, I can see that you guys aren't going to believe me, so I am not going to say any more."

An expert testified that a person in possession of owe sheets is known as an agent of a bookmaker: he takes bets and collects from and pays betters.

Defendant did not testify or offer any evidence in his behalf except such as may have been developed on cross-examination of the People's witnesses.

[1, 2] Defendant was charged with registering a bet and bets on the results or purported results of horse races or purported horse races. It was not necessary that the prosecution prove that a horse race had actually been run. The fact that defendant had possession of sixteen betting markers and owe sheets in his handwriting which indicated the reception of bets on horse races, the amounts won or lost on the races, and the amounts owed various betters, and further his refusal to explain his system, together with his failure to testify, were sufficient to warrant the court in concluding that defendant had registered the bets shown on the markers and owe sheets.

[3] The prosecution is not bound by the statement of defendant to the officers that the pieces of paper were his system for selecting horses, as he argues. It taxes one's credulity to believe that owe sheets could be part of a system to pick winners. It is only when there is no proof to the contrary on the subject that the prosecution is bound by a statement of an accused which it introduces in evidence. See People v.

Coppla, 100 Cal.App.2d 766, 769, 224 P.2d 828. There was not only proof to the contrary here but defendant by his refusal to explain his system in effect admitted that he had no system.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

111 Cal.App.2d 400

DANIELS v. HARNEY et al.
Civ. 14931.

District Court of Appeal, First District, Division 2, California.
May 28, 1952.

As Modified on Denial of Rehearing
June 27, 1952.

Proceeding by Jennie Daniels against James Harney, as Special Administrator of the estate of Shull H. Daniels, deceased, John Daniels, and others to quiet title to certain moneys in the possession of a special administrator. The Superior Court in and for the City and County of San Francisco, Preston Devine, J., entered judgment for plaintiff on the pleadings and defendant John Daniels appealed. The District Court of Appeal, Nourse, P. J., held that where husband and wife held three bank accounts in joint tenancy and on day husband died, he withdrew all bank accounts, wife was entitled to the proceeds of said bank accounts in possession of the special administrator of the deceased husband.

Judgment affirmed.

1. Joint Tenancy 🔑6

Upon the death of one holding a joint tenancy in personal property, the whole interest vested in surviving tenant not by descent but by fact of survivorship alone.

2. Joint Tenancy 🔑5

Where one joint tenant without consent withdraws the whole or part of the fund of a joint bank account during the life of both tenants, the joint tenancy is not destroyed, the proceeds retain the joint tenancy character wherever they can be traced unless the character is changed by agreement of the parties and the deprived tenant can exercise his right of survivorship as to the entire fund which has retained joint tenancy character.

3. Executors and Administrators 🔑443(6)

Complaint alleging in effect that plaintiff and her husband held three bank accounts in joint tenancy and that on day of death of her husband, husband withdrew all funds and that the proceeds of the bank accounts were taken into possession of special administrator of the deceased did not fail to state a cause of action to quiet title because it did not allege how the joint tenancy was created or what the specific claims of the several defendants were

4. Executors and Administrators 🔑56

Where husband and wife held three bank accounts in joint tenancy and on day of death of husband, husband withdrew all bank accounts, wife was entitled to proceeds of said bank accounts in possession of special administrator of deceased husband.

John P. Doran, San Francisco (James A. Himmel, San Francisco, of counsel), for appellant.

Doyle & Clecak, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to quiet title to certain moneys in the possession of a special administrator. A second cause of action for money had and received is not involved in the appeal. A judgment on the pleadings was entered in favor of the plaintiff on the first cause of action.

The appellant argues that the judgment on the pleadings was error because disputed issues of fact were raised in the answer. The disputed issues were issues of law only. The answer admitted that respondent and her husband held three bank accounts in joint tenancy; that, on October 13, 1948, Shull Daniels withdrew all said bank accounts; and, that on October 13, 1948, Shull Daniels died. The proceeds of these bank accounts were taken into the possession of the special administrator of the deceased who was made a defendant, but who does not appeal from the adverse judgment.

[1] The issue of law involved does not call for extensive treatment. The settled rule in this state is that upon the death of one holding a joint tenancy in personal property, which is the case here, the whole interest vests in the surviving tenant, not by descent, but by the fact of survivorship alone. Wallace v. Riley, 23 Cal.App.2d 654, 662, 665, 74 P.2d 807, where numerous authorities are cited.

[2] Applying the principle to the facts of this case the rule is that where one joint tenant without consent withdraws the whole or part of the fund of a joint bank account during the life of both tenants the joint tenancy is not destroyed, the proceeds retain the joint tenancy character wherever they can be traced unless the character is changed by agreement of the parties and the deprived tenant can exercise his right of survivorship as to the entire fund which has retained the joint tenancy character. Wallace v. Riley, 23 Cal.App.2d 654, 665, 74 P.2d 807; Bliss v. Martin, 74 Cal.App.2d 500, 515, 169 P.2d 61; Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 387, 189 P.2d 10.

[3] It is argued that the complaint failed to state a cause of action because it did not allege how the joint tenancy was created nor what the specific claims of the several defendants were. It was not necessary to plead either fact. Ephraim v. Metropolitan Trust Co., 28 Cal.2d 824, 833, 172 P.2d 501.

[4] Appellant argues that the decedent had the legal right to dispose of his right in the tenancy without the wife's consent and cites three cases supporting that doctrine. All three related to joint tenancies in real property and have no bearing on the issues raised here.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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111 Cal.App.2d 368

WASHINGTON v. CITY & COUNTY OF SAN FRANCISCO et al.

No. 14925.

District Court of Appeal, First District, Division 1, California.

May 28, 1952.

Hearing Denied July 24, 1952.

Action by George Washington against the City and County of San Francisco and Melvin E. Garner for personal injuries resulting from the collision of a city and county police car with an automobile owned by defendant Garner. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., entered judgment in favor of City and County of San Francisco notwithstanding verdict for plaintiff, and plaintiff appealed. The District Court of Appeal, Wood, J., held that the evidence was sufficient to warrant finding that police car was not being operated in such manner as to accord driver emergency vehicle privileges.

Judgment reversed with directions to enter judgment for plaintiff against City and County of San Francisco.

1. Automobiles 🔑175(5)

For driver of an emergency vehicle to enjoy exemptions from speed and traffic law requirements under emergency vehicle privileges accorded by Vehicle Code, driver, in addition to displaying red light, must give audible signal by siren as a warning to others using highway, when under all circumstances it is reasonably necessary to do so, and in such a case, driver must sound siren in such manner, with such audibility, as will afford others a reasonable opportunity to yield right of way. Vehicle Code, §§ 454, 554.

2. Automobiles 🔑175(5)

Under provision of Vehicle Code that emergency vehicle's exemptions from traffic laws shall apply only when driver of vehicle sounds a siren as may be reasonably necessary and vehicle displays a lighted red lamp visible from front as a warning to "others", quoted word means persons of reasonably good hearing who are giving attention to their surroundings in observance of their duties as users of public highways. Vehicle Code, § 454.

See publication Words and Phrases, for other judicial constructions and definitions of "Others".

3. Automobiles 🔑244(16)

In action to recover for injuries suffered when police car responding to emergency call collided with automobile at intersection controlled by traffic signals, propelling automobile onto plaintiff who was standing on sidewalk, evidence that siren on police car was being maintained at its highest pitch without letup was sufficient to warrant finding that police car was not being operated in such manner as to accord driver emergency vehicle privileges under statute providing that emergency vehicle's exemptions from traffic laws shall apply only when driver sounds a siren as may be reasonably necessary. Vehicle Code, §§ 454, 465–478, 510–592.2, 554.

4. Judgment ⚿199(3.2, 3.10)

Motion for judgment notwithstanding the verdict may not be properly granted unless there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, giving to evidence in favor of plaintiff all value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence.

5. New Trial ⚿6

Grant or refusal of a new trial rests largely in discretion of trial judge, whose province and duty is to scrutinize and weigh the evidence.

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Keith, Creede & Sedgwick, San Francisco, for appellant.

Dion R. Holm, City Atty., Thomas M. O'Connor, Deputy City Atty., San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff has appealed from a judgment entered in favor of defendant city and county of San Francisco, notwithstanding an $85,000 verdict for the plaintiff, in an action for personal injuries resulting from the collision of a city and county police car with a car owned by defendant Melvin E. Garner. Garner appealed from the judgment entered against him, but his appeal has been dismissed at his request.

The police car, an emergency vehicle, was proceeding north on Divisadero Street (a north-south street) in response to an emergency call. The Garner car was proceeding east on Bush Street (an intersecting east-west street). The police car hit the Garner car at the intersection of Divisadero and Bush, propelling the Garner car onto plaintiff who was standing on the sidewalk at the northeast corner of the intersection.

The issues all bear upon the question whether or not the police car was being operated in such a manner as to accord its driver the emergency vehicle privileges mentioned in section 454 of the Vehicle Code and to impose upon other users of the highway the duties defined in section 554 of that code. Unless the police car was being so operated, it is clear that there was evidence for the jury on the issue of the negligence of the driver of the police car; e. g., the police car was traveling at 35 to 60 miles an hour and entered the intersection against a "stop" traffic control signal.

Appellant does not question the facts that the police car was an emergency vehicle, that the driver of the police car was responding to an emergency call, and that the police car displayed the required red lamp.

He does claim there was evidence from which the jury could infer that the siren was not sounded, or that it was sounded in an improper and deficient manner.

As to the sounding of the siren, the statute[1] declared the driver of such a car exempt from the provisions of (not required to observe the regulations contained in) chapter 3 (sections 465–478) and chapters 6–13 inclusive (sections 510–592.2) of Division 9 of the Vehicle Code, whenever the vehicle was being driven in response to an emergency call, and that "said exemptions shall apply only when the driver of said vehicle *sounds a siren as may be reasonably necessary* and the vehicle displays a lighted red lamp visible from the front as a warning to others." Veh.Code, sec. 454. (Emphasis added.) It further provided that "said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway [a duty which is discharged if the required red light is displayed and if the driver sounds the siren 'as may be reasonably necessary,' Reed v. Simpson, 32 Cal.2d 444, 449–451, 196 P.2d 895], nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section" (the latter, a question with which we are not immediately concerned). With these provisions of section 454, we must read and consider the following provisions of section 554 of the same Code: "Upon the immediate approach of an authorized emergency vehicle *giving audible signal by siren* and having at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle: (1) The driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and thereupon stop and remain in such position until such authorized emergency vehicle has passed, except when otherwise directed by a police or traffic officer. * * *" (Emphasis added.)

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[1] At the time of the accident, which occurred September 18, 1948, section 454 of the Vehicle Code read as amended by the Statutes of 1945, chapter 1251, page 2364; section 554, as amended by the Statutes of 1941, chapter 1057, page 2725.

The italicized phrases of these two sections must be considered together and reconciled. The phrase "giving audible signal by siren" (sec. 554) seems to impose the absolute duty to sound the siren at all events and under all circumstances. But the phrase "sounds a siren as may be reasonably necessary" is the later enactment of these two and requires the driver to sound the siren only when, under all the circumstances, it is reasonably necessary to do so as a warning to others. See Reed v. Simpson, supra, 32 Cal.2d 444, 448–449, 196 P.2d 895, construing the 1937 form of section 454, not materially different, as to this feature, from the 1945 form which we are considering.)

If, in a particular case, the trier of the facts finds, upon sufficient evidence, that it was reasonably necessary for the driver of an emergency vehicle to "sound a siren" as well as display the red light (to acquire the exemption or privilege), there conceivably might also be involved the issue, as a question of fact, whether in sounding his siren he gave an "audible signal" that was suitable "as a warning to others" under all of the circumstances of the case. We find a suggestion to this effect in Goldstein v. Rogers, 93 Cal.App.2d 201, 208 P.2d 719. The court reversed a judgment for the defendant because the trial court, by its instructions, advised the jury, in effect, that unless the plaintiffs (operators of an emergency vehicle) sounded their siren (regardless of the need or lack of need for signaling by sound) they did not acquire and enjoy the privileges accorded by section 454. In discussing that question, the court made the following observations: "Under the facts of the present case plaintiffs could not have been found guilty of contributory negligence unless the jury determined from the evidence that they had failed to *sound a siren in a manner that would have afforded others a reasonable opportunity to yield the right-of-way,* or that they had maintained a speed which under the circumstances constituted an arbitrary exercise of their right-of-way privilege. *If the siren was sounded in a manner which afforded others a reasonable opportunity to yield the right-of-way* plaintiffs were not to be held negligent because of their speed alone, nor their failure to drive on the right-hand half of the highway, or to stop at the intersection because the traffic signal was against them." 93 Cal.App.2d at page 207, 208 P.2d at page 722. (Emphasis added.)

[1, 2] We conclude that sections 454 and 554, read together, mean that (to enjoy exemption from the speed and traffic law requirements) the driver of an emergency vehicle (in addition to displaying the red light) must give audible signal by siren, as a warning to others using the highway, when under all the circumstances it is reasonably necessary to do so, and in such a case he must sound the siren in such a manner, with such audibility, as will afford the others a reasonable opportunity to yield the right of way. "Others," of course, means persons of reasonably good hearing who are giving attention to their surroundings in observance of their duties as users of the public highways.

This requirement presents in each case these questions of fact: (1) Was it reasonably necessary, under all the circumstances, to give audible signal by siren, as a warning to others? (2) If so, did this driver give signal by siren? (3) If so, did he give audible signal by siren? The jury impliedly found in the affirmative on the first question and in the negative on the second question or the third.

No one claims that the affirmative answer to the first question was without support in the evidence. The police car red light alone conceivably might have been sufficient warning to a vehicle driver approaching the police car on Divisadero Street. But Garner was traveling toward Divisadero on Bush, a cross street. The police car red light could not possibly be visible to Garner until both cars were dangerously close to the intersection.

As to the police car siren, the only reasonable inference to be drawn from the evidence is that it was sounded, as a review of the evidence will indicate.

[3] Whether or not the driver of the police car, in sounding his siren, gave "audible signal" by siren, within the meaning of the statute, is a serious question. Can a court say that a reasonable man can draw but one inference from the evidence, the inference that the driver gave such a signal? Or, is more than one inference legally possible, one of them to the effect that he did not give such a signal? If the latter, it was the function of the jury to select the inference, not for the court to withdraw that determination of fact from the jury by granting the motion for judgment notwithstanding the verdict. We will now consider the evidence on that issue.

John Jordan, police officer riding in the front seat of the police car testified: When we received the emergency call we started down Haight Street to Masonic, thence to Geary, down Geary to Divisadero, and north on Divisadero toward Sacramento (north of Bush); as soon as we got the call, officer Schultz, driver of the police car, put on the red light, and I, the traffic was so heavy, pulled out the siren. As we went along Divisadero I was holding the siren all the way out because of all the traffic. It was a loud shriek; it was all the way out. If you pull the siren out just so far (this was a manually controlled siren, under the hood of the car) you can control the sound and pitch, by pulling the handle all the way out it has a high shriek. It makes the highest sound when the handle is completely out. When you pull the siren out it does not increase the sound. It merely increases the pitch, makes a higher pitch. When for four blocks (there are two streets, Post and Sutter, between Geary and Bush) you have the handle out it reaches the highest note it can reach. That high note is a thin, shrill, high scream effect. As we came down Divisadero there was none of this sound effect when the siren dies down, roars up and dies down and roars up again. Asked if a dog can hear a higher frequency than can a human being, the witness said: Yes, the sound is soft to us but a dog can hear it blocks away, nearly a mile away, due to the high frequency of it. To us it is very low because our ear is not sensitive to the higher frequency. The human ear does not hear high frequency or high pitch as well as the "lower ones." Milton Hansen, a police officer riding in the rear seat of the police car, testified that the siren and the light were on at all times.

George C. Brown testified: I was driving my car south on Divisadero; as I approached Bush I saw the police car when it was 1½ to 2 blocks (400 feet and more) away from me. I stopped at the intersection, in the right center lane. I heard the siren before that and by the siren identified it as a police car, also by the revolving light. The siren was a rather shrill sound the time I [first?] heard it, a rather high pitched sound. As it got closer, it naturally seemed to sound louder. It was a high pitched, shrill, loud sound. As it came to Bush Street it was a very high pitch. It was continuously sounding at a high pitch. I had my driver's window open. Mrs. Jean Wilson, riding in the rear seat of Brown's car, said she heard the police car before she "noticed" that car. The Brown car was stopped when she first heard it. A little later she looked up and saw the police car. It was between Sutter and Post then, closer to Sutter.

Vernon Johnson, driving his car south on Divisadero toward Bush, testified: I was half way between Pine and Bush (Pine runs parallel to Bush and lies next to Bush, to the north of the latter) when I saw the police car. I then stopped at the northwest corner of Divisadero and Bush, by the curb. When I first saw the police car it was between Geary and Post, closer to Post (500 feet and more away). I saw the twirling red light on the police car and heard the siren. As it approached Bush it was a very high pitch. I knew it was a police car from the siren. The siren was just a high pitched shrill, a high frequency thing.

Robert L. Stone was upstairs in a garage on Divisadero between Bush and Sutter, closer to Bush. He said: The siren first attracted my attention to the police car. It was just a very high pitched scream that was constant. I was standing near an open window and looked out then. The police car was on Divisadero approaching Sutter, closer to Sutter than Post (200 feet or more away from him). The siren was going continuously. It was just a continuous, single pitch. "Let me say it was inaudible and not very clear at all, very similar to a dog whistle." It was high, a very high, shrill, single note. It was not an exceptionally loud siren. The reason I looked out the window was because I heard the siren. At that time the police car was not two blocks away.

Henry Roberts was in a shoe shop, on Divisadero, a couple of doors from Sutter Street. He testified: I was inside and heard the siren blowing. I ran out to the edge of the sidewalk, saw the police officer and saw him going up to Bush until they had the accident. When I saw the police car it was one-half block from Geary, coming toward Bush (about 400 feet from him). The siren was wide open; anyways it was pretty loud.

Defendant Melvin E. Garner testified: I did not hear the siren at any time before the accident, nor see the police car, nor see any red light. My hearing is excellent. My wife's hearing is excellent. Her mother's hearing is excellent. They were riding with me in my car. Fred Fegan, who talked with Garner shortly after the accident, testified: Garner said he did not hear the police car; Garner thought he was talking to his wife at the time and eating corn chips; he said the first time he knew of the impending accident was when he felt the impact. On the witness stand, Garner said: It is possible that I was eating some corn chips; I do not remember for sure. As we drove along I perhaps was talking to my wife and her mother. I am not sure now if I was talking to my wife at the time of the accident. As I approached Divisadero Street I looked in both directions before I got to the intersection; I think to the left first and then to the right, but am not sure in which order. When I looked to the right I was about 30 feet from the west curb line of Divisadero and looked to the south on Divisadero about 60 to 70 feet; I did not see any car, within my view, traveling north on Divisadero; I then looked just straight ahead. I did not apply my brakes. I can't tell you much about the collision. I think I recall hearing the pop or crack. I was rendered unconscious. When I came to, I was behind the steering wheel. My car was struck on the right side at the fire wall, right behind the front wheel where the dashboard is. I believe the left front fender of the police car hit my car. The traffic signal for west to east traffic on Bush Street (Bush was a one-way street for eastbound traffic) as I approached Divisadero was on "Go." I noticed it change to that when I was back about 150 feet, possibly more, maybe a little less, from Divisadero. Mrs. Garner testified: I was riding in the front seat in my husband's car, looking out the right window, was looking to the right all the time up to the time of the accident; I looked to the south on Divisadero possibly three or four car lengths and saw no car approaching. I did not hear any siren, nor I did see any red light. I did not hear the screaming of brakes. On Bush Street, before coming to Divisadero, I did not hear a thing unusual. After we got into the intersection the only thought I had was that I was taking gas and slipping into unconsciousness. Prior to then I heard nothing. Mrs. Sadie Abraham, mother of Mrs. Garner, was riding in the rear seat of the Garner car. She testified: I do not recall entering the intersection. I did not see the police car, nor hear any siren, nor see the red light. The first I knew of the impact was I heard a crash and the next thing I knew they were taking me out of the car. I just felt the crash and I was "out." In the space of ten minutes prior to the impact I did not hear a siren of any nature, nor unusual sounds of any nature. I did not hear the application of brakes.

William T. Duggan, a physician and surgeon (an ear, nose and throat specialist), was called as an expert witness. He testified: A high frequency tone is constant. Intermittent sounds are much more easily heard than steady tones. A sound is much more apt to be heard by the human ear if it is changed than if it is steady. The human ear should be able to hear a sound that is kept on a high pitch. However, if intermittent, it would be more apt to be heard. A whistle for calling a dog is a very low sound object. It is difficult to hear because [it has] a very high pitch, a very high frequency. Some animals whose ears are receptive to high pitches can hear them for great distances. As to the siren on the average police car, it starts at the lower frequency and winds up as the siren is turned up and the revolutions increase, the vibrations increase. The more you pull it out and the longer and faster it goes, the higher the pitch gets. Pitch and frequency can be described as being similar, synonomous. If for four, five, or six blocks a police siren is held at this highest pitch without letting it off at all, until it gets to the top or highest frequency, the high pitch it finally gets up to is a wail almost, a thin scream. By letting it off and on they increase the audibility of the siren because the tone of the high pitch is harder to hear. The longer you hold out the siren at the higher pitch the less is the audibility of it. I do not believe you can get the frequency so high you cannot hear it at all. You can, I suppose, but I think these instruments are made for that particular purpose and would hold it within human range. You can take a siren that has enough power behind it and the human ear cannot hear it at all. It gets up there and finally diminishes and you do not realize there is a noise there. We are talking of the police siren under the hood, not of the big ones on fire engines and ambulances. I do not know the type of siren involved in this. Not knowing what type this siren is, I have not made a test.

Here is substantial evidence that the siren's sound was constant and that such a sound is harder to hear than if intermittent; that the siren was maintained at its highest pitch and if for such a period as here involved a police siren is so maintained it gets up to a wail, a thin scream, a tone that is harder to hear than if the pitch were varied; that with enough power behind a siren it gets up there and diminishes until you do not realize there is a noise there. One witness said this siren had a high pitched, a shrill sound, a very high pitch; another that it was a very high pitch, just a high pitched shrill, a high frequency thing; another, that it was a constant high pitched scream, not very clear at all, similar to a dog whistle, a very high shrill single note, not exceptionally loud. Three persons most in need of a suitable sound signal as a warning (they were approaching on a side street and could not see the police car's red light until they neared the intersection, possibly too late to draw to the curb and avoid the hazard) testified they did not hear the siren. Two of these three said they did not hear any unusual sounds. And the operator of the siren said the traffic was heavy (traffic which, inferentially, may have furnished interfering sounds and noises).

[4, 5] This evidence and the inferences which reasonably may be drawn from it support an implied finding of the jury that the driver of the police car, though he sounded his siren, did not give such audible signal as was suitable, under all of the circumstances of the case, as a warning to others using the highway, particularly to persons traveling on a cross street toward this intersection. A reviewing court can not say as a matter of law that the requisite audible signal by siren was given. Nor could the trial judge do so when ruling upon a motion for judgment notwithstanding the verdict. His function in passing upon such a motion is quite different from that which he performs when considering and deciding a motion for a new trial. A motion for judgment notwithstanding the verdict may not properly be granted unless there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff, giving to the evidence in favor of plaintiff all the value to which it is legally

entitled and indulging in every legitimate inference which may be drawn from that evidence. In contrast, the granting or refusal of a new trial rests largely in the discretion of the trial judge, whose province and duty it is to scrutinize and weigh the evidence. See Estate of Lekos, 109 Cal. App.2d 42, 240 P.2d 387, approving an order which denied a motion for judgment notwithstanding the verdict and affirming an order which granted a new trial; and Devens v. Goldberg, 96 Cal.App.2d 539, 215 P.2d 935, affirming an order which granted a new trial, after reversal of a judgment entered notwithstanding the verdict.

In view of the conclusion which we have reached, it is not necessary to consider other points presented by the plaintiff in support of his appeal.

The judgment in favor of the city and county of San Francisco is reversed, and the trial court is directed to enter judgment for plaintiff and against the city and county in accordance with the verdict.

PETERS, P. J., and BRAY, J., concur.

39 Cal.2d 83

SUBSEQUENT INJURIES FUND v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 22202.

Supreme Court of California, in Bank.

May 29, 1952.

The Subsequent Injuries Fund of the State of California, petitioner, filed a petition to review an award of the Industrial Accident Commission of the State of California awarding special additional compensation to Lois A. Patterson out of the Subsequent Injuries Fund. The Supreme Court, Schauer, J., held that statute directing commission to fix and award special additional compensation to be paid out of the funds where combined effect of permanent partial disability and subsequent compensable injury is a permanent disability equal to 70% or more of total is not unconstitutional.

Award affirmed.

Prior opinion 236 P.2d 609.

1. Workmen's Compensation ⇨35

Statute directing Industrial Accident Commission to fix and award special additional compensation to be paid by State Compensation Insurance Fund where combined effect of permanent partial disability and subsequent compensable injury is a permanent disability equal to seventy per cent or more of total is not unconstitutional on ground that it violates constitutional provision stating that the Legislature has plenary power to create a system of workmen's compensation. Labor Code, §§ 4750–4755; Const. art. 20, § 21.

2. States ⇨119

Statute directing Industrial Accident Commission to fix and award special additional compensation to be paid by State Compensation Insurance Fund where combined effect of permanent partial disability and subsequent compensable injury is a permanent disability equal to 70 per cent or more of total is not unconstitutional on ground that it violates constitutional provision forbidding gifts of public money. Labor Code, §§ 4750–4755; Const. art. 4, § 31.

3. Workmen's Compensation ⇨1030

Section of the Labor Code providing that nothing in the chapter shall bar right of any injured employee to institute proceedings for collection of compensation within five years after date of injury on ground that original injury has caused new and further disability and that jurisdiction of Industrial Accident Commission shall be continuing jurisdiction at all times within five years from date of injury applies to proceedings for special additional compensation from the Subsequent Injuries Fund. Labor Code, §§ 4750–4755, 5410, 5803, 5804.

4. Workmen's Compensation ⇨1030

Where employee sustained injury resulting in loss of vision of left eye, and thereafter on February 8, 1946 he sustained compensable injury to his right eye, and employee filed application for adjustment of claim against employer and insurer, and on January 9, 1947, Industrial Accident Commission awarded additional temporary disability compensation but found that employee's condition was not stationary and permanent and expressly reserved jurisdiction to determine extent of disability, and on July 8, 1948, Permanent Disability Rating Bureau made 24 per cent permanent disability rating for subsequent injury to right eye alone and 73¾ per cent for combined disabilities, and on May 26, 1950, employee served on the Attorney General and filed application for claim from Subsequent Injuries Fund, claim for additional compensation was not barred by five-year limitations. Labor Code, §§ 4750–4755, 5410, 5803, 5804.

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Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for petitioner.

Edmund J. Thomas, Jr., San Francisco, Thomas L. Higbee, San Diego, Riedman & Silverberg and Milton H. Silverberg, Long Beach, for respondents.

The Issues Involved

SCHAUER, Justice.

The Subsequent Injuries Fund of the State of California seeks review of an award of the Industrial Accident Commission. The attorney general, for the fund, contends that certain of the provisions of the Labor Code (§§ 4750–4755) for subsequent injury payments violate those provisions of the California Constitution which state that the Legislature has "plenary power" to create a system of workmen's compensation (art. XX, § 21) and forbid gifts of public money (art. IV, § 31). And even if the legislation in question is constitutional, urges the attorney general, the present claim for subsequent injury compensation is barred by the statute of limitations. We have concluded that the contentions on behalf of the fund cannot be sustained.

History and Substance of the Legislation

The subsequent injuries legislation (Lab. Code, §§ 4750–4755) does not expressly create an independent state agency called the Subsequent Injuries Fund, but in discussing the problems here presented it will be convenient to refer, as the attorney general, the applicant for compensation and the Industrial Accident Commission have referred, to such a fund as an independent entity. The subsequent injuries plan now under consideration was enacted in 1945 (Stats.1945, ch. 1161) and, as amended, provides in material part as follows: An employer of a workman who has a permanent physical impairment and who thereafter sustains a compensable injury resulting in permanent disability, is not liable for compensation for the ensuing combined disabilities, but only for that portion of permanent disability which is caused by the last injury. (Lab.Code, § 4750.) If an employe who is permanently partially disabled[1] receives a subsequent compensable injury which results in increased permanent partial disability greater than that caused by the last injury alone, and the combined disabilities are 70 per cent or more of total, he is entitled to receive, in addition to the normal compensation for the last injury, compensation for the remainder of the combined permanent disability. (Lab.Code, § 4751.) The Industrial Accident Commission is to fix and award the amount of the last mentioned special additional compensation, and to direct the State Compensation Insurance Fund to pay it out of funds appropriated for the purpose.[2] (Lab.Code, § 4754.) In any "hearing, investigation or proceeding" as to the right to subsequent injury payments, the attorney general (not the attorneys for the State Compensation Insurance Fund) represents the state and "may * * * reimburse himself" for the cost of investigations, medical examinations, etc., out of the Subsequent Injuries Fund. (Lab.Code, § 4753.5.)

The attorney general concedes that the circumstances which resulted in the disability of the applicant-employe (the history of his disability is hereinafter set forth) brought the employe within the terms of the subsequent injuries legislation and, as previously indicated, the argument of the attorney general is devoted to the questions whether the legislation is constitutional and whether the claim for subsequent injury compensation is barred.

Workmen's compensation laws of various states and the federal government contain provisions for additional compensation to be paid from a fund (rather than by the employer or his workmen's compensation insurance carrier) to the already handicapped worker who sustains an industrial injury which causes increased permanent disability. The purpose of such subsequent injuries legislation is manifestly sound and, we think, as hereinafter developed in more detail, is encompassed within the purview of the "complete system of workmen's compensation" contemplated by our Constitution. (See footnote 3.) For example, the one-eyed worker who sustains an industrial injury which results in loss of the sight of his remaining eye is in need of more compensation to enable him to rehabilitate himself than is the worker with two good eyes who sustains an industrial injury which results in loss of the sight of one. Yet it seems unfair to place upon the employer who is willing to hire handicapped workmen the burden of furnishing such additional compensation; indeed, in states which have held that the employer of a one-eyed workman is liable for total disability when the workman loses his second eye as a result of an industrial injury, employers as a consequence of such decisions have refused to employ the handicapped. (See Lawson v. Suwanee Fruit & S. Co. (1949), 336 U.S. 198, 202–204, 69 S.Ct. 503, 93 L.Ed. 611; Peterson v. Halvorson (1937), 200 Minn. 253, 273 N.W. 812, 813; Ruffin v. Albright (1938), 121 N.J.L. 424, 3 A.2d 135; Application of Glennon (1940), 18 N.J.Misc. 196, 12 A.2d 360; Special Indemnity Fund v. Sims (1945), 196 Okl. 101, 163 P.2d 210, 212; Marker v. Industrial Commission (1934), 84 Utah 587, 37 P.2d 785, 98 A.L.R. 722, 725.)

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[1] Formerly limited to an employe who is permanently partially disabled by the loss of use of a hand, arm, foot, leg or eye.

[2] Such funds have been appropriated out of "money in the State treasury not otherwise appropriated." (Stats.1945, ch. 1161, § 5.)

The Constitutional Questions

[1] The present subsequent injuries legislation (Lab.Code, §§ 4750–4755) is the second attempt of the California Legislature to alleviate the plight of the handicapped workman who sustains an industrial injury resulting in seriously increased permanent disability. In 1929 the 1917 Workmen's Compensation Act was amended (Stats.1929, ch. 222) to provide for additional compensation to such employes out of a fund to be created in the following manner: when an employe suffered a fatal industrial injury and left no dependent entitled to a death benefit the employer or his compensation insurance carrier was to pay $300 into a subsequent injuries fund. In Commercial Cas. Ins. Co. v. Industrial Acc. Com. (1930), 211 Cal. 210, 213, 215, 295 P. 11, it was held that a provision of the 1929 legislation which authorized the Industrial Accident Commission to institute and maintain a proceeding to collect the $300 payments from employers violated section 21 of article XX of the state Constitution;[3] and in People v. Standard Oil Co. (1933), 132 Cal.App. 563, 572, 23 P.2d 86, it was held that all provisions of the 1929 legislation "which purport to create and enforce a liability upon the part of an employer to provide compensation for workmen not employed by him, are unconstitutional" because violative of section 21 of article XX.[4] Those cases are not con-

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[3] Cal.Const., art. XX, § 21: "The legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical * * * and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; * * * full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government."

[4] It may be noted that there is no federal constitutional objection to such legislation. "Amendments of the New York Workmen's Compensation Law [citation] provide that, when an injury causes the death of an employee leaving no beneficiaries, the employer or other insurance carrier shall pay the State Treasurer $500 for each of two special funds, one to be used in paying additional compensation to employees incurring permanent total disability after partial disability, the other in vocational education of employees so injured as to need rehabilitation, the use of the special funds for these purposes being additional compensation to employees thus injured over and above that prescribed as

trolling here. The objection to the subsequent injuries legislation which was there sustained was that it required employers to make payments which would compensate persons who were not and never had been their employes. The present plan does not contain such a requirement. It imposes liability upon the entire tax-paying public. The attorney general is mistaken in his argument that the Legislature has no power, under section 21 of article XX, to provide for any payments to an injured workman except those by his employer or the employer's insurance carrier. "A complete system of workmen's compensation includes adequate provisions for the * * * *general welfare* of any and *all* workmen * * to the extent of relieving from the consequences of *any injury* * * * *sustained by workmen in the course of their employment* * * *." (Cal.Const., art. XX, § 21; italics added.)

[2] It is urged that the subsequent injuries fund plan provides for a gift of public money in violation of section 31 of article IV of the state Constitution. We are of the view, however, that the provision for this fund as a part of a complete system of workmen's compensation does not effect a gift of public money; that it is encompassed within the Legislature's "plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation" (art. XX, § 21). Furthermore, it has been pointed out, the adoption of the constitutional provision concerning workmen's compensation effected a repeal *pro tanto* of state constitutional provisions in conflict therewith (see Western Indemnity Co. v. Pillsbury (1915), 170 Cal. 686, 695, 151 P. 398) and enabled the Legislature, so far as not limited by article XX, section 21, itself (see Commercial Cas. Ins. Co. v. Industrial Acc. Com. (1930), supra, 211 Cal. 210, 213, 215, 295 P. 11; People v. Standard Oil Co. (1933), supra, 132 Cal.App. 563, 570–572, 23 P.2d 86), to provide a complete, workable scheme unhampered by limitations contained in other provisions of the state Constitution (see Pacific Coast Casualty Co. v. Pillsbury (1915), 171 Cal. 319, 322, 153 P. 24; Western Metal Supply Co. v. Pillsbury (1916), 172 Cal. 407, 413, 156 P. 491).

The attorney general argues that the subsequent injuries benefits should be limited to indigent California residents. But the Legislature has power to require California to bear a portion of the burden placed upon the previously disabled who are further disabled by injury in California industry, and the question whether such burden should be assumed only in the case of workmen who are needy and who remain in California is for the Legislature. (See County of Los Angeles v. La Fuente (1942), 20 Cal.2d 870, 876, 129 P.2d 378 ["Whether it is wise to give [old age] benefits to one who has a child willing and able to support him is a question for the Legislature and not for the courts"].)

The Statute of Limitations

We next consider whether the employe's claim for subsequent injury compensation is barred by any statute of limitations. There is no express statutory provision as to when proceedings to collect subsequent injury compensation must be instituted. The arguments of the parties concerning periods of limitation applicable to such proceedings are hereinafter set forth.

Prior to the time when the employe suffered the subsequent injury for which he claims special compensation, he had sustained an injury which resulted in loss of vision of his left eye, and the attorney general concedes that his condition was one of preexisting permanent partial disability within the meaning of section 4751 of the

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the payments to be made by their immediate employers. *Held*:

"(1) That the due process clause of the Fourteenth Amendment does not require that this additional compensation be paid by the immediate employers of the employees to be benefited, nor prevent the legislature from providing for its payment out of general funds created as above described. [Citation.]

"(2) The arrangement does not conflict with the equal protection clause." (Sheehan Co. v. Shuler (1924), 265 U.S. 371, 44 S.Ct. 548, 88 L.Ed. 1061, as summarized in headnote.)

Labor Code. The ensuing relevant history of this proceeding is as follows:

February 8, 1946: Employe sustained compensable injury to his right eye. Thereafter the employer's insurer paid temporary disability compensation for a time; then an issue arose as to the extent and duration of disability.

August 1, 1946: Employe filed timely application for adjustment of claim against the employer and the employer's insurer.

January 9, 1947: Commission awarded additional temporary disability compensation, found that the employe's condition was not yet stationary and permanent, and expressly reserved jurisdiction to determine extent of permanent disability within 245 weeks[5] from date of injury. At the hearing which resulted in this award the referee orally announced the determination that the Subsequent Injuries Fund should not yet be joined because it was not yet known whether there would be combined permanent disabilities of 70 per cent of total.

January 24, 1947: Employe filed petition for permanent disability rating.

July 8, 1948: Permanent Disability Rating Bureau made 24 per cent permanent disability rating for the subsequent injury to the right eye alone and 73¾ per cent for the combined disabilities.

January 31, 1950: Commission made findings and award of permanent disability against the employer's insurer in accord with the 24 per cent rating of the bureau.

May 26, 1950: Employe served on the attorney general and filed application for adjustment of claim which joined the Subsequent Injuries Fund as a defendant. This is the first notice which the attorney general had that the employe was claiming subsequent injury compensation.

After a further hearing at which the Subsequent Injuries Fund was represented, the commission determined that the claim for subsequent injury compensation was not barred and (on January 23, 1951) made an award in accord with the 73¾ per cent rating of the bureau.

It is the position of the Subsequent Injuries Fund that the proceedings to collect "compensation for the remainder of the combined permanent disability existing after the last injury" (Lab.Code, § 4751) must be instituted within three years after the occurrence of the last injury. The fund points out that a statute of limitations "runs from the time a cause of action accrues and it invariably accrues when there is a remedy available" (Irvine v. Bossen (1944), 25 Cal.2d 652, 658, 155 P.2d 9; Barlow v. City Council (1948), 32 Cal.2d 688, 694, 197 P.2d 721); therefore, says the fund, as soon as the previously handicapped employe sustains a further compensable injury he has a cause of action against the fund, even though it may not yet be possible to show that the subsequent injury will cause further permanent disability. And, the fund's argument continues, since there is no express period of limitations, the applicable statute is subdivision 1 of section 338 of the Code of Civil Procedure, the three-year statute which governs "An action upon a liability created by statute, other than a penalty or forfeiture." In other jurisdictions general statutes of limitations similar to subdivision 1 of section 338 have been held applicable to workmen's compensation proceedings, but it appears that the courts which so held were confronted with the difficult alternative of holding that no statutory period of limitation whatsoever applied to the proceedings. (See Utah Consolidated Mining Co. v. Industrial Com. (1920), 57 Utah 279 [194 P. 657, 16 A.L.R. 458], and cases in annotation, 16 A.L.R. 462; Federal Rubber Co. v. Industrial Com. (1924), 185 Wis. 299 [201 N.W. 261, 40 A.L.R. 491], and cases in annotation, 40 A.L.R. 495.) We are not confronted with such an alternative.

[3] The commission has continuing jurisdiction to amend its awards (Lab.Code, § 5803) but no award can be amended after

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[5] The continuing jurisdiction of the commission (Lab.Code, §§ 5410, 5803, 5804) which was 245 weeks at the time of the January, 1947, award, was extended to five years by a 1949 amendment of the Labor Code (Stats.1949, ch. 677).

five years from the date of injury (Lab. Code, § 5804). And section 5410 of the Labor Code provides, "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period." Thus the employe can collect for permanent disability which he discovers within five years even though during the first stages of his injury he received an award or voluntary payments for temporary disability only. (Cowell Lime & Cement Co. v. Industrial Acc. Com. (1930), 211 Cal. 154, 161, 294 P. 703, 72 A.L.R. 1118; Gobel v. Industrial Acc. Com. (1934), 1 Cal.2d 100, 103, 33 P.2d 413.) The question whether there will be aggravated permanent disability entitling an applicant to relief from the Subsequent Injuries Fund, like the question whether there will be any permanent disability, is one to which the answer may not appear until months after the injury. Thus application of section 5410 to a case such as the present one, appears to be appropriate if such application is not inconsistent with either the policy or the letter of the law. We find nothing in the letter of the law to preclude such application. The policy of the law, enjoined by both statute and precedent, directs that workmen's compensation laws shall be liberally construed in favor of extending their benefits. (Lab.Code, § 3202; Aetna Life Ins. Co. v. Industrial Acc. Com. (1952), 38 Cal.2d 599, 241 P.2d 530.)

[4] The attorney general complains that if he, as representative of the Subsequent Injuries Fund, is not joined until long after the date of the last injury "it is a practical impossibility" for the attorney general to acquire information as to the existence and extent of the prior disability, and that the employe can "have numerous hearings over a period of years to the end that the Subsequent Injuries Fund be made liable without any representation on the part of said Fund until he had conclusively proven to himself that he does qualify." We note also that the attorney general particularly urges that section 5410 "can avail the respondents nothing for said section is limited to the cause of action between the employee and his employer and does not apply to your petitioner * * * who was not a party." It is true that if section 5410 is applicable to this case then the fund can be joined at any time so long as the proceeding against it (to collect subsequent injury compensation) is commenced within five years from the date of the subsequent injury. The operation of section 5410 is, of course, dependent upon the commencement of a proceeding to collect normal compensation within the time limits prescribed in chapter 2 of part 4 of division IV of the Labor Code. We do not believe that the Subsequent Injuries Fund, even regarded as an entity, must necessarily be also regarded as in the position of an employer. The state having created the fund may prescribe the conditions under which its liability can be established. Questions as to whether the fund should be initially joined in proceedings for normal compensation in order to make section 5410 applicable, like all provisions pertaining to periods of limitation, are peculiarly and primarily for the Legislature. If the attorney general is having difficulty in protecting the fund because of the circumstances appearing here such difficulty, however grave it may be, appears to be one which can be corrected only by the Legislature. We conclude that the disputed claim is covered by section 5410 and is not barred.

For the reasons above stated the award is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

39 Cal.2d 93

RENNER v. HUNTINGTON-HAWTHORNE OIL & GAS CO. et al.

L. A. 21759.

Supreme Court of California, in Bank.

June 4, 1952.

Rehearing Denied June 26, 1952.

Action by Wilvian Jewell Renner against Huntington-Hawthorne Oil and Gas Company and others to quiet title to certain realty which defendants claimed under oil and gas lease. The Superior Court, Orange County, Franklin G. West, J., entered judgment for plaintiff, and defendants appealed. The Supreme Court, Schauer, J., held that under oil and gas lease for 20 years and so long thereafter as oil and gas could be secured in paying quantities, with paying quantities being defined as an average of 50 barrels per day for 30 consecutive days, lease automatically terminated at end of 20 years when production was below amount defined as paying quantities by lease, but that acceptance of royalties by lessor after termination resulted in a tenancy from month to month, which could only have been terminated by proper written notice to quit.

Judgment reversed.

Prior opinion 238 P.2d 35.

1. Mines and Minerals ⟹78(7)

In owner's action to quiet title to land claimed by defendant pursuant to 1921 oil and gas lease, wherein it appeared that lease provided that lessees were to hold for 20 years and so long thereafter as oil or gas could be secured in paying quantities, and defining paying quantity as well from which there might be pumped for 30 consecutive days a quantity of oil averaging 50 barrels per day, evidence sustained finding that well on premises involved could not be made to produce at rate of 50 barrels of oil per day for 30 consecutive days, and that such production, within meaning of definition of paying quantities as defined in lease, could not have been obtained since 1941.

2. Mines and Minerals ⟹78(1)

Where oil and gas lease provided that lessee should hold for 20 years and so long thereafter as oil and gas could be secured in paying quantities, and term "paying quantities" was defined in lease as meaning a well from which there might be pumped for 30 consecutive days a quantity of oil averaging 50 barrels per day, in absence of other circumstances, oil and gas lease would terminate at end of 20 years from date, if oil and gas could not be produced at end of such period in paying quantities within definition of lease.

3. Mines and Minerals ⟹73

Oil and gas lease which provided that lessee should hold for 20 years and so long thereafter as oil and gas could be produced in paying quantities as defined in lease, created a determinable fee interest in a profit a prendre.

4. Estates ⟹6

A determinable fee terminates upon the happening of event named in terms of instrument which created estate, and no notice is required for, and no forfeiture results from, such termination.

5. Mines and Minerals ⟹78(1)

In absence of definition in mineral lease of term "paying quantities", inclusion in habendum of lease of paying quantities phrase serves to perpetuate lease beyond fixed term for so long thereafter as it would be mutually profitable to parties, but when term appears in development provisions, it operates primarily for benefit of lessee as a limitation upon his obligation to drill and pay royalties.

6. Mines and Minerals ⟹78(1)

In absence of definition in mineral lease of term "paying quantities", such term when used in extension clause of oil lease habendum means production in quantities sufficient to yield return in excess of operating costs, even though drilling and equipment costs, and other costs may never be repaid, and undertaking as a whole may result in loss, but when term appears in development provisions of lease, it means production in such quantities as would lead to reasonable expectation of reasonable profits on entire sum, including drilling and other costs.

See publication Words and Phrases, for other judicial constructions and definitions of "Paying Quantities".

7. Mines and Minerals ⟹73

Function of court when construing mineral lease is not to make a new lease for the parties, but to interpret the lease which they have made, without regard to its wisdom or folly.

8. Mines and Minerals 🔑78(1)

Where habendum clause of oil and gas lease provided that term of lease was 20 years and so long thereafter as oil or gas was produced in paying quantities, within definition thereinafter particularly specified, and paying quantities was defined by rate of 50 barrels for 30 consecutive days, to construe lease by striking from habendum the phrase "within definition particularly specified" and by interpretation in accord with general rule that term "paying quantities" as used in habendum means production sufficient to yield return in excess of operating costs, would be in violation of rule that court's duty is to interpret lease as made and not to make new lease.

9. Mines and Minerals 🔑78(5)

Where oil and gas lease was for 20 years and so long thereafter as oil or gas could be secured in paying quantities, with paying quantities being defined as an average of 50 barrels per day for 30 consecutive days, right of lessors to cancel lease after expiration of 20 years when specified quantities were not being produced was not waived, or lessor was not estopped from asserting that lease was terminated, by acceptance of royalty payments after right to terminate arose.

10. Executors and Administrators 🔑315(6)

Decree of distribution in estate of original lessor under oil and gas lease which distributed to plaintiff the rights of lessor and stated that right of lessor in lease was 14 barrels out of each 100 barrels of oil produced and sold, without mention of any minimum rate of production, did not purport to define precise quantum of plaintiff's interest, and could not have been res judicata on meaning of term "paying quantities" as used in habendum clause of lease.

11. Executors and Administrators 🔑315(1)

Probate court, when distributing part of estate of lessor subject to oil and gas lease, was without authority to adjudicate respective interests of distributee of estate and lessees in oil land in question, and could not determine construction of term "paying quantities" in habendum clause of lease.

12. Mines and Minerals 🔑79(1)

If a lessee, under oil and gas lease, holds over after expiration of his term and his lessor accepts monthly rental payments in amount of payments which lessee had been making under the lease, lessee becomes a tenant from month to month.

13. Landlord and Tenant 🔑116(5)

When tenancy of lessee who has held over after expiration of term has become one from month to month by virtue of acceptance of rental payments by lessor, 30 days written notice to quit is necessary in order to terminate tenancy, since tenancy is deemed to be renewed each month unless one of the parties gives written notice to other of his intention to terminate same. Civ.Code, §§ 1945, 1946.

14. Mines and Minerals 🔑78(4)

Where mineral lease had terminated by reason of failure of production in paying quantities within definition of that term in lease, acceptance by lessor of the usual royalty payments created a month to month tenancy which continued until 30 day notice in writing to quit was given, and in absence of such notice, judgment that lessor was entitled to exclusive possession and that lessees had no right or interest was erroneous. Civ.Code, §§ 1945, 1946.

15. Mines and Minerals 🔑78(7)

Where trial court correctly determined that mineral lease had terminated because of failure of production in paying quantities as that term was defined by lease in connection with habendum clause, finding on issue whether forced increased production would probably have destroyed well would have been immaterial, and omission of such finding was not error.

16. Mines and Minerals 🔑78(1, 7)

Where mineral lease was for 20 years and so long thereafter as oil or gas or other hydrocarbon substances might be produced in paying quantities as defined by lease, and term paying quantities was defined as production averaging 50 barrels per day for 30 consecutive days, omission by parties of any specific definition in relation to minerals other than oil indicated that production of oil only was to be measuring stick in determining when lease terminated, and finding that other substances were not being produced in paying quantities was not necessary to judgment for termination of lease.

17. Mines and Minerals ⚷78(7)

Where mineral lease had terminated because of failure of production in paying quantities as defined in connection with habendum clause of lease, and lease provided that lessee should have right to remove casing, machinery, and other property furnished by lessee, provisions of lease, rather than rules of law concerning removal of fixtures, controlled right of lessee to remove machinery and equipment, and trial court properly refrained from making finding in quiet title action by lessor concerning whether lessee had right to remove machinery, when record did not disclose who had furnished such equipment and machinery. Civ.Code, §§ 660, 1013, 1019.

◆

Ben F. Griffith, Los Angeles, Mize, Kroese, Larsh & Mize, Santa Ana, Newby, Holder & Newby, Los Angeles, for appellants.

Blodget, Morris & Blodget, L. W. Blodget and June E. Blodget, Santa Ana, for respondent.

SCHAUER, Justice.

Plaintiff, the owner of fee title to certain real property, obtained judgment quieting her title as against defendants, who claim under an oil and gas lease. This is an appeal by the defendants. Plaintiff's position, which was accepted by the trial court, is that the term of the lease has expired. We have concluded that this position is correct, but that, because the lessee held over after the expiration of the lease and the lessor continued to accept royalty payments, there arose a tenancy from month to month which has not yet been terminated.

On April 23, 1921, plaintiff's predecessor in interest executed the oil and gas lease. The material provisions of the lease are as follows:

The habendum clause provides that the term of the lease is 20 years "and so long thereafter as oil or gas or other hydrocarbon substances can be secured therefrom in paying quantities within the definition hereinafter particularly specified, unless otherwise surrendered or forfeited by the Lessee."

The development provision requires the lessee to drill "with reasonable diligence until oil is found in paying quantities within the definition of such term next hereunder set forth, or to a depth at which further drilling would, to the judgment of the Lessee, be unprofitable, or terminate this lease * * * [I]f oil should not be obtained in paying quantities * * * in the first well drilled, the Lessee shall, as a condition of the continuation of any of the rights given to it by this lease, within sixty (60) days after drilling has ceased on said first well, commence upon the premises the drilling of a second well and shall prosecute the drilling of the same with reasonable diligence until oil is found in such paying quantities by the Lessee or until such well has been drilled to a depth at which further drilling would, in the judgment of the Lessee, be unprofitable."

The definition of "paying quantities" reads: "Oil in paying quantities shall be understood to mean a well drilled from which there may be pumped for a period of thirty (30) consecutive days a quantity of oil which shall average fifty (50) barrels of oil * * * per day."

> "The Lessee agrees to operate each completed well on the premises to its full capacity so long as such well shall produce oil in quantities deemed paying quantities within the definition aforesaid, while this lease is in force as to the portion of the premises on which such well is situated; provided, however, that nothing in this paragraph shall be construed as to require the Lessee to maintain such well to such capacity as would, within the judgment of experienced oil men, possibly result in the destruction of such well."

In 1923 a well was brought in; initial production was 650 barrels of oil a day; by 1938 production had fallen to less than

50 barrels a day and since 1941 the well has produced 30 or 40 barrels a day. There is no other well on the premises.

In 1945 the lessor died and his interest in the land passed to plaintiff. Defendants are the successors in interest of the original lessee. Defendant Invader Oil Company has been in physical possession of the land and has operated the well since oil was discovered in 1923. The remaining defendants are owners of participating interests in production from the well.

[1] Although production had fallen below the "paying quantities" rate of 50 barrels per day at the time when, on April 23, 1941, the 20 years specified in the habendum clause of the lease had passed, Invader continued to operate the well and the lessor (until his death in 1945) and plaintiff (until the institution of this action in 1947) continued to accept their royalty share without protest that the production was less than 50 barrels per day. The trial court found "that said well cannot be made to produce at the rate of 50 barrels of oil per day for 30 consecutive days, and it is not true that since April 23, 1941, oil or gas or other hydrocarbon substances may be pumped therefrom in paying quantities within the definition particularly specified in said lease." This finding is supported by the evidence.[1]

[2–4] According to the ordinary meaning of language the lease terminated on April 23, 1941, at the expiration of 20 years from the date of its making, because oil and gas could then no longer be produced therefrom in "paying quantities" as defined in the lease. Plaintiff contends and the trial court took the view that the lease means just what it plainly says. This construction of the lease is more tenable than the rather strained construction, hereinafter discussed, which is urged by defendants. The oil lease, with its "and so long thereafter" phrase in the habendum clause, created a determinable fee interest in a *profit á prendre.* (Dabney v. Edwards (1935), 5 Cal.2d 1, 12, 53 P.2d 962, 103 A.L.R. 822; Tanner v. Title Ins. & Trust Co. (1942), 20 Cal.2d

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[1] An expert witness testified as follows:

"A. The only thing, in my opinion, that could be done to increase the production on the well would be by lowering the tubing to a lower depth. You would probably, and would get an increase there of both your gross and net. Well, say you would lower the tubing 100 feet, I don't think you would get an amount there of, oh, say maybe ten, fifteen barrels out gross, but I don't think you would hold that for a long period of time. I would say that you would exhaust that down to a normal production within a two-weeks' period.

"Q. Do I understand by that latter statement that within a two-weeks' period it would be back to normal production? A. To the production that it is producing at the present time.

"Q. And what do you mean by ten or fifteen barrels gross? A. Well, that's your water and oil, you would get an increase of water, and if you get an increase in water, you would naturally get an increase in that oil.

"Q. Well, approximately, in your opinion, a well of that type, by lowering the pump, how much increase in oil production, average per day, would you get for thirty days? A. Well, assuming that the cut of the well, which I understand at the present time is about 30 per cent. water, you wouldn't get an increase of net oil of only probably around three or four barrels per day. You might get five, I don't know.

"Q. Would there be any danger of sanding up the well or anything of that kind in connection with lowering the pump? A. Well, there would be if you lowered it too much, I would say yes, there would be danger of sanding it up.

"Q. Then what would happen in that event? A. Well, then, you simply have to pull the rods and tubing and clean the well out in order to get it back on production again."

Another expert, the actual operator of the well, testified that since 1938 (i. e., since production has been less than 50 barrels a day) to produce oil from the well at greater capacity than he had produced it would destroy the well within "sixty days probably, or maybe longer." Still another expert testified to the same effect. Obviously if the well is and has been since 1938 in a condition where forcing production to 50 barrels a day would destroy it within 60 days, it was not in 1941 in a condition where oil and gas could be pumped from it in "paying quantities" within the express definition of the lease.

814, 819, 129 P.2d 383; and cases cited therein and in 8 Cal.Jur. Ten Year Supp. (1948 rev.), p. 624.) A determinable fee terminates upon the happening of the event named in the terms of the instrument which created the estate; no notice is required for, and no forfeiture results from, such termination. (Henck v. Lake Hemet Water Co. (1937), 9 Cal.2d 136, 140, 69 P.2d 849; Caswell v. Gardner (1936), 12 Cal.App.2d 597, 600, 55 P.2d 1222; Macco Construction Co. v. Fickert (1946), 76 Cal.App.2d 295, 304, 172 P.2d 951.)

[**5, 6**] Defendants rely upon Transport Oil Co. v. Exeter Oil Co. (1948), 84 Cal. App.2d 616, 191 P.2d 129. That opinion contains the following correct general statements 84 Cal.App.2d at pages 621, 622 of 84 Cal.App.2d at page 132 of 191 P.2d: "In the evolution of oil and gas leases, the paying quantities phrase has come to have two entirely different meanings. In the habendum it serves to perpetuate the lease beyond the fixed term for as long thereafter as it would be mutually profitable to the parties. [Citations.] A different function is performed where the term appears in the development provisions, for there it operates primarily for the benefit of the lessee, as a limitation upon his obligation to drill and pay royalties. * * * By the great weight of authority, the term, 'paying quantities,' when used in the extension clause of an oil lease habendum means production in quantities sufficient to yield a return in excess of operating costs, even though drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss. [Citations.]" Where the term appears in the development provisions of the lease, and the question is whether oil has been found in "paying quantities" so as to permit or require the drilling of other wells, the normal meaning of the term is such quantities as would lead to a reasonable expectation of a reasonable profit on the entire sum, including drilling costs, to be expended in prosecution of the enterprise. (See cases collected in 48 A.L.R. 887; 84 A.L.R. 761; 91 A.L.R. 900.)

These general statements apply where the term "paying quantities" is not expressly defined by provisions of the lease. However, the lease of which Transport was lessee, like the lease here, contained an express definition of the term "paying quantities." The material provisions of Transport's lease were as follows:

> "The habendum clause provided: 'The Lessee shall hold said land hereunder, for the period of twenty (20) years from, and after, the date hereof and as long thereafter as oil or gas is produced in paying quantities unless otherwise forfeited by Lessee in accordance with the terms of this lease.'" (Pages 617–618 of 84 Cal.App.2d, page 130 of 191 P.2d.)
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> "The duty to drill the first well was limited to a depth of 3,500 feet, 'unless oil, in paying quantities shall have been obtained at a lessor [sic] depth.' Furthermore, a cash bonus was to become payable only 'in the event oil is obtained in paying quantities in the well so drilled on the north half of said Lot Three.' And finally, the lessee's obligation to pay royalties was not to commence until 'after the discovery and production of oil in paying quantities from said well.'" (Page 620 of 84 Cal. App.2d, page 132 of 191 P.2d.)

The term "paying quantities" was defined as follows: "'For all purposes herein contemplated, a well shall be deemed to be producing oil in paying quantities when such well, operated in a diligent and skillful manner, will produce oil or gas or both of a value at the well of $15.00 per day or more in excess of the reasonable cost of the fuel, labor, supplies and material required in the operation of such well.'" (Page 620 of 84 Cal.App.2d, page 132 of 191 P.2d.)

In the Transport case the wells on the leased property were all producing but none was making as much as $15 per day. It was contended that the lease had expired and that production could be abandoned. The District Court of Appeal (page 621 of 84 Cal.App.2d, page 133 of 191 P.2d) held that "the effect to be given to the term 'paying quantities,' in the habendum is not governed by the $15 per day definition, but is to be determined by reference to the established legal meaning of the term" (i. e., production yielding revenue in excess of operating costs); otherwise, said the District Court of Appeal, the operator of the wells could abandon production even though such production was mutually profitable to lessor and lessee, a result which "would do violence to the rule that such leases are to be construed in accordance with their reasonable and common sense meaning."

[7, 8] Defendants urge that by similar reasoning the lease here should be rewritten to strike from the habendum clause the phrase "within the definition hereinafter particularly specified." As so rewritten the lease would continue for a term as long as operation of the well was "mutually profitable." Defendants would have us read into the habendum clause another provision of the lease which has nothing to do with the duration of its term; i. e., the provision that the lessee need not operate a well at a capacity which would result in its destruction. This construction, they say, is in accord with the construction which the parties themselves adopted when, after April 23, 1941, they continued to operate as if the lease were still in existence. These arguments ignore the elementary rule of construction, applicable to oil leases as well as to other documents, that the function of the court is not to make a new lease for the parties but to interpret the lease which they have made, "without regard to its wisdom or folly." (Hill v. General Petroleum Corp. (1932), 128 Cal.App. 284, 294, 16 P.2d 1035.)

[9] Defendants argue that because plaintiff and her predecessor in interest permitted Invader to continue production and accepted royalty payments, plaintiff "waived the right to cancel the lease" or "is estopped to deny that said lease is still in full force." These arguments are but another way of saying that, because plaintiff for a time accepted her royalty share of a production less than 50 barrels a day, the lease endures so long as oil is produced at a rate which is "mutually profitable" rather than at the expressly defined rate of 50 barrels per day. In other jurisdictions it has been held that the lessor's acceptance of royalty does not "estop" or otherwise preclude him from insisting that the lease has expired. (Woodruff v. Brady (1937), 181 Okl. 105 [72 P.2d 709, 113 A.L.R. 391], and annotation in 113 A.L.R. 396; Gas Ridge v. Suburban Agricultural Properties (1945; 5 Cir.), 150 F.2d 363, 365; see Watson v. Rochmill (1941), 137 Tex. 565 [155 S.W.2d 783, 137 A.L.R. 1032], and annotation in 137 A.L.R. 1037.) We agree with this view rather than with the apparently contrary view expressed in Eagle Oil Co. v. Sinclair Prairie Oil Co. (1938; D.C.N.D.Okl.), 24 F.Supp. 612, 618, and McCoy v. Texon Royalty Co. (1939; Tex.Civ.App.), 124 S.W.2d 877, 881. Here, the Huntington defendants find waiver and the Invader defendants find estoppel from the fact that Invader expended time and money in continually producing oil. But there is no evidence that defendants changed their position to their detriment in reliance on plaintiff's continued acceptance of royalty payments. Of course Invader incurred operating expenses in order to continue production, but the continuing of production was an operation which was profitable to all parties after all operating expenses had been deducted from the proceeds of production.

[10, 11] Defendants urge that their construction of the term "paying quantities" in the habendum clause of the lease is res judicata because of the decree of distribution in the estate of the original lessor, plaintiff's predecessor in interest. That decree distributed to plaintiff "All of the right, title and interest" of the lessor and stated, "The right of deceased at the time of his death, was, and the right of his estate now is, *inter alia*, 14 barrels out of each 100 barrels of oil produced and saved, together with four-fifths (4/5) of one (1) cent per 1000 cubic feet of gas royalty, all as shown by the records in the office of the Recorder"; the decree contains no mention of any minimum rate of production. It is obvious that the decree did not purport to define the precise quantum of plaintiff's interest. Even if it had purported to do so the probate court could not have adjudicated the respective interests of plaintiff and defendants in the oil land in question. (Noble v. Beach (1942), 21 Cal.2d 91, 98, 130 P.2d 426.)

[12] We must next decide what relationship existed between the parties after the lease terminated on April 23, 1941. After that date Invader made and the lessor and plaintiff as the lessor's successor in interest accepted monthly royalty payments. If a lessee holds over after the expiration of his term and his lessor accepts monthly rental payments in the amount of the payments which the lessee had been making under the lease, the lessee becomes a tenant from month to month. (Civ.Code, § 1945; Agar v. Winslow (1899), 123 Cal. 587, 591, 56 P. 422; Colyear v. Tobriner (1936), 7 Cal.2d 735, 740, 62 P.2d 741, 109 A.L.R. 191; Herman v. Rohan (1918), 37 Cal.App. 678, 681, 174 P. 349.)

[13, 14] Notice to quit is necessary to terminate a month to month tenancy; such tenancy is "deemed to be renewed" each month "unless one of the parties gives written notice to the other of his intention to terminate the same, at least * * * 30 days" before the expiration of the month; or either party to the month to month tenancy "may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination." (Civ.Code, § 1946; see Sullivan v. Cary (1860), 17 Cal. 80, 85.) The month to month tenancy here was never terminated by the required notice; therefore, the finding that "defendants have no right, title or interest whatever in said land," and the portions of the judgment which decree that plaintiff is entitled to exclusive possession and that defendants have no interest in or right to possession of the real property, are erroneous. (Cf. Moon v. Marker (1938), 26 Cal.App.2d 33, 37, 78 P.2d 460, where the lessees, prior to the end of the term of years fixed by their oil lease, completely ceased production and thereafter held over but, so far as appears, made no rental payments whatsoever; in that situation the lessees upon expiration of the fixed term of years became mere tenants at sufferance and no notice to surrender possession was required as a prerequisite to the maintenance of a possessory action by the lessors.)

[15] Defendants urge that the judgment must be reversed because the trial court failed to find on material issues. The Invader defendants complain of the omission of a finding as to whether forced increased production would probably destroy the well. Such a finding would have been irrelevant because of the theory accepted by the trial court; if the lease had long since terminated (as the trial court correctly determined) and plaintiff was entitled to possession (as the trial court erroneously determined), the manner of future operation of the well, otherwise than by consent, express or implied, could have no effect on the rights of the parties.

[16] Defendants contend that the trial court should have made a finding as to whether *gas* was being produced in paying quantities. As previously stated, the court found that "it is not true that since April 23, 1941, oil or gas or other hydrocarbon substances may be pumped therefrom in paying quantities within the definition particularly specified in said lease." The lease contains no definition of the term "paying quantities" as applied to production of gas or other hydrocarbon substances. Plaintiff argues that the parties to the lease, by defining "Oil in paying quantities" and omitting any specific definition of what should constitute paying quantities of other substances, showed their intention that production of oil only should be the "measuring stick" in determining when the lease terminated. This construction, upon the record in this case, is tenable, and from the last quoted finding it appears that the trial court accepted it.

[17] Finally, defendants contend that the trial court should have made a finding on the question of Invader's right to remove its casing, equipment and machinery from the premises. The trial court expressly declined to make any finding "concerning the title to or right to remove by any party any personal property placed upon the premises by Lessee or his successors in interest." The lease provides that lessee shall have the right to remove casing, machinery, "and other property and improvements belonging to or furnished by said lessee." This provision of the lease, rather than the rules of law concerning removal of fixtures (see Civ.Code, §§ 660, 1013, 1019; 39 A.L.R.

1255), controls the right of the lessee to remove machinery and equipment. (R. Barcroft & Sons Co. v. Cullen (1933), 217 Cal. 708, 712, 20 P.2d 665; Teater v. Good Hope Dev. Corp. (1939), 14 Cal.2d 196, 207, 93 P.2d 112.) Defendants produced no evidence that the equipment and machinery on the premises belonged to or was furnished by the lessee or any of defendants; the record does not disclose who furnished such equipment and machinery; therefore, the trial court could not make a finding favorable to defendants concerning title and right to remove such property.

Although the trial court correctly determined that the lease had terminated and did not, as defendants contend, err in omitting findings above discussed, it did err in determining that defendants have no right whatsoever in the real property and that plaintiff is entitled to immediate possession. Therefore, the judgment is reversed. Each party shall bear its own costs on appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

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39 Cal.2d 66

PATERSON v. COMASTRI et al.

(three cases).

S. F. 18092.

Supreme Court of California, in Bank.

May 27, 1952.

Rehearing Denied June 19, 1952.

Actions by Jessie H. Paterson against Alcide Comastri and others to determine ownership of three joint tenancy bank accounts which plaintiff's sister had opened with plaintiff. The actions were consolidated for trial and the Superior Court, San Francisco County, George W. Schonfeld, J., enteerd judgment for defendants and plaintiff appealed. The Supreme Court, Spence, J., held that plaintiff's sister at the time of deposit did not intend to create a true joint tenancy account but regarded the accounts as her own property.

Affirmed.

Prior opinion, 236 P.2d 230.

1. Joint Tenancy 🔑**3, 6**

Provision of Bank Act relating to joint deposits sets up two presumptions; first, that a deposit in names of depositor and another person, in form to be paid to either or the survivor, becomes the property of such persons as joint tenants, but such presumption may be overcome by proof that owner-depositor when making deposit had no intention to create true joint tenancy; and second, that in absence of fraud or undue influence, it was intention of depositors to vest title in survivor, and such presumption is conclusive. Gen.Laws, Act 652, § 15a.

2. Joint Tenancy 🔑**6**

In order that conclusive presumption created by provision of Bank Act relating to joint deposits may be applicable, there must be survivorship, and even then such presumption applies only in favor of survivor to monies still remaining in the account at time of death and does not apply in respect to monies withdrawn by either depositor during life, even if one of the depositors has subsequently died. Gen.Laws, Act 652, § 15a.

3. Joint Tenancy 🔑**10**

In action by survivor of two sisters in whose joint names deposits had been made for one half of the amount which the deceased sister had withdrawn from such account, the statutory presumption of equality of interest arising from form of joint account was rebuttable by competent evidence showing true character and ownership of monies deposited. Gen.Laws, Act 652, § 15a.

4. Banks and Banking 🔑**129**

Evidence 🔑**461(1)**

Provision of Bank Act relating to joint deposits forms a part of each contract creating a joint bank account, and to the extent that parol evidence of intention becomes admissible to overcome rebuttable presumption created by such provision, the provision effects a statutory modification of the parol evidence rule with respect to bank accounts established in the statutory pattern, and therefore evidence of depositor's intention in making joint deposits in her own and her sister's names was competent in sister's action for one-half of the amount which depositor, since deceased, had withdrawn, through joint accounts were created by writing. Gen.Laws, Act 652, § 15a.

5. Joint Tenancy ⚷3

Evidence as to deceased's intent at time of creation of joint accounts was competent to show that contrary to rebuttable presumption created by provision of bank act relating to joint deposits, deceased did not intend to create true joint tenancy accounts with her sister, and that deceased had regarded the accounts as her own property. Gen.Laws, Act 652, § 15a.

6. Joint Tenancy ⚷3

In action by surviving sister against husband of her deceased sister, who had made joint bank deposits in the sisters' names and who had subsequently withdrawn such deposits and opened an account with her husband, for one half of the amount so withdrawn, evidence sustained trial court's finding that deceased sister at time of deposit had not intended to create a true joint tenancy account with her sister but had regarded the accounts as her own property. Gen.Laws, Act 652, § 15a.

7. Husband and Wife ⚷14(3)

Where wife had opened joint account with her husband, it would be conclusively presumed that title became vested in husband as survivor, in absence of showing of fraud or undue influence. Gen.Laws, Act 652, § 15a.

◆

Stanley Burke, San Francisco, for appellant.

Alcide Comastri, in pro. per.

Thomas P. Kelleher, Frank J. Fontes, Davis & Barber and Robert K. Barber, all of San Francisco, for respondent.

James B. Abbey and James S. Lowrie, San Diego, amici curiæ on behalf of respondent.

SPENCE, Justice.

Plaintiff brought three separate actions, which were consolidated for trial, to determine the conflicting claims of plaintiff and defendant Comastri to three joint bank accounts. One account is in each of the defendant banks, and it was stipulated that the banks are mere stakeholders. From findings and judgments adverse to her, plaintiff appeals.

Plaintiff and Mary Blair Gilmour were sisters. Following the death of Mary's husband in 1934, Mary opened a savings account in the names of herself and plaintiff with each of the defendant banks. In July, 1945, Mary married defendant Comastri, and in August of that year she caused the three accounts to be transferred from the names of plaintiff and herself to the names of herself and her husband in joint tenancy. Plaintiff did not learn of these transfers until after Mary's death in 1947.

It is plaintiff's claim that she is entitled to one-half of the monies transferred from each of the original joint accounts to the new accounts. She argues that Mary was entitled to withdraw only one-half of these monies, and that by her appropriation of the entire balances to open the new accounts, she effected a severance of the unity of title. As a result thereof, plaintiff maintains that she became entitled as a tenant in common to one-half of the whole of each deposit existing at the time.

Defendant Comastri, on the other hand, takes the position that his wife had the right to withdraw the funds from the original accounts without liability to plaintiff because she was in fact and in law the real owner of the money. He therefore, as the survivor of the joint tenancies established by his wife through the transfers in August, 1945, claims to be entitled to the entire balances in all three accounts.

It is undisputed that all three original accounts were opened with Mary's money; that the withdrawals from time to time were all made by her; that the passbooks were held by her throughout, and that the transfers to the new accounts were negotiated by her without the plaintiff's knowledge or consent. Nor does plaintiff dispute that all subsequent deposits were made by Mary except one for $2,000, which plaintiff claims to have made. The trial court, however, found otherwise as a reasonable inference from the evidence. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183;

Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660.

When the account with the Hibernia Bank was opened in December, 1934, plaintiff and Mary signed a printed form providthat the funds therein would be "payable to either or to the survivor of them." A more extended writing was signed by them when the account with the Bank of America was opened in the same month. It provided in part that: "The undersigned depositors agree as follows with Bank of America * * * (2) that all funds now to the credit of or which may hereafter be placed to the credit of this account are and shall be the property of the undersigned as joint tenants to be withdrawn as follows: Upon the signature of either of us or the survivor * * *." They signed a substantially similar writing when the account with the American Trust Company was opened in January, 1939, and again in 1943, when, after loss of the passbook for the Bank of America account, a new book was issued to them.

Plaintiff testified at length in reference to the circumstances surrounding the opening of the accounts, the related conversations between her sister and herself during the ensuing years, and the exercise of control by her sister over the funds by keeping sole possession of the passbooks and making the deposits and withdrawals. She stated that in two of the three instances Mary had asked her to accompany her to the bank for the purpose of opening a "joint account"; that she had done so and had signed whatever was presented to her by the bank teller. On the other occasion the bank's printed card was mailed to her for her signature. She testified that her "sister would occasionally tell me this account has earned so much interest or I have added to this," and that when the Bank of America and American Trust accounts were opened, her sister in each instance had said "it was a joint account, and it was to come to me automatically at her death."

Plaintiff further testified that while she had never made any withdrawals from any of the three joint accounts, she knew that if she "needed money or help in any way my sister would certainly have allowed me to have a certain sum from her bank as I would from my own if she needed money." With respect to the single deposit of $2,000 which she claimed to have made in one of the accounts, plaintiff appeared to be very uncertain about the exact nature of the transaction. While identifying such sum to have been realized as her share in the sale of some family property, plaintiff admitted that she had "no definite recollection" of what was done with the money.

The court made findings favorable to defendant Comastri in every respect. It found that Mary "never intended" and plaintiff "never understood or believed that the addition of plaintiff's name in the statutory pattern endowed plaintiff with a vested property interest" in the three accounts opened in their names; that they were not joint tenancy accounts, and that Mary and plaintiff agreed that they "would have a different character," namely, "that of sole and absolute ownership" in Mary with plaintiff "succeeding upon the death of Mary * * * to whatever, if anything, was left." The court further found that plaintiff at no time made any deposits in, contributions to, or withdrawals from these accounts, and that Mary "at all times withheld from plaintiff all dominion over the account[s] and exercised full control and power of disposition as sole owner thereof, retaining the passbook[s] in her possession." The court determined therefrom that the "presumption arising from the form of the account[s]" in the names of Mary and plaintiff had been "overcome by evidence." With respect to the accounts established in the names of Mary and defendant Comastri, the court concluded that the joint tenancies "in the statutory pattern" were "conclusive evidence of the intention of the depositor to vest title to the deposit[s] and all additions thereto in the survivor, Alcide Comastri."

The position of plaintiff on this appeal is twofold. She argues (1) that although in the usual case of withdrawals by one depositor from a joint account during the lives of the depositors the presumption of joint tenancy is rebuttable, Section 15a of the California Bank Act, it may not be rebutted by parol evidence in the case where the joint tenancy account was created by an unequivocal writing; but (2) if parol evidence is admissible, there has been an insufficient showing in this case to overcome the rebuttable presumption.

Section 15a of the California Bank Act, Deering's Gen.Laws 1937, Act 652, pp. 221–222, provides that a deposit made by any person in the names of such depositor and others "in form to be paid to any of them or the survivor or survivors of them" shall become the "property of such persons as joint tenants," and that "[t]he making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which * * * the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

[1, 2] This section, which was copied from the New York Bank Act, has been construed by the courts of this state and of New York to set up two presumptions: First, that a deposit in the names of the depositor and another person "in form to be paid to" either or the survivor of them, becomes the property of such persons as joint tenants. This first presumption is not conclusive, and may be overcome by proof that the owner-depositor, when making the deposit, had no intention to create a true joint tenancy. The second presumption, that in the absence of fraud or undue influence, it was the intention of the depositors to vest title in the survivor, is conclusive. In order that the conclusive presumption may be applicable, however, there must be survivorship, and even then it applies only in favor of the survivor to monies still remaining in the account at the time of death. It does not apply in respect to monies withdrawn by either of the depositors during life, even if one of the depositors has subsequently died. Wallace v. Riley, 23 Cal.App.2d 654, 661, 74 P.2d 807; Moskowitz v. Marrow, 251 N.Y. 380, 396, 167 N.E. 506, 512, 66 A.L.R. 870; Matter of Porianda's Estate, 256 N.Y. 423, 425–426, 176 N.E. 826; Matter of Juedel's Will, 280 N.Y. 37, 40, 19 N.E.2d 671; Walsh v. Keenan, 293 N.Y. 573, 578, 59 N.E.2d 409.

[3] The question presented by plaintiff's claim is that of the right of one of the codepositors to withdraw funds from the account during the lives of the codepositors. Under these circumstances the statutory presumption of equality of interest arising from the form of the joint account is rebuttable by competent evidence showing the true character and ownership of the monies deposited. Wallace v. Riley, supra, 23 Cal.App.2d 654, 664, 74 P.2d 807; In re Kellogg, 41 Cal.App.2d 833, 841–845, 107 P.2d 964; Spear v. Farwell, 5 Cal.App.2d 111, 113, 42 P.2d 391; Moskowitz v. Marrow, supra, 251 N.Y. 380, 396, 167 N.E. 506. This is conceded by plaintiff, but she argues that parol evidence is incompetent to vary the terms of the specific joint tenancy agreements executed by the parties. This argument has particular reference to the Bank of America and American Trust accounts, where the agreements specifically stated that all funds deposited therein "shall be the property of the undersigned as joint tenants."

Plaintiff bases her position mainly on Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055, and certain cases which preceded it. Kennedy v. McMurray, 169 Cal. 287, 146 P. 647; In re Estate of Harris, 169 Cal. 725, 147 P. 967; In re Estate of Gurnsey, 177 Cal. 211, 170 P. 402; Crowley v. Savings Union Bank & Trust Co., 30 Cal.App. 144, 157 P. 516; Conneally v. San Francisco Savings & Loan Soc., 70 Cal.App. 180, 232 P. 755; In re Estate of Fritz, 130 Cal.App. 725, 20 P.2d 361. However, none of these cases gave extended consideration to the effect of section 15a of the Bank Act and each involved a controversy over the right of the surviving codepositor to the balance remaining in a joint account existing at the time of the death of the deceased codepositor, rather than a controversy over the right of a codepositor to make withdrawals during the lifetime of all the codepositors. These cases are therefore clearly distinguishable, for if section 15a of the Bank Act had been applied, the conclusive presumption rather than the rebuttable presumption would have come into play and would have produced the same result.

Section 15a was in existence at the time of the transactions in the Gaines case, but this court found it unnecessary to rest the decision upon that section, as it found no substantial evidence, competent or incompetent, sufficient to sustain the theory that the surviving depositor held title to the balance in the existing joint account subject to a trust. For the purpose of the present discussion, which concerns only the right of a codepositor to make withdrawals during the lifetime of the codepositors, it is significant to note that this court gave apparent approval to Wallace v. Riley, supra, 23 Cal.App.2d 654, 74 P.2d 807, in the Gaines case. See 15 Cal.2d 255, at page 260, 100 P.2d 1055.

[4] Since its enactment, section 15a of the Bank Act has been deemed a part of each contract creating a joint bank account. Wallace v. Riley, supra, 23 Cal.App.2d 654, 666, 74 P.2d 807. The presumptions created by that section are therefore applicable regardless of the unequivocal nature of the deposit agreement; and to the extent that parol evidence of intention becomes admissible in certain types of controversies to overcome the rebuttable presumption and to show the "realities of the ownership". Wallace v. Riley, supra, 23 Cal.App.2d at page 664, 74 P.2d at page 813, the section effects a statutory modification of the parol evidence rule with respect to bank accounts established in the statutory pattern. To hold otherwise "would do violence to intention, for those who open such accounts have seldom any thought of restricting their enjoyment of the fund, their right to draw and spend, by the shackles of a formula. * * * It would foster litigation, for each of the two depositors, the one opening the deposit as fully as the other, would be subject to an accounting for moneys afterwards withdrawn, and forced to make division on the footing of equality." Cardozo, Ch.J., in Moskowitz v. Marrow, 251 N.Y. 380, at page 397, 167 N.E. 506, at page 512, 66 A.L.R. 870. See, also, Spear v. Farwell, supra, 5 Cal.App.2d 111, 42 P.2d 391; In re Kellogg, supra, 41 Cal.App. 2d 833, 107 P.2d 964.

[5, 6] The record here contains substantial evidence as to Mary's intent at the time of the creation of the joint accounts with plaintiff. This evidence was competent to show that contrary to the rebuttable presumption, Mary did not intend to create true joint tenancy accounts with plaintiff, and had regarded the accounts as her own property. The trial court so found, and that question was for the trial court to resolve. Wheeland v. Rodgers, 20 Cal.2d 218, 222, 124 P.2d 816; Spear v. Farwell, supra, 5 Cal.App.2d 111, 113, 42 P.2d 391; Copprell v. Copprell, 87 Cal.App.2d 4, 6, 195 P.2d 868. The conclusion of the trial court, that the "tenancy created at the opening" of the joint accounts between Mary and plaintiff was "in truth something different from the tenancy defined by the presumption," was therefore proper. Walsh v. Keenan, supra, 293 N.Y. 573, 580, 59 N.E.2d 409; see, also, Wallace v. Riley, supra, 23 Cal. App.2d 654, 663, 74 P.2d 807.

[7] Since the presumption in favor of plaintiff's claimed interest in the transferred funds has been overcome, it follows that the trial court properly concluded that defendant Comastri was the owner of the funds as the survivor of the joint tenancies between Mary and himself. In the absence of a showing of fraud or undue influence, it is conclusively presumed that title became vested in defendant Comastri as such survivor. Jorgensen v. Dahlstrom, 53 Cal. App.2d 322, 332, 127 P.2d 551; Hill v. Badeljy, 107 Cal.App. 598, 604, 290 P. 637; Conneally v. San Francisco Savings & Loan Soc., supra, 70 Cal.App. 180, 183, 232 P. 755.

Our attention has been directed to only two cases which are contrary to the views expressed herein. Henry v. Bank of America, 8 Cal.App.2d 353, 47 P.2d 1068; Tobola v. Wholey, 75 Cal.App.2d 351, 170 P.2d 952. The Henry case was decided prior to the decision in Wallace v. Riley, supra, 23 Cal. App.2d 654, 74 P.2d 807, and without adequate consideration of the history, purpose and effect of section 15a of the Bank Act. No distinction was there made between the conclusive presumption and the rebuttable presumption created by that section, and the conclusive presumption was applied despite the fact that the real question involved was that of the right of one of the codepositors to make withdrawals during the lifetime of all the codepositors. The Tobola case was decided later, and while the decision of the court was correct under the facts there, the court erroneously held that parol evidence was inadmissible to vary the express terms of the written contracts of deposit during the lifetimes of the depositors. This holding was based on such cases as Hill v. Badeljy, supra, 107 Cal.App. 598, 290 P. 637; In re Estate of Gurnsey, supra, 177 Cal. 211, 170 P. 402; Kennedy v. McMurray, supra, 169 Cal. 287, 146 P. 647; Conneally v. San Francisco Savings & Loan Soc., supra, 70 Cal.App. 180, 232 P. 755, all of which involved the survivorship situation. The court failed to distinguish between the conclusive and rebuttable presumptions created by Section 15a of the Bank Act, and did not consider the views expressed in the Wallace case or those found in Re Kellogg, supra, 41 Cal.App.2d 833, 107 P.2d 964. The decision of the Henry case, and the above-mentioned holding of the Tobola case, are therefore disapproved.

The judgments are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SCHAUER, JJ., concur.

39 Cal.2d 75

SOLON v. LICHTENSTEIN.

L. A. 22157.

Supreme Court of California, in Bank.
May 27, 1952.

Action by deceased's granddaughter against deceased's daughter, plaintiff's aunt, to establish a constructive trust in stock and a bank account which defendant had held in joint tenancy with deceased. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., entered judgment granting defendant's motion for nonsuit and plaintiff appealed. The Supreme Court, Spence, J., held, inter alia, that plaintiff had made a prima facie case.

Reversed.

Prior opinion, 235 P.2d 22.

1. Witnesses 🔑205

The objection of a privileged statement between attorney and client cannot be asserted where statement was made for purpose of communication to a third person. Code Civ.Proc. § 1881, subd. 2.

2. Witnesses 🔑200

Where only legal matter discussed by client and attorney was question of transfer of cemetery lots to certain relative of client, balance of conversation between client and attorney concerning client's family arrangements for division of his property upon death had no relation to any professional employment of the attorney by the client, and therefore the conversation as to the division of property was not privileged. Code Civ.Proc. § 1881, subd. 2.

3. Witnesses 🔑200

A communication to be privileged must have been made to an attorney acting in his professional capacity toward his client. Code Civ.Proc. § 1881, subd. 2.

4. Witnesses 🔑205

Where statements by client to attorney had been made by client to others on several previous occasions, manifestly such statements were not regarded by client as confidential upon repetition to attorney, and therefore they were not privileged. Code Civ.Proc. § 1881, subd. 2.

5. Joint Tenancy 🔑1

Joint tenancy stock account would be governed by general rules applicable to joint tenancy in personal property, and joint tenancy bank account would be governed by specific statutory provisions of the Bank Act. Gen.Laws, Act 652, § 15a.

6. Gifts 🔑29

Where close confidential relationship existed between father and daughter, and father opened joint stock account, and daughter gave no valuable consideration for father's transfer of his personal account into the joint tenancy holding and exercised no control over the property therein during her father's life time, the accounts were gift transactions and would be governed by rules applicable thereto.

7. Gifts ⚷47(3)

Where a gift is made by a parent to a child between whom a confidential relationship exists to the exclusion of another and contrary to the expressed intent of the parent, the burden is on the child to show that the transaction was fair and free from undue influence or fraud.

8. Gifts ⚷47(3)
Trusts ⚷110

In action by granddaughter against her maternal aunt to establish constructive trust in joint stock account which her maternal grandfather had opened with the aunt, wherein it was admitted that a confidential relationship had existed between the grandfather and the aunt, evidence that grandfather had intent to divide all his property, including the joint stock account, equally between his granddaughter and the aunt made a prima facie case, and the aunt had the burden of showing the validity of the gift.

9. Joint Tenancy ⚷6

The surviving depositor in joint bank account is entitled to benefit of conclusive presumption provided for in Bank Act unless he has through his own misfeasance placed himself in a better position than was intended by the deceased depositor. Civ. Code, § 3517; Gen.Laws Act 652, § 15a.

10. Fraud ⚷50

In general, fraud will not be presumed, but a presumption of fraud and undue influence may arise in case of a confidential relationship from which an undue advantage was gained.

11. Trusts ⚷107

In action by granddaughter against her maternal aunt to establish constructive trust in joint bank account which her maternal grandfather had held with the aunt, wherein the aunt admitted that a confidential relationship had existed between her and the grandfather, evidence that the aunt had secured an advantage which was not intended by the grandfather was sufficient to raise a presumption of fraud and undue influence, and to cast the burden upon the aunt to show fairness and good faith in all respects. Civ.Code, § 3517; Gen.Laws, Act 652, § 15a.

12. Fraud ⚷58(1)

A presumption of fraud and undue influence is sufficient to sustain a finding thereof.

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Perry Bertram, Los Angeles, for appellant.

Fred W. Heatherly, Arcadia, for respondent.

SPENCE, Justice.

Plaintiff brought this action to establish a constructive trust in certain personal property which defendant held in joint tenancy with her father, Eugene Parisek, now deceased. At the close of plaintiff's evidence, the trial court granted defendant's motion for a nonsuit, and plaintiff appeals from the ensuing judgment. She contends that such ruling violates the settled principle that the trial court should deny a motion for nonsuit "if there is * * * any substantial evidence, which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the averments of the complaint." 9 Cal.Jur. § 36, pp. 558–559; Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 837, 161 P.2d 673, 164 A.L.R. 1. Golceff v. Sugarman, 36 Cal.2d 152, 153, 222 P.2d 665. In this regard she also maintains that the trial court erred in excluding certain testimony upon the theory that it constituted a privileged communication arising from an attorney-client relationship. Code Civ. Proc. § 1881, subd. 2. Viewing the evidence in the light most favorable to plaintiff, disregarding conflicts, and construing all inferences which may reasonably be drawn in her favor, Hinds v. Wheadon, 19 Cal.2d. 458, 460, 121 P.2d 724; Lawless v. Calaway, 24 Cal.2d 81, 85, 147 P.2d 604; Lashley v. Koerber, M. D., 26 Cal.2d 83, 84–85, 156 P.2d 441, it appears that plaintiff's position must be sustained.

Eugene Parisek died in Los Angeles in March, 1948, at the age of 83 years. Plaintiff is his granddaughter. Her mother, who had died some ten years earlier, and defendant were his only children. By the terms of his will deceased divided his property equally between plaintiff and defendant, providing that one-half of his estate should go directly to defendant and the other half should go to defendant and a third person as cotrustees for the benefit of plaintiff until she reached the age of 32 years, when distribution should then be made to her. It does not appear what property deceased left at his death other than four joint tenancy accounts. Two of these accounts consist of government bond holdings, each in the approximate value of $15,000, one standing in the names of deceased and plaintiff and the other in the names of deceased and defendant. There is no dispute as to these accounts.

The property here in question consists of the two other joint tenancy accounts, both standing in the names of defendant and deceased at the time of his death: one created in December, 1934, covering deceased's bank account and the other established in April, 1947, covering his investment securities account. During the lifetime of deceased, defendant did not deposit or withdraw any money from the bank account, and she did not transact any business regarding the securities account. At the time of deceased's death, there was a balance of $1,792.20 in the bank account; and in the stock investment account there were securities valued at $14,239.79 and $180 on deposit.

Plaintiff seeks to establish a one-half interest in these two joint tenancy accounts. Her complaint charges that prior to April, 1947, deceased had become ill and had created the stock joint tenancy for his convenience in securing cash for personal expenses in the event he could not go to the bank or his broker's office; that defendant, his daughter, occupied a confidential relationship with him and spent considerable time with him; and that it was expressly agreed between them that the joint tenancy arrangement was "for convenience only," and that upon his death, "all of his property," including these two joint tenancy accounts, would be distributed equally between plaintiff and defendant as the division of his estate was made by his last will. The prayer asks that defendant be declared a constructive trustee of one-half of each of these joint tenancy accounts.

It appears from the evidence that a close confidential relationship existed between deceased and plaintiff, who lived in Chicago, and between deceased and defendant, who resided in Santa Barbara. The existence of this confidential relationship is admitted by defendant. Plaintiff testified that when she had visited deceased in 1941 at his invitation, deceased had told her in a number of conversations that he had arranged to divide everything he owned between her and defendant—even pointing out furnishings, personal jewelry and collector's items for inclusion in such equal division. This testimony was supported by the testimony of a Mr. Friend, a life-long intimate of deceased, who testified that on a number of occasions after the death of deceased's wife in 1935, deceased had told him that he (deceased) was leaving everything he had—property, stocks, bonds, furniture, all his possessions—to plaintiff and defendant equally. He testified further that in April, 1947, deceased made similar statements, saying, in particular, that "his government bonds" were "taken care of * * * because they were in his and his daughter's name and in his and his granddaughter's name, and all other stock including personal property was to be divided equally between those two because that was all he had in the world"; that at that time deceased also specifically mentioned "stocks and other bonds, and cash in the bank" which he wanted equally divided between his daughter and granddaughter.

Deceased's stockbroker testified that in 1946 deceased began to talk to him about saving inheritance taxes; that he then "pointed out the advantages of a joint tenancy"; and that in April, 1947, about the time deceased transferred his securities from his personal account to the joint tenancy with defendant, deceased told him that if anything happened to him, deceased, he wanted to leave the securities to defendant.

Plaintiff also sought to introduce the deposition of a Mr. Sirota, an attorney from Illinois, into evidence. The court sustained defendant's objection to the offer of that testimony on the ground that it constituted a privileged communication between a client and an attorney. Plaintiff thereupon offered to prove the following facts through this witness: that on the occasion of Mr. Sirota's visit to Los Angeles in August and September, 1947, he met the deceased; that they struck up an acquaintance by reason of the fact that he knew plaintiff, deceased's granddaughter, and her family; that deceased had certain cemetery lots in Chicago which he desired to transfer to plaintiff in exchange for her promise to care for them after deceased's death; that deceased asked him to see if plaintiff would agree to such undertaking, and if so, to make out the necessary papers; that in the course of conversation about deceased's family, deceased stated that he had "everything arranged so that everything in [his] estate" would go to plaintiff and defendant "share and share alike"; that deceased also stated that since he had had several heart attacks and on those occasions could not get to the bank, he had made an arrangement whereby defendant could draw out the funds he needed or "any stocks or bonds" that he had or "may have," and she had "access to those"; that he had "these in a joint safe account"; and that deceased further stated that plaintiff would receive one-half of what he possessed just as if her mother, his "own daughter were living"—that he had made a "definite arrangement" with defendant and "she [defendant] understands it." After returning to Chicago, Mr. Sirota communicated deceased's request to plaintiff and plaintiff promised to care for the graves. Mr. Sirota then prepared the deed, sent it to a bank in California, and upon its return to him, he delivered it to plaintiff.

[1–4] The only legal matter discussed by deceased and Mr. Sirota was the question of the transfer of the cemetery lots in Chicago. Deceased intended the instructions with regard to that matter to be conveyed by Mr. Sirota to plaintiff. The objection of a privileged statement cannot be asserted where the disclosure was made for the purpose of communication to another. 27 Cal.Jur. § 38, p. 53; Ferguson v. McBean, 91 Cal. 63, 73, 27 P. 518, 14 L.R.A. 65. The balance of the conversation between deceased and Mr. Sirota concerned the deceased's family arrangements for the division of his property upon his death. It had no relation to any "professional employment" of Mr. Sirota by the deceased, Code Civ.Proc. § 1881, subd. 2, or his status as an attorney, Collette v. Sarrasin, 184 Cal. 283, 288–289, 193 P. 571. A communication to be privileged must have been made to an attorney acting in his professional capacity toward his client. 27 Cal.Jur. §§ 36–37, pp. 50–52; Hager v. Shindler, 29 Cal. 47, 65; Sharon v. Sharon, 79 Cal. 633, 677, 22 P. 26, 131; Finnell v. Finnell, 156 Cal. 589, 602, 105 P. 740; In re Estate of Perkins, 195 Cal. 699, 710, 235 P. 45. According to the evidence, similar statements had been made by deceased to both plaintiff and his life-long intimate, Mr. Friend, on several previous occasions. Manifestly such statements were not regarded by deceased as confidential upon repetition to Mr. Sirota and so were not privileged. People v. Hall, 55 Cal.App. 2d 343, 356, 130 P.2d 733. The trial court erroneously applied the rule of a privileged communication between attorney and client in bar of Mr. Sirota's deposition.

[5] In determining the propriety of the granting of defendant's motion for a nonsuit, we must consider separately the joint tenancy stock account and the joint tenancy bank account. The former is governed by the general rules applicable to joint tenancies in personal property, while the latter is governed by the specific statutory provisions of Section 15a of the California Bank Act, Stats.1909, p. 87, as amended; 1 Deering's Gen.Laws 1937, Act 652, p. 221. Considering these accounts separately, we have nevertheless concluded that the trial court erred in granting the motion for a nonsuit as to both joint tenancy accounts here in dispute.

The Joint Tenancy Stock Account

[6–8] At the time the joint stock account was opened in 1947, a close confidential relationship admittedly existed between deceased and defendant. Defendant gave no valuable consideration for deceased's transfer of his personal account into the joint tenancy holding, and she exercised no control over the property therein during deceased's lifetime. Under these circumstances the accounts appear to have been gift transactions and are governed by the rules applicable thereto. Campbell v. Genshlea, 180 Cal. 213, 224, 180 P. 336. Where a "gift" is made by a parent to a child between whom a confidential relationship exists, to the exclusion of another and contrary to the expressed intent of the donor, the burden is on the donee to show that the transaction was fair and free from undue influence or fraud. Nobles v. Hutton, 7 Cal.App. 14, 20–21, 93 P. 289; Pleasants v. Hanson, 48 Cal.App. 626, 630–631, 192 P. 183; Hatch v. Penzner, 44 Cal.App. 2d 874, 879, 113 P.2d 295; see also Johnson v. Clark, 7 Cal.2d 529, 534–535, 61 P.2d 767. Since plaintiff presented substantial testimony from which it could be reasonably inferred that deceased had the intent to divide all his property, including the joint stock account, equally between plaintiff and defendant, the trial court erred in granting defendant's motion for a nonsuit. Having presented substantial evidence directly or inferentially supporting all the elements of the rule of Nobles v. Hutton, supra, plaintiff had made a prima facie case, and defendant then had the burden of showing the validity of the gift.

The Joint Tenancy Bank Account

In determining the propriety of the motion for a nonsuit as to the joint bank account, the effect of Section 15a of the California Bank Act must be considered. That section provides that a deposit made by any person in the names of such depositor and others "in form to be paid to any of them or the survivor or survivors of them" shall become the "property of such persons as joint tenants," and that "[t]he making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which * * * the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

The import of the above statute was discussed in Paterson v. Comastri, Cal.Sup. 244 P.2d 902. The only question to be discussed here is whether plaintiff has presented sufficient evidence of fraud to overcome the conclusive presumption of intent to vest title in the surviving depositor. It is our couclusion that she has.

[9–12] In creating the conclusive presumption of intent to vest title in the surviving depositor the Legislature made two exceptions to its application—fraud and undue influence. The surviving depositor is thus entitled to the benefit of the conclusive presumption unless he has through his own misfeasance placed himself in a better position than was intended by the deceased. See Civ.Code, § 3517. In general, fraud will not be presumed, 12 Cal.Jur. 816, but a presumption of fraud and undue influence may arise in the case of a confidential relationship from which an undue advantage was gained. Johnson v. Clark, supra, 7 Cal.2d 529, 534, 61 P.2d 767; 12 Cal.Jur. 818. Here a confidential relationship was admitted, and plaintiff presented substantial evidence to show that defendant secured an advantage which was not intended. This raised a presumption of fraud and undue influence, and the burden was cast on defendant to show fairness and good faith in all respects. Nobles v. Hutton, supra, 7 Cal.App. 14, 20–21, 93 P. 289; Pleasants v. Hanson, supra, 48 Cal.App. 626, 630–631, 192 P. 183; Johnson v. Clark, supra, 7 Cal.2d 529, 534, 61 P.2d 767; Hatch v. Penzner, supra, 44 Cal.App.2d 874, 879, 113 P.2d 295. Since a presumption of fraud and undue influence is sufficient to sustain a finding thereof Campbell v. Genshlea, supra, 180 Cal. 213, 224, 180 P. 336, the trial court erred in granting the motion for a nonsuit. 9 Cal. Jur. 559; Golceff v. Sugarman, supra, 36 Cal.2d 152, 153, 222 P.2d 665.

A factual situation somewhat similar to that presented here appears in Re Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055, where this court held that the evidence was insufficient to sustain a finding of a trust. The burden of showing that the transaction had been free from fraud and undue influence was not placed on appellant there, because, as the record in that case shows, no allegation of fraud, undue influence, or the existence of a confidential relationship had been made by respondent.

The problem of this court in the Gaines case was merely to decide whether or not sufficient evidence of the existence of a trust had been presented. In the present case the problem is whether or not sufficient evidence of fraud and undue influence to support a judgment in favor of plaintiff has been presented. As indicated above, it is our conclusion that such evidence is present here in the form of a presumption of fraud and undue influence arising from the existence of a confidential relationship through which an unintended advantage has been secured.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SCHAUER JJ., concur.

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39 Cal.2d 104

CALIFORNIA-WESTERN STATES LIFE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION.

Sac. 6262.

Supreme Court of California.

June 10, 1952.

Application by the California-Western States Life Insurance Company, carrier of employer's unemployment disability insurance under voluntary plan, against the Industrial Accident Commission of the State of California, for writ of review of an award of the commission which denied petitioner's claim for lien against the State Compensation Insurance Fund, carrier of the employer's workmen's compensation insurance. The Supreme Court, Schauer, J., held that where petitioner's claim for lien against the Fund for disability benefits paid to injured employee was erroneously denied by the commission, fact that the State Fund paid out the compensation awarded before the petitioner filed petition for rehearing on award denying lien did not cause petitioner to lose its lien.

Award annulled and cause remanded with direction.

Carter, J., dissented.

1. Workmen's Compensation 🔑1004

Denial by the Industrial Accident Commission of a lien in favor of carrier of employer's unemployment disability insurance under a voluntary plan, for disability benefits paid injured employee, against State Compensation Insurance Fund, carrier of employer's workmen's compensation insurance, was beyond jurisdiction of Commission. Gen.Laws, Act 8780d, § 450 et seq.

2. Workmen's Compensation 🔑1793

Provision of the Labor Code that any award of workmen's compensation is completely immune from collateral attack after 20th day, even though in excess of jurisdiction of Industrial Accident Commission, is based on policy of assuring workmen that awards are paid speedily and with certainty. Labor Code, § 5302.

3. Workmen's Compensation 🔑1793

Provision of the Labor Code that any award of workmen's compensation is completely immune from collateral attack after 20th day, even though in excess of jurisdiction of Industrial Accident Commission, is not intended to prevent effective reconsideration by commission or review by courts of awards which erroneously deny lien claims. Labor Code, § 5302.

4. Workmen's Compensation 🔑1004

Where carrier of employer's unemployment disability insurance under a voluntary plan commenced paying workmen unemployment compensation disability benefits on same date that employee filed application with Industrial Accident Commission for adjustment of claim, and such disability carrier requested commission to allow lien against any award of workmen's compensation, and commission denied allowance of lien and awarded compensation, fact that State Compensation Insurance Fund paid out award before disability carrier attacked denial of lien by filing of petition for rehearing did not cause disability carrier to lose its right to lien against State Fund. Labor Code, §§ 3603, 4903, 5302, 5903, 5950.

5. Workmen's Compensation 🔑1004

Where Industrial Accident Commission erroneously denied lien in favor of carrier of employer's unemployment disability insurance under a voluntary plan, for disability benefits paid to injured employee, and State Fund illegally paid compensation award after notice that the disability carrier claimed a lien, State Fund remained liable to disability carrier regardless of fact that compensation had been paid. Labor Code, § 4903.

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Sidney L. Weinstock, H. Harold Leavey and J. Richard Glade, Sacramento, for petitioner.

Edmund J. Thomas, Jr., Robert Ball and T. Groezinger, San Francisco, for respondent.

SCHAUER, Justice.

[1] Petitioner, carrier of employer's unemployment disability insurance under a voluntary plan (Unemployment Insurance Act, 3 Deering's Gen.Laws, Act 8780d, art. 10, part 6) seeks review of an award of the Industrial Accident Commission which denies petitioner's claim for a lien against the State Compensation Insurance Fund, carrier of the employer's workmen's compensation insurance. The commission concedes, as it must, that its original order denying the lien was beyond its jurisdiction because contrary to Bryant v. Industrial Acc. Comm. (1951), 37 Cal. 2d 215, 231 P.2d 32. Before the original order became final the workmen's compensation insurance carrier paid the entire amount of compensation to the employe; the Industrial Accident Commission then granted a rehearing. The commission takes the position that although petitioner's lien claim against the workmen's compensation insurance carrier should have been allowed it has now been lost because the latter carrier, before the original order had become final, paid out the compensation against which the lien should have been allowed. We cannot sustain this position.

The particular facts which gave rise to this controversy are as follows: On October 3, 1949, Celestino Aguilar sustained an injury which arose out of and in the course of his employment and which resulted in disability. The State Fund, workmen's compensation insurance carrier for the employer, paid Aguilar temporary disability compensation until March 31, 1950, then discontinued payments because of a dispute as to the nature and extent of disability. On April 19, 1950, Aguilar filed with the Industrial Accident Commission an application for adjustment of claim and, on the same date, petitioner commenced paying Aguilar unemployment compensation disability benefits of $25 a week.

Petitioner, with Aguilar's consent, requested the Industrial Accident Commission to allow a lien against any award of workmen's compensation. A copy of the request for and consent to allowance of lien was served on the State Fund on May 24, 1950, and filed on May 29, 1950. On October 10, 1950, the Industrial Accident Commission awarded Aguilar $1,050 permanent partial disability compensation ($30 a week for 35 weeks commencing April 9, 1950) less $60 as a fee for Aguilar's attorneys, and denied petitioner's request for allowance of a lien. The denial of lien was based on the commission's announced policy to deny liens for unemployment compensation disability benefits against permanent disability compensation; the question whether such policy could be upheld was then pending on review in the Bryant case. The State Fund paid Aguilar the $1,050 on October 26, 1950. On October 30 an application for rehearing was filed. The Industrial Accident Commission granted a rehearing and withheld action pending final disposition of the Bryant case. After the Bryant decision (supra, 37 Cal.2d 215, 231 P.2d 32), the Industrial Accident Commission issued its decision in this case; it allowed petitioner's claim of lien against Aguilar but denied its claim against the State Fund.

As stated above, the Industrial Accident Commission concedes that under the Bryant case its decision on October 10, 1950, was in excess of its jurisdiction, but contends that nevertheless the petitioner is unable to claim a lien against the workmen's compensation insurance carrier. The Industrial Accident Commission relies on several Labor Code provisions. Section 5903 provides that within twenty days after service of an Industrial Accident Commission award a person aggrieved may attack it by petition to the Industrial Accident Commission for reconsideration. Section 5950 provides that within thirty days after disposition of a petition for reconsideration, or reconsideration on the Industrial Accident Commission's own motion, any person affected by the award may seek review by the District Court of Appeal or this court. Section 5302 provides that Industrial Accident Commission awards are "prima facie lawful and conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside" within the time and manner provided by law. Section 3603 provides that payment of compensation in accordance with the order of the Industrial Accident Commission discharges the employer from all claims therefor.

[2–4] In the present action the award of workmen's compensation was paid by the State Fund on the 16th day after the award was made, and the petition for rehearing was filed on the 20th day. The Industrial Accident Commission argues that its award was presumed valid until attacked (Lab.Code, § 5302), that no attack had been made as of the 16th day, and that the payment by the State Fund thus relieved the latter from liability (Lab. Code, § 3603). Petitioner contends that an erroneous award cannot be saved by payment by the workmen's compensation insurance carrier before the award becomes final. Petitioner's argument is sound. Under section 5302 any award is completely immune from collateral attack after the 20th day, even though in excess of the jurisdiction of the Industrial Accident Commission. The policy underlying this rule is that it assures workmen that the awards are paid speedily and with certainty. (Thaxter v. Finn (1918), 178 Cal. 270, 275, 173 P. 163.) But section 5302 cannot have been intended to prevent effective reconsideration by the commission or review by the courts of awards which erroneously deny lien claims. If the section were given the effect for which the commission contends, then the commission (by denying liens) and the workmen's compensation insurance carrier (by immediately paying awards to impecunious claimants) could nullify the legislative intent which was pointed out and upheld in the Bryant decision (supra, 37 Cal.2d 215, 219, 231 P.2d 32: an unemployed workman should not receive workman's compensation and unemployment benefits for the same period of disability) in every case wherein a claim of lien for unemployment benefits has been established before the Industrial Accident Commission.

[5] Finally, the Industrial Accident Commission asserts that it cannot order the State Fund to pay the amount of the lien to petitioner because, by statute, the commission can allow the lien only against "any amount to be paid as compensation" (Lab.Code, § 4903); the commission argues that, after the October 26th payment by the State Fund, there was no "amount to be paid as compensation" upon which the lien could be impressed. This argument assumes that the award was properly paid by the State Fund. Since the State Fund illegally paid the compensation award after notice that petitioner claimed a lien, the State Fund remains liable to the petitioner. (See Johnson v. Industrial Acc. Comm. (1935), 2 Cal.2d 304, 307, 40 P.2d 518.)[1] In similar situations it is uniformly held that a debtor pays his creditor at his peril after notice of garnishment or as-

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[1] Cf. State Comp. Ins. Fund v. Industrial Acc. Comm. (1949), 89 Cal.App.2d 821, 824, 202 P.2d 86. There an application for compensation came before the commission, and the compensation insurance carrier accepted the commission's permanent disability rating and commenced to make installment payments as ordered. The employe then applied for adjustment of compensation. A hearing was had on October 22, 1947, when the employe for the first time was represented by an attorney. On October 22, $225 in permanent disability as originally rated remained to be paid. Findings and award were not filed until January 26, 1948; meanwhile the insurer, pursuant to the original rating, had paid the $225. No claim of lien by the attorney was on file. The January 26 award purported to require the insurer to pay $225 less $35 payable as attorney's fees. The Dis-

signment. (See Bliss v. California Cooperative Producers (1947), 30 Cal.2d 240, 250, 181 P.2d 369, 170 A.L.R. 1009; Finch v. Finch (1909), 12 Cal.App. 274, 280, 107 P. 594, 598; In re Kling (1919), 44 Cal. App. 267, 270, 186 P. 152.)

For the reasons above stated the award after rehearing is annulled and the cause is remanded to the Industrial Accident Commission for proceedings in accord with this opinion.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion in this case is predicated on Bryant v. Ind. Acc. Comm., 37 Cal.2d 215, 231 P.2d 32, see also Aetna Life Ins. Co. v. Ind. Acc. Comm., 38 Cal. 2d 599, 241 P.2d 530, and for the reasons expressed in my dissenting opinion in that case, I cannot agree that a lien is allowable here.

111 Cal.App.2d 556

TECHOW v. POLLACK et al.

Civ. 18829.

District Court of Appeal, Second District,
Division 1, California.

June 9, 1952.

Suit by Ottilie Techow against Barnett Pollack and others to obtain a determination with respect to the amount of the plaintiff's obligation to the defendant. From a judgment of the Superior Court, Los Angeles County, A. A. Scott, J., and from an order denying a motion for a new trial the plaintiff appealed. The Court of Appeal, Drapeau, J., held that, under the substantial evidence rule, the findings on the merits must stand and that an award of $1,500 for defendant's attorney's fees was proper.

Judgment affirmed and appeal from order denying a new trial dismissed.

1. Appeal and Error 🔑1010(1)

Findings that note and trust deed were sold to defendant in due course of business for valid consideration were conclusive where supported by substantial evidence.

2. Costs 🔑172

Where note executed by plaintiff and trust deed which secured it provided for attorney's fees, defendant who purchased the note and trust deed was entitled to attorney's fees in suit by plaintiff to determine amount of her obligation, notwithstanding failure to file a counterclaim for allowance of attorney's fees.

3. Costs 🔑172

Under mortgage providing for attorney's fees, attorney's fees may be recovered where adverse claim is made by mortgagor or grantor.

4. Costs 🔑172

Where right to recover attorney's fees rests upon provisions of mortgage, court, in suit involving rights thereunder, may determine what amount would be reasonable without hearing any testimony thereon.

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Levy, Bernard & Jaffe, Los Angeles, for appellant.

Peter T. Rice, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff alleged in her complaint that she executed for delivery and put into escrow her promissory note for $26,750, secured by a trust deed on her real property; that by certain transactions in the escrow defendant Barnett Pollack paid her $20,000 only for her note; that the dif-

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trict Court of Appeal concluded that the commission could not require the insurer to pay an independent award of $35 to the attorney. It expressly pointed out that it was not passing on the situation where a written notice of lien claim was on file.

ference of $6,750 between the amount stated in the note and the amount paid was a bonus, contrary to the usury laws of the State of California.

Plaintiff prayed that the Superior Court determine what balance was due from her to defendant, on the basis of an original indebtedness of $20,000, without interest; that the obligation to pay the additional $6,750 be declared void; and that defendant be enjoined from enforcing collection of any greater sum.

The trial court found that plaintiff owned real property upon which she proposed to build an apartment house; that she borrowed $100,000 for the purpose, secured by a first trust deed; that the note and second trust deed were made by plaintiff to the contractor who built the building, and were by him sold and transferred to defendant for $20,000; that, together with money advanced by plaintiff, the proceeds from the first loan, and the $20,000 from the second loan were all put into escrow and paid out by the escrow holder as construction of the building progressed; that, while the financing was all in one escrow, the sale of the note and second trust deed by the builder to defendant was in the due and ordinary course of business, and the consideration was good and valid.

Judgment was for defendant, together with $1,500 for counsel fees, as provided in the note and in the trust deed. Plaintiff appeals from the judgment.

At the time of plaintiff's motion for a new trial her counsel stated: "Now may the record show that the only attack we are making is in the matter of attorneys fees." However, on appeal plaintiff argues the sufficiency of the evidence.

[1] Plaintiff's witnesses testified to facts which if believed by the trial judge would have supported findings for her. Defendant testified that he purchased the note and second trust deed at a discount, in good faith and for value. Other testimony and facts in the record support his testimony. So, under the familiar substantial evidence rule the findings on the merits must stand. Harris v. Pollack, 101 Cal.App.2d 26, 224 P.2d 824.

Plaintiff's contention that it was error for the court to adjudge $1,500 for defendant's attorneys fees is also untenable. Plaintiff argues that there was no evidence in the record to support the judgment and "no proof of the amount of services rendered, value thereof or obligation or agreement of the defendant to pay attorneys fees;" that defendant failed to file a counter-claim for the allowance of attorneys fees; and that in any event attorneys fees in such circumstances as these are not recoverable in a suit by the maker against the holder.

[2] Defendant's answer pleads the covenant in the note for attorneys fees should action be instituted thereon. The trust deed provides for attorneys fees, "in the event beneficiary shall appear in an action wherein the security of the deed of trust or the rights or powers of the beneficiary are affected." So no counterclaim was required, and the judgment was properly rendered.

[3, 4] Attorneys fees may be recovered where the adverse claim is made by the mortgagor or grantor. Hewlett v. Evans, 56 Cal.App. 344, 205 P. 492. A finding that a mortgage was executed is equivalent to a finding that the mortgagor agreed to pay a reasonable attorneys fee if so provided in the mortgage. The conclusion of law that defendant was entitled to recover attorneys fees rest upon the provisions of the mortgage, and the court could determine what amount would be reasonable without hearing any testimony thereon. Martin v. Gibson, 48 Cal.App.2d 449, 119 P.2d 1012; Hellier v. Russell, 136 Cal. 143, 68 P. 581; Huber v. Shedoudy, 180 Cal. 311, 181 P. 63.

The judgment is affirmed. Appeal from order denying motion for new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

111 Cal.App.2d 529

SPRECKELS v. SPRECKELS.

Civ. 18938.

District Court of Appeal, Second District, Division 2, California.

June 6, 1952.

Rehearing Denied June 23, 1952.

Wife brought suit for divorce against husband. The Superior Court of Los Angeles County entered an order awarding the wife temporary alimony, attorney's fees and costs, and husband appealed. The District Court of Appeal, Fox, J., held separation agreement was not a bar to an award for temporary support, counsel fees, and costs, but that in view of wife's income it was an abuse of discretion to allow her temporary alimony, and that it was proper to award her counsel fees and costs.

Order modified and, as modified, affirmed.

McComb, J., dissented in part.

1. Divorce ⚷211, 223

When a divorce action is pending, court may, in its discretion, require husband to pay such amount as may be reasonably necessary to enable wife to support herself and children and to prosecute her action. Civ.Code, § 137.

2. Husband and Wife ⚷278(1)

Property settlement agreements occupy a favored position in the law. Civ.Code, §§ 158, 159.

3. Divorce ⚷213, 225

When a wife has entered into a property settlement agreement waiving all claims whatsoever for support or attorney's fees and such contract has been judicially determined to be valid and binding, court may not thereafter, in another action, make an award of alimony pendente lite and suit money contrary to provisions of the agreement. Civ.Code, §§ 158, 159.

4. Divorce ⚷189, 213, 225

If property settlement agreement has not had judicial approval and is attacked as being void or as having been obtained through fraud, court may make an award in favor of wife in divorce suit for necessary temporary support, counsel fees, and costs. Civ.Code, §§ 137, 158, 159.

5. Divorce ⚷189, 213, 225

Where wife filed action for divorce, and thereafter husband and wife executed a property settlement agreement providing that each party releases the other from all claims for attorney's fees and expense money in connection with any action for divorce that might thereafter be commenced and parties were reconciled and lived together and two children were born, and thereafter wife instituted second divorce suit, wherein it was necessary to determine validity and effect of property settlement agreement in order to adjudicate rights of parties, court properly deferred its ruling on such questions until case should be tried on merits, and agreement was therefore not a bar to award for temporary alimony, counsel fees, and costs. Civ.Code, §§ 137, 158, 159.

6. Divorce ⚷212, 224

The sine qua non of an order for temporary alimony, counsel fees, and suit money under statute is the necessity therefor. Civ.Code, § 137.

7. Divorce ⚷209, 215

The respective incomes of the parties to divorce suit as well as their needs should determine necessity for and amount of alimony pendente lite. Civ.Code, § 137.

8. Divorce ⚷211

The discretion of court under statute to award temporary alimony to wife in divorce suit refers to a legal discretion controlled by established legal principles. Civ. Code, § 137.

9. Divorce ⚷214(3)

In suit for divorce, wife, in order to be entitled to temporary alimony, must prove a necessity for temporary alimony. Civ.Code, § 137.

10. Divorce ⚷213

If a wife possesses independent means in sufficient amount to live in her accustomed manner without impairing the capital of her separate estate, no allowance for temporary alimony should be granted her in divorce suit. Civ.Code, § 137.

11. Divorce ⚷212

Temporary awards of alimony to wife are made solely for purpose of preserving intact the family and to prevent diminution of wife's separate estate, as nearly as practicable, until chancellor shall finally determine whether either party be entitled to any relief in equity. Civ.Code, § 137.

12. Divorce 🔑211

Where wife was worth in excess of $500,000, all of which was the gift of husband and his mother, and her monthly income from such property exceeded $1,000 a month, court in divorce suit abused discretion in awarding wife $1,000 a month temporary alimony in addition to $600 a month for support of children. Civ.Code, § 137.

13. Divorce 🔑223

Where revenues of wife from her own property would be substantially consumed by her own living expenses, trial court did not abuse its discretion in divorce suit in making an award to wife of counsel fees and costs while divorce suit was pending. Civ.Code, § 137.

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Daniel Schnabel, Beverly Hills, for appellant.

Wright, Wright, Green & Wright, Loyd Wright, and Charles A. Loring, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from an order awarding his wife $1,000 per month alimony *pendente lite,* $2,500 attorney's fees, and $200 costs.

The parties married September 6, 1945. They are the parents of two children, ages two years, and eight months, respectively. It was plaintiff's third marriage; prior thereto she had been employed either as a model or as a motion picture actress; she had no issue by her previous marriages.

In July, 1948, the parties separated and plaintiff filed an action for divorce. On July 26th they executed a property settlement agreement. Soon thereafter they effected a reconciliation and lived together until their current separation on September 5, 1951. The two children were born subsequent to the reconciliation.

The property settlement agreement was received in evidence at the hearing on the order to show cause. Its stated purpose was to "finally and forever" setttle their respective property rights. Paragraph one recites that the parties have no community property or community property rights by virtue of their marriage. By paragraph two the husband agrees to pay the wife upon the execution of the agreement $25,000, payment of which she acknowledges receipt. In paragraph nine it is agreed that in the event the wife hereafter sues the husband for divorce this contract "shall in all respects limit the quantum and nature of the relief granted" her. The agreement further provides that the wife will immediately dismiss her divorce action, which she did, and in the event she should thereafter obtain a decree of divorce the husband agrees to pay her $2,750. Finally it is provided each party releases the other from all claims for attorney's fees and expense money in connection with any action for divorce which may "hereafter" be commenced, and each "specifically waives the right to support or maintenance, alimony or right of family support by reason of the marital relations now existing between them, * * * or *which may hereafter exist between them.*" (Italics added.) Although the agreement provides it may be presented to the court for approval in the event of a divorce, this has never been done.

Trust funds have been established for the benefit of the children. At the hearing on the order to show cause defendant was required to pay $600 monthly for the support of the children. He does not object to this order.

Defendant challenges the order for temporary alimony, attorney's fees and costs upon two grounds: (1) the July, 1948, contract is a bar to the making of any award; and (2) in any event, plaintiff failed to prove such necessity on her part as would justify the order.

[1] When a divorce action is pending the court may, in its discretion, require the husband to pay such amount as may be reasonably necessary to enable the wife to

support herself and her children and to prosecute her action. Civ.Code, sec. 137.[1]

[2–4] Property settlement agreements are sanctioned by the Civil Code, secs. 158 and 159 and occupy a favored position in the law of this state. Hill v. Hill, 23 Cal.2d 82, 89, 142 P.2d 417. So when a wife has entered into a property settlement agreement waiving "all claims whatsoever" for support or attorney's fees and such contract has been judicially determined to be valid and binding the court may not thereafter, in another action, make an award of alimony *pendente lite* and suit money contrary to the provisions of such agreement. Patton v. Patton, 32 Cal.2d 520, 196 P.2d 909. If, however, such property settlement agreement has not had judicial approval and is attacked as being void or as having been obtained through fraud, the court may make an award for necessary temporary support, counsel fees and costs. Steinmetz v. Steinmetz, 67 Cal.App. 195, 227 P. 713; Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715.

[5] When the order to show cause came on for hearing on September 21, 1951, the case was not at final issue on the pleadings. In her complaint plaintiff not only asked for a divorce but also for a determination of the community property. Also, she asked that an equitable share thereof be awarded to her, and that she be granted both temporary and permanent alimony, support for the children, attorney's fees and court costs. The latter relief cannot be granted if the contract of July, 1948, is valid and enforceable. However, a serious question as to the legality of the quoted waiver provision in the contract on grounds of public policy is apparent. See Civ.Code sec. 159; Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880; Barham v. Barham, 33 Cal.2d 416, 202 P.2d 289; Restatement of Contracts, sec. 587. The subsequent reconciliation, resumption of marital relations and birth of two children were facts that have an important bearing on the effect of the contract. See Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal.App.2d 416, 418, 95 P.2d 966; Lloyd Corp. Ltd. v. Industrial Accident Commission, 61 Cal.App.2d 275, 279–280, 142 P.2d 754. Interrogation of both plaintiff and defendant by the latter's counsel clearly indicated defendant would rely on the contract as a defense to any of plaintiff's financial demands upon him. When the contract was presented at the beginning of the hearing, counsel for plaintiff stated to the court he was not prepared at that time to litigate "the question of the validity of this agreement." It was thus clear that the validity and effect of the contract would have to be litigated and determined. That such was a correct analysis of the situation is demonstrated by the fact that the pleadings which have been brought up on this appeal show that defendant relies on the contract and plaintiff attacks it on six grounds. Thus, since it is necessary to determine the validity and effect of the property settlement agreement in order to adjudicate the rights of the parties, the court properly deferred its ruling on these questions until the case be tried on its merits. The agreement, therefore, is not a bar to an award for temporary support, counsel fees and costs. Steinmetz v. Steinmetz, supra; Locke Paddon v. Locke Paddon, supra.

Patton v. Patton, supra, on which defendant strongly relies, is not applicable here because the property settlement agreements there had been held valid and binding. The court in the Patton case, in discussing and distinguishing the Steinmetz and Locke Paddon cases, points out that in those cases (as here) the property settlement agreements were under attack. Although in the Patton case there was a reconciliation after the first agreement was made (as here), it is significant that the parties ratified the first contract by a new agreement following their second separation, and a new consideration was paid to the wife.

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[1] It is to be noted that defendant's brief refers to Civil Code sections 137.2 and 137.3, which were added by ch. 1700, secs. 3 and 4, Stats.1951, effective Sept. 22, 1951, ten days after the filing of the complaint in this action. However, sections 137.2 and 137.3 are substantially similar to the provisions of former section 137 and are basically a separation of the prorisions of the old section.

[6–9] The *sine qua non* of an order for temporary alimony, counsel fees and suit money under Civil Code section 137 is the *necessity* therefor. Kalmus v. Kalmus, 103 Cal.App.2d 405, 422, 230 P.2d 57; Loeb v. Loeb, 84 Cal.App.2d 141, 144, 190 P.2d 246; Baldwin v. Baldwin, 28 Cal.2d 406, 413, 170 P.2d 670. The respective incomes of the parties as well as their needs should determine the necessity for and the amount of alimony *pendente lite.* Sweeley v. Sweeley, 28 Cal.2d 389, 391, 170 P.2d 469. The discretion contemplated by the statute refers to a legal discretion controlled by established legal principles. Gossman v. Gossman, 52 Cal.App.2d 184, 194, 126 P.2d 178. The wife must prove a necessity for the moneys or other property awarded to her. Loeb v. Loeb, supra, 84 Cal.App.2d at pages 148, 149, 190 P.2d 246. If she fails to make such proof an allowance of her demand is invalid to the extent that she does not prove the necessity. If she establish no necessity at all her motion must be denied.

From the record it is clear that plaintiff is worth in excess of one-half million dollars, all of which is the gift of defendant and his mother. Approximately one half of this property is income bearing. In 1950 her reported net income exceeded $14,000. Her monthly income averages in excess of $1,000.

Plaintiff counters with an array of expenses for herself and children which aggregate in excess of $2,000 per month. Deducting the salaries of servants which plaintiff says are dispensable, she would still expend on herself and the two children monthly in excess of $1,700. Upon the discharge of these employees her outlay for food would be correspondingly decreased. So the total, reasonable outlay for her gross expenses should not exceed $1,600 per month. Such expense could be paid with the income which plaintiff receives from her own property, and the $600 which, under the order, defendant must pay for the children.

[10] Not only is there no necessity for the payment to plaintiff of "$1,000 per month alimony *pendente lite*" but the record shows that her own income is equivalent to or exceeds the amount of the order. If a wife possesses independent means in sufficient amount to live in her accustomed manner without impairing the capital of her separate estate, no allowance should be granted her. Bernheimer v. Bernheimer, 103 Cal.App.2d 643, 648, 230 P.2d 17.

[11] Temporary awards are made solely for the purpose of preserving intact the family and to prevent diminution of the wife's separate estate as nearly as practicable, until the chancellor shall finally determine whether either party be entitled to any relief in equity.

[12] Under the evidence the court abused its discretion in ordering defendant to pay plaintiff $1,000 per month for her own support inasmuch as she is the recipient of income sufficient to maintain herself in accordance with her accustomed standard of living.

[13] However, inasmuch as plaintiff's revenues will be substantially consumed by her own living expenses, it cannot be said that the trial court abused its discretion in making the award of counsel fees and costs. Cameron v. Cameron, 85 Cal.App.2d 22, 192 P.2d 89. While the facts might have sustained a different conclusion on this point, the trial court was justified in exercising a reasonable precaution to preserve the corpus of the wife's separate estate. Fallon v. Fallon, 83 Cal.App.2d 798, 189 P.2d 766. However, nothing in this opinion is to serve as an indication of what would be a proper judgment upon the ultimate issue of permanent support. See Loeb v. Loeb, supra.

The order here on appeal is modified by striking therefrom the following: "Defendant is ordered to pay $1,000.00 per month alimony *pendente lite,* payable on the first day of each month, beginning October 1, 1951."

As so modified the order is affirmed.

MOORE, P. J., concurs.

McCOMB, Justice.

I concur in the majority opinion written by Mr. Justice Fox in so far as it modifies the judgment of the trial court's awarding plaintiff alimony pendente lite.

I dissent from the opinion in so far as it affirms the order of the trial court in granting plaintiff attorneys' fees for the prosecution of the action. My dissent is predicated upon the view that in this enlightened era a woman should not be discriminated against simply because she is a woman.

There is no question that a man and wife may enter into a contract relative to their property rights. Section 159 of the Civil Code provides in part as follows: That they may agree in writing to an immediate separation and that they may make provision for the support of either of them, and expressly permits them to enter into a contract relative to their property rights.

It is likewise conceded that any person may waive a right which he has. In the present case plaintiff entered into an agreement which she does not claim was entered into under duress, menace, undue influence or under any other form of compulsion, providing as follows:

"Each of the parties hereto releases the other from any and all claims for attorneys' fees and expense monies in connection with the negotiation and preparation of this agreement and in connection with any action for divorce or separate maintenance which has heretofore, or which may hereafter, be commenced by either of the parties hereto, and each of the parties hereto specifically waives the right to support or maintenance, alimony or right of family support by reason of the marital relations now existing between them, which have heretofore existed between them, or which may hereafter exist between them;"

Plaintiff likewise admits that she received a full, adequate and complete consideration for this agreement. Therefore there is no reason in law or justice why she should not be bound by it. There is no question that had defendant made a similar motion the court would have held that he had waived his right under the agreement.

As much as I regret to disagree with my learned associates, I cannot subscribe to a rule which is discriminating against a woman just because of her sex. Should the rule which the majority opinion establishes be the law of California we would find ourselves in this situation:

A husband who had been derelict in his marital duties might be perfectly willing to offer his wife a most adequate property settlement far in excess of any which a court would award but for the fact that he would know that any agreement which she might make in consideration of such property settlement would not be binding upon her. The result would be that he would be forced to say, "I cannot in fairness to myself offer you this property settlement because the law discriminates against you because you are a woman and says you may not waive your rights or enter into a contract with me which will be to your advantage. Therefore I must leave the settlement of our property rights to the courts."

I am therefore of the opinion that the agreement which the plaintiff made is binding upon her, and consequently the court could not grant attorneys' fees and court costs.

111 Cal.App.2d 452

MITTY v. OLIVEIRA.

No. 14886.

District Court of Appeal First District,
Division 1, California.
May 29, 1952.

Proceeding in the matter of the application for the removal of the remains of Arthur Martin Terra, Joseph Oliveira, also known as Jose Oliveira, and Frank Martin Terra, by Amelia Oliveira against John J. Mitty, the Roman Catholic Archbishop of San Francisco, and another. The Superior Court, County of Alameda, A. J. Woolsey, J., entered an order permitting removal of remains, and the defendants appealed. The District Court of Appeal, Wood, J., held that under the circumstances, there could be no disinterment except in accordance with rules, regulations and discipline of church of which decedents had been members and in whose consecrated grounds they were buried.

Reversed with directions.

1. Dead Bodies 🔑5

Each case concerning right to remove body of dead to new place of interment must be considered in equity on its own merits, having due regard to interest of public, wishes of decedent, rights and feelings of those entitled to be heard by reason of relationship or association, rights and principles of religious body or other institution which granted right to inter body at first place of burial, and whether consent was given to burial in first place of interment.

2. Dead Bodies 🔑5

Where decedents had lived and died members of church whose tenets placed great emphasis upon importance of burial of members in consecrated ground and proscribed cremation, there was presumption that decedents subscribed to those tenets and desired to be buried in compliance therewith, in proceeding for removal of remains from consecrated church cemetery for purpose of cremation. Health and Safety Code, §§ 7500–7528, 8730, 8736.

3. Dead Bodies 🔑5

Where decedents had lived and died members of church whose tenets placed great emphasis upon importance of burial in consecrated ground and proscribed cremation, and surviving parent and wife who took active part in arranging for burials 10 and 22 years before sought to remove remains for purpose of cremation, withholding of consent by church was neither whimsical nor unreasonable. Health and Safety Code, §§ 7500–7528.

4. Dead Bodies 🔑5

Where decedents had lived and died members of church whose tenets placed great emphasis upon importance of burial in consecrated ground and proscribed cremation, even if surviving parent and wife who was also member of church could plead ignorance of doctrines of church, fact that survivor who arranged burial was not informed of canons of church would not be reason for removal for cremation in absence of showing that she would have buried them differently or that she would have cremated bodies had she known of restrictions, or that she had intended burials as other than permanent in character. Health and Safety Code, §§ 7500–7528.

5. Dead Bodies 🔑5

Surviving wife and parent who was member of church whose tenets placed great emphasis upon importance of burial in consecrated ground and proscribed cremation, could not plead ignorance of those doctrines, in her proceeding to have remains of decedents removed from consecrated church ground for purposes of cremation. Health and Safety Code, §§ 7500–7528.

6. Associations 🔑5

From act of joining voluntary society is implied an agreement to abide by society's rules and regulations to extent at least that they are not in contravention of law or against public policy.

7. Dead Bodies 🔑5

Asserted ignorance of surviving wife and parent who was member of church whose tenets placed great emphasis upon importance of burial in consecrated ground and proscribed cremation, and who was allegedly ignorant of such tenets, could not be ascribed to decedents to defeat presumption that they had been buried in consecrated ground in accordance with their devout hopes and desires. Health and Safety Code, §§ 7500–7528.

8. Dead Bodies 🔑5

Performance, breach, enforcement or rescission of perpetual care contract executed by survivor with cemetery authority would have no compelling, persuasive or proper bearing upon question of whether or not court of equity should consent to removal and cremation contrary to presumed desires and in desecration of memory of decedents, and in contravention of canon law and tenets of their church in accordance with which their remains were buried, and was not sufficient reason to grant permission for removal and cremation. Health and Safety Code, §§ 7500–7528.

9. Dead Bodies ⚷5

Section of Health and Safety Code providing that heirs, relatives or friends of decedent whose remains had been interred in cemetery owned, governed or controlled by church shall not disinter remains except in accordance with rules, regulations and discipline of such church, applies to a proceeding under sections of that code for disinterment of bodies based upon breach of contract for perpetual care. Health and Safety Code, §§ 7500–7528, 7980.

10. Dead Bodies ⚷5

Section of Health and Safety Code providing that heirs, relatives or friends of decedent whose remains have been interred in cemetery owned, governed or controlled by church shall not disinter remains except in accordance with rules, regulations and discipline of the church, gives preference to rules, regulations and discipline of church over the desires of relatives, but will not prevent court from authorizing removal in case of emergency or other controlling public reason. Health and Safety Code, § 7980.

11. Dead Bodies ⚷5

Where decedent and surviving parent were members of church whose tenets placed great emphasis upon importance of burial in consecrated ground and proscribed cremation, survivor's alleged mistake in interring decedent in consecrated church ground, not made known until five years after she became dissatisfied with failure of cemetery authority to care for grave and delay in performance of perpetual care contract, did not warrant removal of remains from consecrated grounds for cremation, under section of health and safety code providing that remains shall not be disinterred from church grounds except in accordance with rules, regulations and discipline of church. Health and Safety Code, § 7980.

12. Dead Bodies ⚷5

In proceeding for disinterment of body from church cemetery, evidence that because of surviving parent's grief and because of priest she buried him in church cemetery and made a mistake, did not indicate any undue influence exerted or that church acted in belief that funeral and burial carried out were not in full conformity with desires of survivor and decedent as members of church. Health and Safety Code, §§ 7500–7528.

13. Cemeteries ⚷17

In proceeding for disinterment of bodies from church cemetery, evidence supported finding that perpetual care contract entered into on part of church, was breached by delay of performance. Health and Safety Code, §§ 7500–7528.

14. Dead Bodies ⚷5

Where decedent had lived and died a member of church whose tenets placed great emphasis upon importance of burial in consecrated ground and proscribed cremation, and was buried in 1944 in church cemetery, and neither church nor cemetery authority had been informed of decedent's expressed desire to mother that his remains be cremated, desire for cremation could not be literally fulfilled and there could be no removal of body by mother for cremation in view of Health and Safety Code provision that relatives of decedent whose remains have been interred in church cemetery shall not disinter remains except in accordance with rules, regulations and discipline of church. Health and Safety Code, § 7980.

Andrew F. Burke, San Francisco, for appellants.

Buckley & Ehlers, Oakland, for respondent.

FRED B. WOOD, Justice.

John J. Mitty, Roman Catholic Archbishop of San Francisco, and The Roman Catholic Archbishop of San Francisco, a corporation sole, have appealed from an order of the superior court permitting the petitioner, Amelia Oliveira, to remove the remains of Arthur Martin Terra, Joseph Oliveira, and Frank Martin Terra from St. Mary's Cemetery, a Roman Catholic cemetery in Oakland, California.

This order was made in a proceeding under sections 7500–7528 of the Health and Safety Code for the disinterment of the bodies, "based upon a breach of contract for the perpetual care" of the graves, as stated by the respondent. The proposed disinterment was for the purpose of cremating the bodies and placing the ashes in a columbarium. Respondent had obtained the necessary permits from the local registrar of vital statistics, as required by sections 7500 and 7501 of the Health and Safety Code, but the cemetery authorities (appellants herein) withheld their consent to such removal. Amelia is the surviving spouse of Joseph and the sole surviving parent of Arthur and Frank, neither of whom left a surviving spouse or child.

Of the decedents, Arthur died and was buried in this cemetery in May 1927; Joseph, in January 1939; Frank, in February 1944. They were buried in a plot which Amelia and Frank selected and purchased upon the occasion of Arthur's death. The court found that Amelia has been and is the owner of the right of interment in that plot to the year 2200, "but only in accordance with and subject to the canon law of the Roman Catholic Church, and the rules and regulations established by the Roman Catholic Archbishop of San Francisco for the operation of said St. Mary's cemetery, including such laws, rules and regulations which deal with the right of interment in and disinterment from cemeteries of the Roman Catholic Church, including said St. Mary's Cemetery; that in this connection, it is the fact that neither respondent nor any of his agents or employees ever called petitioner's attention to the canon law of said church, or to any of the other rules and/or regulations mentioned herein."

Amelia is a Roman Catholic and always has been. Each of the decedents was a Roman Catholic. Each was buried from a Roman Catholic Church. The interment of each was, as found by the trial court, "in accordance with the rules, regulations, discipline and rites of the Roman Catholic Church and the canon law of such Church" but "none of said rules, regulations, discipline, rites and/or canon law was called to the attention of petitioner [Amelia] by respondent [the appellants herein] or by any of its agents or employees."

The court also found that at all times mentioned in the petition or in the answer: (1) All rights of interment in cemeteries of the Roman Catholic Church, including St. Mary's Cemetery, and all rights of disinterment from any thereof, have been and are regulated by and subject to the canons of the Church; (2) the canon law of the church has prohibited cremation of the bodies of its members or communicants except in cases of great emergency and has prohibited and still prohibits removal of bodies from any such cemetery for cremation; (3) all such cemeteries are blessed pursuant to prescribed rites of the church and regarded by all Roman Catholics in good standing as consecrated ground, and the removal of the remains of a Roman Catholic buried therein, for the purpose of cremation, is regarded as a profanation and desecration of the remains; (4) the cemeteries within the Archdiocese of San Francisco, including St. Mary's have been and are subject to certain rules and regulations prescribed by the Archbishop of the Archdiocese of San Francisco, including one which prohibits removal from such a cemetery of the body of any catholic in good standing which has been interred therein; (5) all rights of interment have been and are subject to certain rules and regulations of the cemetery, including one which prohibits the removal of a body, interred therein, without the written consent of the Archbishop of the Archdiocese of San Francisco or the Reverend Director of the cemeteries of the Archdiocese. In this connection the court further found that "none of the provisions of the canon law of the Roman Catholic Church, nor any of the rules or regulations prescribed by the Roman Catholic Archbishop of the Archdiocese of San Francisco, nor any of the rules or regulations of St. Mary's Cemetery, which are mentioned or referred to in said paragraphs of said answer [those mentioned in clauses (1) to (5) of this paragraph], were ever called to petitioner's [respondent's] attention by respondent [the appellants] or by any of its agents or employees."

The court further found that Frank told Amelia that when he died he wanted his remains cremated and placed in a columbarium; that Frank died suddenly and Amelia was "grief sticken and under the influence of the Roman Catholic Church and by reason thereof failed to observe the wishes of * * * Frank * * * and buried his remains as aforesaid in St. Mary's Cemetery."

The court also found that Amelia paid $42.78 for the ordinary service of interment of Frank and on the date of the interment of his body the cemetery agreed with her to take perpetual care of all three of the graves for the sum of $100, which sum she paid; that the cemetery authority did not intend to give such care until it could secure sufficient men to care for the graves; that at no time did the cemetery authority notify Amelia that she would not receive perpetual care of the graves for an appreciable period of time after entering into the perpetual care contract and this information was deliberately and knowingly withheld and concealed from her; that Amelia at the time of entering into the contract believed the cemetery would immediately furnish perpetual care; that Amelia was 79 years old at the time of the hearing (August 26, 1949), is of Portuguese descent, and reads and writes poorly; that the Archbishop and his agents are men in the best years of their lives and highly educated; that in February, 1947, the cemetery increased the number of its employees, started to complete a perpetual care program on a section to section basis over the entire cemetery but had not informed Amelia thereof or that it would not provide immediate perpetual care; that the cemetery breached the contract by allowing the graves to sink without filling them in and the graves became overgrown with weeds and grass, with an accumulation of rubbish; that moles, gophers, squirrels, and wild animals dug holes in the graves and the graves continued in that state of uncare to the date of the filing of the petition herein (July 28, 1949); that Amelia continually notified the cemetery of this condition and was continually put off with excuses, and the cemetery failed and refused during that period to care for the graves. There is evidence that the cemetery's perpetual care plan was adopted in 1941, the work to start at the main entrance and proceed, section by section, on the right of the main drive, to the rear (the graves involved in this action were at the rear), and then section by section on the left of the main drive toward the front; that this was the only practical method as distinguished from an individual lot basis, for it was necessary to remove stones and coping, level the ground, lay water pipes, and then seed the lawns and place markers to indicate the various graves; that the progress of the work was delayed because of the manpower shortage during the war; that when the petition herein was filed the work had proceeded to within 25 feet of the Terra and Oliveira graves; that during the hearing of the petition herein these graves were graded and a sprinkler system installed, and the cemetery was about ready to seed this plot.

From these facts, the trial court concluded: (1) Amelia never agreed to the rules and regulations restricting the removal of the remains from the cemetery; (2) the appellant corporation breached its contract of perpetual care and failed to obey the requirements of sections 8730 and 8736 of the Health and Safety Code; (3) appellants are estopped to set up any rule of law or contract preventing Amelia from removing the remains; (4) to enforce those rules and regulations would create a hardship.

These legal conclusions reflect consideration only of the interests and rights of the surviving relative and of the cemetery authority, viewed in the light of a contractual relationship between them. They do not suggest that consideration was given other factors, including the interest of the public. The statute, it is true, mentions only the surviving relatives and the cemetery authority, and then says if the consent of either of them be withheld the "permission of the superior court * * * is sufficient." (H. & S. Code, sec. 7526.) It is silent concerning the factors which should move the superior court to grant its permission.

The interpretation of a similar, earlier statute of New York is persuasive of the interpretation which should be accorded our statute in this regard. Our statute was first enacted in 1931, as a part of the General Cemetery Act of that year, a comprehensive revision of our laws concerning cemeteries and related topics. (Stats.1931, ch. 1148, p. 2434, sec. 24 at p. 2447.) The

New York statute was enacted in 1895, Membership Corporation Law, McK.Consol.Laws, c. 35, § 88. Construing and applying this statute in 1908, a New York court held that among the grounds upon which a court should act in granting its permission are "those upon which courts of equity would heretofore have allowed the disinterment and reburial of human remains." In re Ackermann, 1908, 124 App. Div. 684, 109 N.Y.S. 228, 229.

Those grounds, the factors which a court of equity should take into consideration in such a case, we find well expressed in Klahr v. Nadel, 1937, 166 Misc. 288, 1 N.Y.S.2d 733: "The interest of the public, the conventions of common decency, the wish of the decedent expressed in his or his lifetime, and frequently, as we have here, the prohibitions of religious law, require attention. Judicial examination of the problem has resulted in the rule that, unless reasons of substance exist or a rare emergency arises, the repose of the dead should not be disturbed. In re Donn, Sup., 14 N.Y.S. 189. In discussing this subject the Court of Appeals (Yome v. Gorman, 242 N.Y. 395, 403, 152 N.E. 126, 129, 47 A.L.R. 1165) expressed the principle of law in the following language: 'Only some rare emergency could move a court of equity to take a body from its grave in consecrated ground. * * * The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose.' The Appellate Division, In re Ackermann, 124 App.Div. 684, 685, 109 N.Y.S. 228, 229, expressed this doctrine: 'Many circumstances arise from time to time necessitating a disturbance of the repose of the dead, but it must be some controlling public reason or superior private right which should induce the court to permit that to be done which from time immemorial has been considered abstractly as a work of desecration.'" 1 N.Y.S.2d at page 734.

[1] Essentially the same principles were enunciated recently in a proceeding in equity in this state for the removal of the cremated remains of a deceased person: "It may be gathered from the cases that, while the courts have announced certain general principles governing the right to remove the bodies of the dead to new places of interment, 'Each case must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, the rights and feelings of those entitled to be heard by reason of relationship or association, the rights and principles of the religious body or other institution, which granted the right to inter the body at the first place of burial, and determining whether consent was given to the burial in the first place of interment.' 15 Am.Jur. 844, quoted in Cordts v. Cordts, 154 Kan. 354, 118 P.2d 556, 558. The court in that case adds: 'Not all of the authorities give the same order to the factors to be considered, and speaking generally, perhaps primary importance is given to the wishes of the deceased. With respect to reinterment, it has been said the same rules apply as to the original interment, but with a presumption against removal growing stronger with remoteness of connection with the decedent and reserving always the right of the court to require reasonable cause to be shown for it.' [Citations.]" In re Keck, 75 Cal.App. 2d 846, 851, 171 P.2d 933, 936.

[2–7] In the light of these principles let us consider, first, the factors in this case which bear upon the question whether or not a court should grant its permission for the removal of the remains of Arthur and Joseph from consecrated ground and the cremation of those remains. Arthur and Joseph lived and died members of a church whose tenets placed great emphasis upon the importance of burial of its members in consecrated ground and proscribed the cremation of their remains. There is a presumption, from the very fact of their membership in that church, that Arthur and Joseph subscribed to those tenets and desired to be buried in compliance therewith. The record discloses not the slightest evidence that they were unaware of those tenets or ever harbored a desire to be buried in other than consecrated ground or to have their remains cremated. In conformity with those tenets they were buried in consecrated ground. Now, after 22 years in the case of Arthur and ten years in the case of Joseph, the surviving parent and wife (who took an active part in arranging for their burial in full accordance with the tenets of their church of which she herself has always been a member, and presumably in compliance with their desire) seeks to remove their remains for the purpose of cremation. The church, which controls this cemetery, withholds its consent. That withholding is neither whimsical nor unreasonable, we think, in view of the very tenets we have mentioned and the presumed wishes of the decedents. What reasons does she give why a court of equity should intervene and give its permission? She says she was not informed of these canons of the church which proscribe burial of the faithful in other than hallowed ground and forbid the cremation of their remains. That is hardly a reason. It does not appear that she would have buried them differently or that she would have cremated their bodies had she known of those restrictions or that she intended these burials as other than permanent in character. Moreover, we do not think she can plead ignorance of those doctrines of her church. Her very membership tokens subscription to them. From the act of joining a voluntary society there is implied an agreement to abide by the society's rules and regulations, to the extent at least that they are not in contravention of law or against public policy. "When a person joins an organized society, such as a church or congregation associated for religious worship, under the supervision and control of higher church courts, he necessarily by that act agrees to abide by its rules of government and the judgments of its courts regularly made, and consents that all his rights, privileges, and duties as a member, or in respect to his membership, shall be governed and controlled by those rules and judgments. This agreement is always implied from the fact of membership." Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 122, 106 P. 395, 401. See, also, Linke v. Church of Jesus Christ, 71 Cal.App.2d 667, 668–669, 163 P.2d 44. Then, too, Amelia's asserted ignorance of the significant tenets of her church can not be ascribed to Arthur and Joseph, as if they were likewise ignorant, to defeat the presumption that their remains have lain in hallowed ground these many years in accordance with their devout hopes and desires.

[8] The only other reason which she gives is the asserted breach of a perpetual care contract which she executed with the cemetery authority. Arthur and Joseph had no part in the negotiation of that contract which took place in 1944, years after their burial. Nor was it any part of the arrangements which she made for their burial. It was a completely separate and independent transaction. The performance, the breach, the enforcement, or the rescission of that contract, has no compelling, persuasive, or proper bearing upon the question whether or not a court of equity should consent to removal and cremation contrary to the presumed desires and in desecration of the memory of Arthur and Joseph, and in contravention of the canon law and tenets of their church in accordance with which their remains were buried. We find no sufficient reason for a court to grant permission for the removal and cremation of the remains of Arthur and Joseph.

In relation to Frank's remains, we have an additional statute to consider.[1] Section 7980 of the Health and Safety Code as enacted in 1939 declared and still declares that "The heirs, relatives or friends of any decedent whose remains have been interred in any cemetery owned, governed or controlled by any religious corporation or by any church or religious society of any denomination or by any corporation sole administering temporalities of any religious denomination, society or church, or owned, governed or controlled by any person or persons as trustee or trustees for any religious denomination, society or church shall not disinter, remove, reinter or dispose of any such remains except in

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1. The additional statute, section 7980 of the Health and Safety Code, may or may not apply to the proposed removal of the remains of Arthur and Joseph. We express no opinion on that question.

accordance with the rules, regulations and discipline of such religious denomination, society or church. * * *" (Stats, 1939, ch. 60, p. 482, at p. 695.) This provision appears in the same part of the same Division (Part 2 of Division 7) of the Code as do sections 7525–7528 which authorize the instant proceeding. This provision was derived from section 17 of chapter 312 of the statutes of 1923, a statute which provided for the abandonment of cemeteries and the removal of remains. It accorded the relatives an opportunity to attend to the removal, and then stated in section 17 that "Nothing in this act contained shall authorize or permit * * * the heirs, relatives or friends of any deceased person whose body has been interred in any cemetery owned, governed or controlled by any religious corporation or by any church or religious society * * * or by any corporation sole administering temporalities of any religious denomination, * * * to disinter, remove, reinter or dispose of any such body except in accordance with the rules, regulations and discipline of such religious denomination, society or church." (Stats.1923, ch. 312, p. 646, sec. 17 at p. 656.) In that form it, of course, applied only to the subject matter of the 1923 statute, removal of remains upon the abandonment of a cemetery.

[9–13] In 1931 this 1923 statute was made a part of the General Cemetery Act. This was done by way of incorporation by reference, concluding with these words: "and said act as amended is hereby approved, adopted and enacted as section 28 of this act, as fully as if copied herein." (Stats.1931, ch. 1148, p. 2434, sec. 28 at pp. 2448–2449.) In this form, it literally applied to everything in the General Cemetery Act, including the provisions of section 24 thereof which in 1939 were carried into sections 7525–7528 of the Code without substantial change. In such a case, they carry with them the scope and meaning they had before. See Southern California Jockey Club v. California Horse Racing Bd., 36 Cal.2d 167, 173, 223 P.2d 1; Sandstrom v. California Horse Racing Board, 31 Cal.2d 401, 413, 189 P.2d 17, 3 A.L.R.2d 90; and Sobey v. Molony, 40 Cal.App.2d 381, 104 P.2d 868. The first draft of this portion of the proposed Health and Safety Code, which the Code Commission distributed for comment and criticism, limited the provisions of section 7980 to the chapter which dealt with the abandonment of a cemetery and removal of remains when ordered by a city or city and county. Appended was a note stating that the "Expression 'nothing authorizes' is ambiguous, and perhaps meaningless. If prohibition is intended it should be definite. There seems to be no prohibition elsewhere against removing bodies upon permit from civil authorities without regard to religious observances." The text of the final draft of section 7980, distributed by the Code Commission for further comment and criticism, was the same as that in which it was later enacted into law. It would appear, therefore, that the portion of section 7980 which we have quoted represents an interpretation and restatement of that portion of section 28 of the Act of 1931 which incorporated therein the provisions of section 17 of chapter 312 of 1923 and thus applies to a proceeding under sections 7525–7528. When a burial has been made in a religious cemetery as described in section 7980, that section gives preference to the rules, regulations and discipline of the church over the desires of the relatives of the decedent, in this case the desires of Amelia. There might be circumstances under which the statute does not accord that preference. Nor would the statute necessarily prevent a court from authorizing a removal in case of some emergency or other controlling public reason. The question is whether there is any such circumstance in this case. We have found none. Whatever Amelia's rights may have been to have effected a different arrangement for the original disposition of Frank's remains, the fact is that she had him buried in full compliance with the canons, rules and regulations of his and her church. Whatever bearing her lack of awareness of the restrictions upon removal might have upon her contractual relationship stemming from the purchase of the burial plot or the execution of the perpetual care contract, does not obtain in respect to her relationship to the church as a member. She dealt with the representatives of the church in that capacity. She was bound, as we have seen, by those canons, rules and regulations by the very act of becoming and being a member of the church. The finding that she acted while grief stricken and "under the influence of the * * * church" is based upon her testimony that "because of his [Frank's] sudden death —he died from heart failure—and my grief, and because of the Priests I buried him in St. Mary's Cemetery. I made a mistake." That does not indicate that any undue influence was exerted or that the representative of the church acted in the belief that the funeral and burial planned and actually carried out were not in full conformity with the desires of Amelia and Frank as members of the church. Had she promptly made her "mistake" known to the authorities of the church we might have a circumstance to consider. But she did not do so. She made that known only after some five years when she became dissatisfied with the failure of the cemetery authority to care for the three graves. These facts do not indicate that a situation exists which renders the statutory preference inapplicable as between the surviving relative and the cemetery authority. Nor does the perpetual care contract and its delayed performance (which the trial court, upon supporting evidence, found has been breached) render the statutory preference inapplicable. The making of that contract was independent of and separate from the conduct of the funeral ceremonies for Frank and the burial of his remains. It appears that Amelia had arranged for those ceremonies and that burial, when a man from the funeral parlor came and told her that if she paid $100 in addition to the burial the cemetery would take care of the graves. That transaction, though closer in point of time, had no closer factual or legal connection with the burial and right of removal of Frank's remains than it had in the case of Arthur or Joseph.

[14] There is this difference: Frank had orally expressed a desire that his remains be cremated. That, of course, was a desire for cremation upon his decease, not after a permanent burial and the lapse of several years. That desire can not now be literally fulfilled. Permanent sepulture was effected by the person to whom he expressed that desire, in a plot which in 1927 he assisted her to select, in a cemetery of his faith. The church and cemetery authorities were not informed of his desire for cremation or of any facts indicating that this proposal for removal might later be made. Accordingly, they effected burial in full conformity with the rules, regulations and discipline of the church. These circumstances convince us that this is a case for observance of the policy expressed in section 7980 of the Code, which does not sanction removal except in conformity with the rules, regulations and discipline of the church.

The judgment is reversed with directions to the trial court to amend the findings of fact and conclusions of law and render judgment thereon in accordance with the views herein expressed.

PETERS, P. J., and BRAY, J., concur.

JANSEN et al. v. SOUTHERN PACIFIC CO. et al. *

Civ. 8074.

District Court of Appeal,
Third District, California.

June 6, 1952.

Rehearing Granted July 3, 1952.

Carl V. Jansen and another sued Southern Pacific Company and Southern Pacific Railroad Company for injuries sustained as the result of a crossing collision between the plaintiffs' automobile and a switch engine. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment in favor of plaintiffs, and the Southern Pacific Company appealed. The District Court of Appeal, Peek, J., held, inter alia, that the jury had been properly instructed.

Affirmed.

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* Subsequent opinion 247 P.2d 581.

1. Appeal and Error ⚷934(1)

On appeal from order denying motion for judgment notwithstanding verdict, evidence would have to be viewed in light most favorable to respondents.

2. Negligence ⚷1

In deciding negligence cases, effort should be made to apply settled principles of law to facts in particular case as they existed at scene of injury, rather than to determine matter by matching cases.

3. Negligence ⚷1, 136(9)

Actor's conduct must be gauged in relation to all other material circumstances surrounding it, and if such other circumstances admit of reasonable doubt as to whether such questioned conduct falls within or without bounds of ordinary care, then such doubt must be resolved as matter of fact.

4. Railroads ⚷329

There was no "special duty of care" devolving upon motorist driving upon unguarded railroad crossing, notwithstanding fact that crossing was known to motorist.

5. Railroads ⚷350(13)

In action against railroad for injuries sustained as result of collision between plaintiffs' automobile and switch engine, plaintiffs' contributory negligence was for jury.

6. Railroads ⚷351(9)

In personal injury action arising out of crossing collision between plaintiffs' automobile and defendant's switch engine, it was not error to charge that it was duty of fireman to exercise same care that reasonably prudent person in same circumstances would in observing approaching automobiles and in warning engineer of their presence.

7. Appeal and Error ⚷882(12)

In personal injury action arising out of crossing collision between plaintiffs' automobile and defendant's switch engine, defendant could not complain of instruction, with regard to required signals, given at instance of its adversaries, when it had requested a substantially similar one. Civ. Code, § 486.

Devlin, Diepenbrock & Wulff, Sacramento, for appellant.

Thomas C. Perkins, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by defendant Southern Pacific Company from a judgment in favor of plaintiffs Carl V. and Meryl Jansen. husband and wife, in an action to recover for injuries alleged to have been sustained by them as the result of a collision between their automobile and a switch engine owned and operated by the defendant company. Specifically defendant's appeal is from the order of the court denying its motion for a judgment notwithstanding the verdict made before the entry of judgment, from the whole of said judgment and from the order denying defendant's motion for a judgment notwithstanding the verdict made in the alternative with a motion for a new trial after the entry of judgment.

[1] The evidence, viewed as we must in the light most favorable to respondents, shows that on December 17, 1949, and sometime between the hours of 6:30 and 7:30 o'clock p. m. plaintiffs were driving northerly on Thirty ninth street, a heavily traveled arterial street, in the city of Sacramento. The evening was quite cold, cloudy and dark. Mr. Jansen, who was driving, and his wife who was riding in the front seat of their sedan with him, were acquainted with the crossing in question as would any person who had lived in a community for a number of years. Thirty ninth street is approximately 36 feet in width. It crosses over the privately owned right of way of the defendant company at what is commonly known as R Street. The right of way at that point is approximately 99 feet in width, near the center line of which the company maintains a single track. No regularly scheduled trains operate on said track but it is used occasionally for the purpose of switching. There is no mechanical warning device at the crossing, the only warning is the usual cross-arm railroad sign. The intersection is lighted by one

325 watt street light located approximately in the center of Thirty ninth street at a point 75 feet north of the center line of the railroad tracks and approximately 27 feet above the ground. Respondents' view of the right of way was obstructed to a degree by houses and trees along both sides of the street. To the east, the direction from which the engine was coming, the view was obstructed by a hedge and trees in the yard of the house immediately adjacent to the right of way. Also in the right of way itself was a large oak tree approximately 87 or 88 feet east of the easterly boundary of Thirty ninth street and approximately 20 feet south of the boundary on the right of way. Immediately before the collision respondents were proceeding at a speed of between 15 to 20 miles per hour. The train was approaching at a speed of approximately 6 to 10 miles per hour.

The evidence was sharply in conflict as to whether or not a bell, whistle or other warning was sounded and whether or not the headlight on the engine was lighted. However, both plaintiffs and a passenger in a car which was immediately following them, testified they noticed no light nor did they hear any whistle or bell. The testimony was also conflicting as to whether or not the window on the driver's side of the car was open. The plaintiff, Carl Jansen, testified that he looked to his left and then to his right before reaching the southerly boundary of the right of way, his speed remaining constant at the rate of approximately 15 miles per hour; that upon entering the right of way area he again looked to the left and to the right, looking lastly to the right just prior to the impact and just as he was moving on to the track. His wife further testified that she looked to the right and saw the engine just prior to the impact. The engineer was seated on the right side of the cab which was located at the rear of the engine. Thus the fireman who was seated on the left side of the cab was the only trainman who could observe traffic approaching from the south. He testified that he first saw plaintiff's car when it was approximately 140 to 150 feet from the crossing and that the engine was approximately 25 feet from the crossing; that he gave no warning to the engineer of the approaching automobile; that as the front of the engine was entering the crossing he realized respondent Jansen was not going to stop and that he then gave a warning to the engineer.

[2–5] The two contentions made by appellant, neither of which is well founded, are: (1) That respondents were guilty of contributory negligence as a matter of law in that they failed to exercise proper care before crossing the track, and (2) that the court erred in giving and in refusing to give certain instructions.

In support of its first contention the defendant argues that since the crossing was known to plaintiffs and since it was unguarded there was placed upon them a "special duty of care", citing the usual case of Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788, and a recent case of this court, Shirk v. Southern Pacific Co., 103 Cal.App.2d 97, 229 P.2d 100. We do not understand the Koster case to so hold. Nor did this court so hold in the Shirk case. Statements from these cases such as defendant quotes and relies upon in its brief cannot be so taken out of context and used as defendant does to support its contention that the courts in the cases cited have enunciated what defendant terms a "special duty of care rule" and that such purported rule is applicable to the present case.

Attempts to reduce negligence to rigid rules have never been successful. Rarely, if ever, will the facts of any two cases be identical. Hence, "The effort should be to apply settled principles of law to the facts in the particular case as they existed at the scene of the injury, rather than determine the matter by matching cases." Antonian v. Southern Pacific Co., 9 Cal.App. 718, 734, 100 P. 877, 884.

As stated in Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848, 851, "Standards of care are typically relative; rules of law are basically absolute. Hence, in regard to negligence, any attempt to screen factual conduct into legal classifications through a sieve of absolute law will be impracticable whenever the related circumstances admit of materially conflicting inferences." In other words, as the court there states: "the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law."

Appellant's remaining contention relates to an asserted error in the instructions given by the trial court. These contentions are that the court erred in (1) failing to instruct the jury that there was a special duty of care imposed upon the driver of a vehicle approaching a railroad crossing; (2) refusing to instruct the jury in particular language chosen by the defendant from the Koster case; (3) instructing the jury that the fireman on defendant's switch engine had a duty of care, not placed upon him by law, and (4) that the instruction given, predicated upon section 486 of the Civil Code, was erroneous in that the jury was informed it was the duty of defendant to ring a bell at the intersection.

Since the first two contentions are but a re-argument of appellant's first main contention, suffice it to say that the jury was instructed in accordance with the views herein expressed relative to that contention; and hence what has heretofore been said in that regard is equally applicable here.

[6] Appellant next argues that the court's instruction that "It was the duty of the fireman to exercise the same care that a reasonably prudent person in the same circumstances would in observing approaching automobiles and in warning the engineer of their presence", erroneously instructed the jury that the fireman had a duty not placed upon him by law, to-wit, "to warn the engineer that automobiles are *approaching* the crossing", and that such a duty is contrary to law relative thereto as laid down in Billig v. Southern Pacific Co., 192 Cal. 357, 363, 219 P. 992.

Appellant further asserts that "the respondents make the same erroneous contention as to the subject matter under this heading as they do in all of the other points in their brief, that is, they contend that the reasonably prudent person rule is applicable, whereas the law lays down a specific standard of conduct." We cannot agree with this argument.

The jury was instructed that the fireman in acting as a lookout had the duty "to exercise the same care that a reasonably prudent person in the same circumstances would in observing approaching automobiles *and* in warning the engineer of their presence." (Emphasis added.)

The duty specified, as we read the instruction, was not "to warn the engineer that automobiles are *approaching* the crossing", but to *observe and* warn of approaching automobiles in the same manner as would a reasonably prudent person under the same circumstances. We find nothing in the Billig case to the contrary. The standard of conduct is always the same, that is, "reasonable care under the circumstances." Cooper v. Southern Pacific Co., 43 Cal.App.2d 693, 703, 111 P.2d 689. The Billig case is merely an exposition of what conduct on the part of the fireman would constitute reasonable care under the circumstances.

[7] Appellant's final contention relates to an instruction given at the request of respondents relative to the duty of defendant under the provision of section 486 of the Civil Code. The court first instructed the jury in the precise language of said section and then continued with the instruction which defendant now attacks, and which is as follows:

> "You are instructed therefore that it was the duty of the defendants traversing the intersection of its tracks with 39th Street and for a distance of at least 1,320 feet before reaching 39th Street to ring a bell as required by the Statute, and if you find that the defendants failed to comply with said section 486 of the California Civil Code, just read to you, and that the failure to so comply was the proximate cause of the collision and of the plaintiffs'

> resulting damage, and that plaintiffs were not guilty of contributory negligence you must return a verdict for the plaintiffs."

However, that was not the only instruction on that subject; in fact there were two more which the court gave. The following instruction, which respondents state was given at the request of appellant, and which statement appellant has not denied, was as follows:

> "I have stated to you heretofore that it was the duty of the defendants to give statutory signals, and I desire to instruct you further that the obligation to give satisfactory signals is necessarily controlled by our statutes and in cities the said statute provides 'that a bell of at least twenty pound weight must be placed on each locomotive engine and must be rung a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed the street, road or highway;' that in cities there is no statutory obligation for the defendants to sound any steam or other whistle as a warning of the engine's approach to such crossing. Of course, the railroad may, if it so desires, go beyond the terms of the statute and cause both the bell to be rung and the whistle to be sounded."

Immediately following that instruction was a third instruction by which the jury was told: "under the statute which deals with sounding of whistle or bell by a steam locomotive 'it is the sounding or giving of the' warning and not the hearing of it which determines the question of statutory violation. On this phase of the case, the only issue is whether a signal, as required by the statute, was sounded. If you find that a signal was sounded as required by the statute, the fact that it may not have been heard by some person, is not ground for finding that the statute was violated, or that the railroad or its employees were negligent."

As previously stated, appellant contends the court, by the first quoted instruction, erroneously instructed the jury, and such error was prejudicial. Whether the law is as appellant here contends or whether Civil Code section 486 may be complied with by either ringing a bell *or* sounding a whistle we need not determine. Appellant, as appears from the instruction which it requested and which was given, believed the law to require it to ring a bell in cities at all events, but that if it chose it could also sound a whistle warning. Having received instructions in conformity with its view of the law it cannot now contend that such a statement of the law was erroneous and prejudicial to it. It is well established that "A party cannot complain of an instruction given at his own request, or of an error in an instruction given at the instance of his adversary, when he requests a substantially similar one." Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772, 774. See also Cedzo v. Bergen, 53 Cal.App.2d 667, 675, 128 P. 2d 683; Benton v. Douglas, 82 Cal.App. 2d 784, 787, 187 P.2d 469; Blythe v. City and County of San Francisco, 83 Cal.App. 2d 125, 132, 188 P.2d 40.

The judgment and orders are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

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111 Cal.App.2d 566

ROBERTS v. REDLICH.

No. 14987.

District Court of Appeal, First District, Division 1, California.

June 10, 1952.

Morris Roberts brought an action against H. M. Redlich for damages caused by defendant's holding over after termination of defendant's lease of realty owned by plaintiff. The Superior Court of the State of California in and for the City and County of San Francisco, Frank T. Deasy, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that a judgment rendered for plaintiff in a prior unlawful detainer was not a bar to the action.

Judgment affirmed.

1. Forcible Entry and Detainer ⟹30(1)

Damages recoverable in unlawful detainer action are incidental to restitution of premises and if plaintiff fails to prove an unlawful detainer plaintiff cannot be awarded damages in such action. Code Civ.Proc. § 1174.

2. Judgment ⟹606

Judgment rendered for plaintiff landlord in unlawful detainer action brought against tenant was not a bar to subsequent action by landlord for damages caused by tenant's holding over after termination of lease of realty where damages sought in second action commenced to accrue but one day before rendition of decision in unlawful detainer action and after submission of cause in unlawful detainer action.

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Worthington, Park & Worthington, Alden Ames, San Francisco, for appellant.

Vladimir Vucinich, Langer & Simpson, J. C. Simpson, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant appeals from a judgment for $5,250 damages caused plaintiff by defendant's holding over after termination of his lease of certain improved real property of the plaintiff.

The sole question is the asserted bar of the award of damages to plaintiff by the judgment rendered in an unlawful detainer action brought by plaintiff against this defendant for restitution of this property upon termination of the lease. We conclude that the award of damages in the former action is not a bar to the present action and that the judgment herein should be affirmed.

On April 6, 1948, defendant was a tenant of plaintiff on a month-to-month basis under an oral lease of the property, at a rental of $600 payable monthly in advance. On that day plaintiff gave defendant a thirty-day notice of termination of the lease. May 18, 1948, plaintiff filed the unlawful detainer action, alleging damages in the amount of $16,000.[1] Defendant filed his answer June 10. The case was tried June 21. Findings of fact and conclusions of law were filed July 2. The court found that defendant had failed and refused to surrender the premises following termination of the lease on May 6, 1948; that plaintiff had executed a lease with a tenant other than defendant at a rental of $750 a month; and that "plaintiff has been damaged in the sum of $270 by reason of defendant's failure and refusal to vacate said premises." Judgment was rendered July 27, 1948, awarding plaintiff restitution of the premises and damages in the sum of $270. That judgment became final prior to the trial of the present action.

Plaintiff commenced the present action November 12, 1948. He alleged and the court found: March 10, 1948, plaintiff executed a lease of the premises to another tenant for seven years at $750 a month for the first four years, with a right in the tenant to cancel the lease if plaintiff could not deliver possession by June 15, 1948; defendant, with knowledge of said lease and its cancelability, wilfully continued in possession until June 30, 1948; the new tenant cancelled the lease; the premises were vacant July through September, 1948; plaintiff again leased them October 1, 1948, for five years, at $600 a month during the first two years and $750 a month during the last three years; with a resultant loss to plaintiff of $750 a month for three months and $150 a month for twenty-four months, a total of $5,850, caused by defendant's unlawful detainer of the premises; against which defendant had a valid counterclaim of $600.

It is apparent that the $270 awarded in the former action represented damages caused by defendant holding over from the termination of his lease, May 6, until the time of trial, measured by the difference between the two rental rates, defendant having paid the $600 rate until June 30. The $5,850, upon the other hand, represented damages for loss of rent after June 30, predicated upon the loss of the new lease caused by defendant's holding over beyond June 15 with knowledge of the right of the new tenant to cancel if delivery to him were not effected by June 15.

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[1] As to those damages, plaintiff alleged "That by reason of the foregoing [defendant's holding over] plaintiff has been damaged in the sum of $16,000."

In respect to damages recoverable in an unlawful detainer action, the statute declares that if the verdict or findings be in favor of the plaintiff and against the defendant judgment shall be entered for restitution of the premises and the jury or the court "shall also assess the damages occasioned to the plaintiff by any * * * unlawful detainer, alleged in the complaint and proved on the trial * * *." Code Civ.Proc. sec. 1174.

[1] This means that the damages recoverable in such an action are incidental to restitution of the premises. If the plaintiff fails to prove an unlawful detainer he cannot be awarded damages in that action. Markham v. Fralick, 2 Cal.2d 221, 225–227, 39 P.2d 804; Chase v. Peters, 37 Cal.App. 358, 174 P. 116. The damages recoverable in an unlawful detainer action are limited, under the circumstances of the instant case,[2] to those occasioned by the detention itself and which occur during the detention up to the time of trial. Awards of damages so measured were approved in Mason v. Wolff, 40 Cal. 246; Keyes v. Moy Jin Mun, 136 Cal. 129, 68 P. 476; Nolan v. Hentig, 138 Cal. 281, 71 P. 440; Holland v. Eastern Outfitting Co., 16 Cal.App. 441, 117 P. 562; Delger v. Jacobs, 19 Cal.App. 197, 125 P. 258 (to the date of the findings); Flournoy v. Everett, 51 Cal.App. 406, 196 P. 916 (to the time of judgment); and Pfitzer v. Candeias, 53 Cal.App. 737, 200 P. 839 (to the time of judgment). In the Pfitzer case the trial court awarded plaintiff the further sum of $4.05 per day for each day of continued occupancy by the defendant after judgment. The reviewing court struck this provision from the judgment, as an unauthorized element of damages in an unlawful detainer action. In so doing the court made these significant observations: "In cases of this character, a defendant may hold possession, under certain conditions, pending appeal. It may be months, or even years, before the defendant is required to surrender possession. It does not appear by what means the court can determine what damages are 'certain to result in the future.' The value of the use and occupation may be greater or less than at the time of the trial. No statute or decision has been cited, and none has been found, which would authorize a judgment of the character rendered for future damages." 53 Cal.App. at page 741, 200 P. at page 841.

[2] The damages awarded in the present action accrued after the period of detention of the property by defendant and after the submission of the cause upon the trial of the former action. They commenced to accrue but one day before the rendition of the decision in the former action. Such damages were not recoverable in the former action. The judgment rendered in the former action did not operate as a bar to the recovery of the damages awarded in the present action.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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[2] The instant case does not, for example, involve any circumstance of fraud, force or violence, for which section 1166 of the Code of Civil Procedure permits a plaintiff to claim damages in an unlawful detainer action.

111 Cal.App.2d 507

McATEE v. CITY OF MARYSVILLE.

Civ. 8036.

District Court of Appeal, Third District, California.

May 4, 1952.

Action by John L. McAtee against City of Marysville for personal injuries sustained by plaintiff when one of the wheels of automobile in which he was riding ran into hole in street intersection. The Superior Court, Yuba County, Ben R. Ragin, J., entered judgment on verdict for city, but thereafter granted new trial upon all issues, and defendant appealed, and plaintiff cross appealed from judgment entered upon the verdict. The District Court of Appeals, Van Dyke, J., held that when a public improvement has been planned by city officials and has been constructed in accordance with such plans, and when a dangerous condition has been created by carrying out of that plan, no further proof is needed to charge city with notice within public liability act.

Order affirmed, cross appeal dismissed.

1. Appeal and Error ⊂⊃979(2, 3), 1015(1)

An appellate court will not reverse an order granting or refusing a new trial unless there was no substantial evidence to support a judgment for the moving party, or there was a clear or manifest abuse of discretion of trial court in granting a new trial, but when there is no substantial conflict in testimony on material issues and evidence as a whole would be insufficient as a matter of law to support a verdict in favor of moving party, order granting new trial cannot be sustained.

2. Municipal Corporations ⊂⊃831(1)

When a public improvement, such as municipal sewerage system, has been planned by city officials and constructed in accordance with such plan, and it is shown that by carrying out the plan a dangerous or defective condition has been created, no further proof is needed to charge city with notice of that condition within requirements of public liability act. Gen.Laws, Act 5619.

3. Municipal Corporations ⊂⊃733(1)

Whether a given set of circumstances which arise because of construction by municipality of public improvement in accordance with plans made by city officials creates a dangerous or defective condition is primarily a question of fact to be determined upon circumstances of a particular case. Gen.Laws, Act 5619.

4. Municipal Corporations ⊂⊃832

Where sewerage system, constructed in accordance with city's plans, utilized terra cotta line under certain intersection, and changed conditions and extension of system created unsafe pressure in terra cotta line, showing of creation of such dangerous condition was sufficient to charge city with notice thereof.

5. Municipal Corporations ⊂⊃832

Where changed conditions brought about by passage of time and extension of city sewerage system created pressure in terra cotta line located under intersection, there was duty upon city officials to exercise reasonable diligence in making inspections for discovery of unsafe or defective conditions.

6. Automobiles ⊂⊃259

Liability might be imposed upon city for personal injuries sustained by automobile occupant when wheel of automobile ran into hole in intersection, if such hole was result of inherently dangerous condition which came about in connection with city's operation of its planned sewerage system.

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Rich, Carlin & Fuidge, Marysville, for appellant.

Robert W. Steel, Erling S. Norby, Marysville, for respondent.

VAN DYKE, Justice.

This action was brought under the provisions of the Public Liability Act of 1923, Gen.Laws, Act 5619. Plaintiff McAtee was injured when one of the wheels of the automobile in which he was riding ran into a hole in a street in the City of Marysville. The action was tried to a jury which returned a verdict in favor of defendant city and judgment was entered in conformity therewith. The trial court thereafter granted a new trial upon all issues, specifying as the basis of the order the insufficiency of the evidence to justify the verdict and that it was against law. From that order the defendant city has appealed. Contending that there were errors in the instructions to the jury the plaintiff has cross-appealed from the judgment entered upon the verdict. We shall refer to the city as appellant and to the plaintiff as respondent.

The accident occurred at a point within the southeast portion of the northwest quadrant of the intersection of Tenth and Yuba Streets in Marysville. In 1905, and when the easterly portion of Marysville, in which the intersection is located, contained but few residents, the city laid a ten-inch sewer line composed of terra cotta pipe intended to carry sewage by gravity from the easterly portion of Marysville in a westerly direction and to a point of disposal. The line at the intersection of Tenth and Yuba Streets lay two or three feet beneath the surface. In 1929, and when the population of eastern Marysville had substantially increased and the high school was being built north of the intersection involved, the city laid a second sewer line consisting of 12-inch concrete pipe running southerly on Yuba Street and emptying into a sump on the southeast corner of the intersection. Two pumps were installed at the sump for the purpose of pumping the collected sewage up into the 10-inch line whence, along with the sewage collected in that line, it all flowed westerly to the point of disposal. Where the 12-inch line passed beneath the intersection it was approximately 12 feet below the surface. The intersection at Tenth and Yuba Streets is subjected to heavy traffic, including the passage over it of loaded logging trucks coming from the easterly mountains. In March, 1949, in the year preceding the accident to respondent, a city employee noted a damp area in the intersection and reported the matter to the city engineer. The area was excavated and a break was found in the 10-inch line. One section of terra cotta pipe had collapsed and three others were cracked. The break was repaired by substituting sections of concrete pipe. During the following summer the city tore out the paved portion of the intersection and replaced the paving with 10 inches of gravel covered by 2 or 3 inches of black top. The city also, at the point where the logging trucks generally turned from Yuba onto 10th, added gravel and black top over the area they would thus traverse. The burden of duty of the sewer pipes steadily increased with the increase of population in the area served and the 10-inch terra cotta line was itself considerably extended to serve a greater area east of the intersection. The result was that the carrying capacity of the 10-inch line was at times, particularly in wet weather, so taxed that the pumps sometimes created internal pressure in the terra cotta line for a considerable distance around the intersection. There was evidence that terra cotta pipe of the kind used when the line was laid was not fitted to withstand such pressure. The accident occurred February 4, 1950, during rainy weather when the discharge from the sewer system was high. Two city employees went through the intersection about 4 or 5 hours before the time of the accident, but there was either no indication of trouble in the intersection at that time or, if there was, they did not observe it. When the wheel of the car in which plaintiff was riding dropped into the recess the car came to a sudden stop, throwing plaintiff against the forward part of the interior of the car and causing him serious injury. The driver, to extricate the car, "rocked" it back and forth until he succeeded in getting the wheel out of the hole. The next morning the city engineer discovered the hole, at which time he said it was about one and a half feet in width and was conical in shape. The water would rise and fall in the hole as the pumps would go on and off. The section of black top which had covered the hole had disappeared. The city engineer testified that he had been concerned with the situation at the intersection, particularly because of the truck traffic over it; that the city knew there was internal pressure exerted by the pumps in the terra cotta line and he had observed at various times that sewage was discharged through a manhole on the surface of the street one-half block west of the intersection, sometimes spurting up 6 to 8 inches. He testified that the lines became overloaded in the later months of the winter time and that when the pumps would go on at the sump, throwing the load on the terra cotta line, the sewage would be backed up and the lines overloaded. Before the accident happened the city had commenced construction of a new disposal line which would eliminate the pumping from the sump into the terra cotta line. An engineer called by respondent testified that in his opinion the condition of the terra cotta line and the fact that it was under pressure and full of water and sewage would lead him to expect breaks in the line at the intersection and he said further that pipe of that type was never used under pressure. He said that, considering the condition of the pipe itself, the fact that it was under pressure, and full of water from other sources being carried in the pipe, it was his opinion it would very likely break from internal pressure. He testified that this opinion would be strengthened, considering that the line had broken on one occasion, and considering that in periods of storm sewage spurted from the manhole near the intersection.

> [1] "The rule is well established that an appellate court will not reverse an order of a trial court granting or refusing a new trial unless it can be said as matter of law that there was no substantial evidence to support a judgment for the moving party, or that there was a clear or manifest abuse of discretion on the part of the trial court in granting the new trial. * * * The rule as stated in Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 168, 153 P.2d 338, is that if the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, the order appealed from should be reversed. * * * In Seth v. Lew Hing, 125 Cal.App. 729, 732, § 14 P.2d 537, 538, 15 P.2d 190, in which an order granting a new trial was reversed and a hearing in the Supreme Court denied, the rule was thus stated: 'Preliminarily we should consider the function of this court on an appeal from an order granting a new trial. On this point the authorities are in accord with the statement found in Moss v. Stubbs, 111 Cal.App. 359, 363, 295 P. 572, 573, 296 P. 86, that: "It is equally well settled that, where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained."'" Martin v. Smith, 103 Cal.App.2d 894, 897, 230 P.2d 679, 681.

[2, 3] It is well settled that when a public improvement, such as was involved in the instant case, has been planned by city officials and constructed in accordance with such plans, and when it is shown that by carrying out the plan a dangerous or defective condition has been created, no further proof is needed to charge the city with notice of that condition and the statutory requirement under the Public Liability Act that a city sought to be held responsible thereunder had notice has been met. Fackrell v. City of San Diego, 26 Cal.2d 196, 203, 157 P.2d 625, 158 A.L.R. 773, and cases cited. In the Fackrell case it was contended that, conceding the foregoing rule, there was nothing in that case about the street or sidewalk involved as originally completed that was inherently dangerous, but that on the contrary they were then safe and remained safe for some weeks; that an inherent danger is one that exists from the beginning as distinguished from one which should be merely anticipated. The court held otherwise and declared that a public street need not be immediately dangerous in order that it be inherently dangerous and that if the improvement be designed to be used without inspection and under varying conditions normally to be anticipated, the improvements should be made reasonably safe for ordinary use under all of those conditions; further, that the defect and danger are no less inherent merely because the anticipated conditions which activate such defect and

danger are to be present only occasionally. Said the court, 26 Cal.2d at pages 206–207, 157 P.2d at page 630:

> "* * * Actual notice of a defective or dangerous condition is not required. Constructive notice satisfies the statute. * * * Constructive notice is defined by section 19 of the Civil Code as that knowledge of circumstances 'sufficient to put a prudent man upon inquiry as to a particular fact' where 'by prosecuting such inquiry, he might have learned such fact.' The rules governing constructive notice require reasonable diligence in making inspections for the discovery of unsafe or defective conditions. * * * Where the authorities who have planned and constructed an improvement have knowledge of circumstances which reasonably might be expected to result in a dangerous condition as a natural and probable consequence of the work, such authorities are put upon inquiry, and it follows that it is incumbent upon them to make inspections commensurate in scope with the nature and character of their knowledge and the peril which should be avoided.
>
> "As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts. * * * Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact. * * * All legitimate and reasonable inferences must be indulged toward upholding the findings. [here we must indulge the same inferences in determining whether or not a verdict in favor of respondent would have been supported by the record.] Appellate courts, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical."

[4–6] We think this case is governed by the rules declared in the Fackrell decision and that, applying those rules to the facts shown here, the order of the trial court appealed from must be affirmed. It is true that when, back in 1905, the terra cotta gravity sewer line was installed, it may be assumed to have been adequate for its purposes. But from the time of its installation to the time of respondent's injury the city had known at all times that it was not intended to operate under pressure nor designed to meet such a requirement. We must here take the testimony of respondent's engineer to the foregoing effect. We must also take that testimony as stating the truth when the engineer said that if sewage were pumped through that line at that intersection under pressure to the extent testified to, a break in the line was reasonably to be expected. We may assume that when in 1929 and under the conditions then obtaining as to volume of sewage disposal from the area served by the concrete line the sump and pumps were installed there was no immediate danger in pumping the collected sewage into the terra cotta line. But when the changed conditions in the area served by the two lines brought about a situation where the sewage was being pumped through the terra cotta line under pressure and under varying pressure, as the evidence showed, then a situation arose whereunder the general design became, to the knowledge of the city, inherently dangerous in that washing out the material underlying the surface of the intersection was to be reasonably expected. Under such a situation the principles declared in the Fackrell case come into play. For it can make no difference whether an inherently dangerous condition is present when the improvement is completed according to plan, or whether that inherently dangerous situation arises through change of circumstances which, to the knowledge of the city, renders the design unfit for the continued use being made of the improvement. It is not unreasonable to charge responsible officials of a city with knowledge that conditions have so changed, and that an originally safe plan of improvement has become an inherently dangerous one. In view of the foregoing, we hold that the order of the trial court granting a new trial as to all issues ought not to be disturbed. What we have heretofore said effectually disposes of all matters before the Court.

The order appealed from is affirmed. The cross appeal is dismissed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

111 Cal.App.2d 378

PERATA et al. v. OAKLAND SCAVENGER CO.

No. 15125.

District Court of Appeal, First District, Division 1, California.

May 28, 1952.

Rehearing Denied June 27, 1952.

Hearing Denied July 24, 1952.

Action by Frank Perata, and others, against Oakland Scavenger Company to recover dividends. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Bray, J., held that evidence sustained finding that monthly payments of $400 made to plaintiffs, who were required by corporate by-laws to work for the corporation, included dividends, but that the trial court erroneously computed the portion of the $400 which constituted dividends.

Judgment modified and as modified affirmed.

1. Corporations 🔑**155(2), 172**

Where by-laws of corporation provided that all stockholders should work in corporate business, that board at all times had control of stock and stock could be sold only by board, and that stockholder could be fined for infractions of rules or orders of board, stockholders could terminate their connections with corporation without penalty and were entitled to whatever dividends were being paid other stockholders from date stockholders ceased to work for corporation until such time as their stock was sold.

2. Appeal and Error 🔑**994(3)**

Credibility of witnesses is a matter for the trial court.

3. Corporations 🔑**155(5)**

Evidence sustained finding that monthly payments of $400 to stockholders, who were required by corporate by-laws to work in corporate business, included dividends.

4. Corporations 🔑**310(1)**

Ordinarily courts will not interfere with sound judgment of officers of corporation in determining wages to be paid.

5. Evidence 🔑**18**

Value of certain types of work is a matter of common knowledge.

6. Corporations 🔑**155(2)**

Corporate stockholders who were required by corporate by-laws to work for corporation and who received $15.38 per working day, which sum included dividends, were entitled upon termination of connections with corporation to dividends computed by determining value of stockholders' services over services of employees who were not stockholders, at the highest pay of such employees at the particular time plus one-half the difference between that pay and the $15.38 paid the stockholders.

St. Sure & Moore, Oakland, for appellants.

Elliott Johnson, W. I. Follett, Oakland, for respondents.

BRAY, Justice.

Questions Presented.

This appeal by defendant from a judgment in favor of plaintiffs raises primarily the interpretation of the by-laws of defendant corporation as to a stockholder who desires to terminate his connection with the corporation, and the question of whether the monthly payments to working stockholders were solely wages or included dividends.

Facts.

Defendant is a California corporation engaged in the scavenger business. Each of its 208 stockholders owns 100 shares of stock. In 1935 plaintiff Gamba became a stockholder by purchasing 100 shares for $12,500; plaintiff Perata inherited in 1920 his 100 shares; plaintiff Rossi purchased his in 1933 or 1934 for $11,500; and plaintiff Ferro purchased his in 1930 for $11,500. In 1939 the by-laws were amended in the present form and all stockholders, including plaintiffs, signed them. As required by the by-laws all stockholders worked in the company business. There were a number of nonstockholder employees, usually referred to as "helpers." During 1943 these helpers were paid from $7.50 to $8 per day. May 1, 1944, the rate was changed to from $8 to $9.50. October 15, 1944, it was changed to $8.50 to $9.50. Working stockholders were paid a monthly "basic rate" which, during the period here involved, was $400 per month. From this amount was deducted any collections made by the stockholder and not turned in, income tax withholding, unemployment insurance and deductions for time off. There was a period during which the basic rate was $350 per month and $50 per month additional was paid the employee-stockholder. It is not clear just what this so-called "side money" was. The trial court treated it as a part of the basic rate, and we have done so.

This controversy arose when each plaintiff respectively quit work, all except Perata without the express consent of the board of directors. Perata had broken his elbow in 1931, and because of it was bothered in his work. He told the director of men that he wanted time off as his doctor had told him to quit work. He was referred to the board. Later he was informed by the director that his request was granted. He left his employment November 30, 1943. Gamba went into the Merchant Marine, being given time off from March, 1942, until March, 1945. From March, 1942, until September, 1943, he received full pay less a deduction for employment of a substitute. For the balance of the period he received no pay. He returned to work June 1, 1945, and worked until March 1, 1946. In February he told the director and board that he was leaving because of his health and because he was dissatisfied. He was told that his stock could not be sold at that time. There was some talk to the effect that the only way he could get out of the company was to fight. He quit. Ferro quit December 31, 1945, giving notice to that effect at a regular monthly meeting in November, because he was dissatisfied. Rossi quit June 10, 1946. Prior thereto he presented to the board a letter from his doctor advising him to quit. He was told to wait a few months as the company was short of men. He refused. The stock of all plaintiffs was sold by the board on May 7, 1947. Each 100 shares brought $13,000, and that sum was paid by the company to each of the plaintiffs except Rossi. Approximately 16 months after Rossi quit he was notified that he was fined for not working $100 per month for the 16 months prior, from July 1, 1946, to November, 1947. Although fines were usually entered in the minute book of the board, no fines appear against any of the plaintiffs, not even Rossi. None of the plaintiffs received any pay or dividends from the date each quit work. Defendant's president testified that the board decided not to fine plaintiffs for not working but merely not to pay them. No formal action in this respect appears in the minutes. There was evidence that when all other stockholders wanted to quit they continued working until their stock was sold by the board. Plaintiffs brought this action to recover dividends payable from the time each quit until his stock was sold, contending that besides the declared dividends that portion of the monthly pay which exceeded the $8.00 per day stated in the by-laws and hereafter mentioned, or at least that portion which exceeded the wages paid for replacement of their work, constituted dividends.

Findings.

The court made extensive findings, the substance of which were that long established custom required that each stockholder must own 100 shares and that by such custom and the by-laws each stockholder must work for the corporation subject to the provisions of the by-laws as to time off from work; that the company during the period in question earned net profits which varied from month to month; that it was provided by long established custom that each stockholder except the president and vice-president must at all times receive the same amount of money monthly except for deductions provided by the by-laws; that the stock of each plaintiff, endorsed in blank, was held by the corporation from date of issuance to date of sale, for safekeeping and to enable defendant to enforce the provisions of article V of the by-laws; that until the sale of the stock of each respective plaintiff he was entitled to receive from defendant the same amount as paid by defendant to any other stockholder except the president and vice-president and except as such amount should be reduced for time off as provided in article VII, section 12 of the by-laws, and less such portion of said money as constituted a reasonable wage for the work performed by a stockholder; that from November 30, 1943, to May 1, 1944, $8 per day and no more, from May 1, 1944, to May 7, 1947, $9.50 per day and no more, were reasonable wages to be paid each stockholder employed by defendant during the respective periods; that all monthly distribution to each of said stockholders over and above said sums were dividends to the extent they exceeded such reasonable wages; that such excess payments were made under the guise of compensation but were in fact not so paid but were paid without regard or reference to the services performed by each stockholder and in certain instances in the absence of the performance of any services; that such excess was paid out of the corporation earnings and was dividends; that each plaintiff was entitled to receive for the period between the time he quit working and the sale of his stock the difference between $400 per month and the reasonable wages of helpers above mentioned for all working days (the court figured 26 working days to a month). The court then awarded Perata as dividends for that period, figured in that way, the sum of $6,479.50, and for additional sums which were paid to the stockholders over that period as declared dividends, and for interest on both types of dividends, the total sum of $2,428.86, or a total sum of $8,908.36. It awarded Rossi, on the same basis, $3,422.35, Gamba, $7,870.71, and Ferro $3,181.93. No attack is made on the correctness of the arithmetic of the computations.

By-laws.

Those important here follow.[1] Articles V and VI state that the corporation is, in effect, a membership corporation, and because it is particularly important that each stockholder shall enjoy the respect and confidence of all other stockholders and to insure that the stock shall not come into the hands of persons not acceptable to the other stockholders, each stockholder agrees that the restrictions and limitations upon the transfer of stock shall be a part of the by-laws and a contract between each stockholder and every other stockholder. Each stockholder is required to endorse his certificate of stock and deposit it with the board with whom it must remain during the "lifetime of said stockholder." Upon his death the title to the stock becomes vested in the board. No stockholder can sell or assign his stock to any person not approved by the board. In the event of the death of the stockholder provision is made for its transfer to a male relative, if such relative is acceptable to the board. If there be none, then the board may sell the stock at a price to be determined by the board and pay the proceeds to the wife or heir of the stockholder. If the stockholder is guilty of theft and is expelled from the corporation he shall accept from the board the reasonable value of his stock. The opinion and judgment of the board as to transfers of stock under this article are final and conclusive. All stockholders are required to attend all stockholders' meetings under penalty of fine. All operations of the corporation are secret and must not be divulged by the stockholders.

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[1] Unless otherwise noted, all emphasis (except titles of sections) is ours.

Article VII provides the duties of workers who are stockholders. They must pay for loss of tools or truck equipment and for all damages caused by them or a truck driven by them. Fines are provided if the stockholder fails to report for work or give notice of illness.

Section 9 of Article VII provides as follows: "*General Duties of Employees and Stockholders.* Each employee or stockholder of this Corporation *shall devote all his time to the work of this corporation and shall gather personally,* according to the custom of this corporation, all rags, bottles, newspapers, paper and other articles of salvage within the field of his particular work. *For each time he fails in this duty, he shall be fined an amount to be determined by the Board of Directors.*"

Section 11 of article VII provides as follows: "*Failure or Refusal to Follow Orders of the Board of Directors.* Each employee or stockholder of this corporation who shall refuse or fail to carry out strictly the orders of the Board of Directors of this Corporation, or of the President, or other persons authorized to give such order, shall be fined Ten Dollars ($10.00) and shall be laid off from work for a period of one month, and during such period of layoff. he shall have no right to any wages, dividends, or other compensation from this corporation. * *"

Section 12 of article VII provides as follows: "*Time Off.* Any employee or stockholder of this corporation desiring to have time off, must advise the Director of Men the day before, and such person *shall not take any time off without the consent of the Director of Men.* Failure to observe this rule shall subject the employee to a fine of Five Dollars ($5.00). Each stockholder or employee desiring time off shall be charged Six Dollars ($6.00) per day for all time off up to and including fifteen (15) days, and Eight Dollars ($8.00) per day for all time off in excess of fifteen (15) days, and such amounts shall be deducted from the salary, dividends or other compensation to be paid by this corporation to said stockholder or employee."

Section 13 of article VII provides as follows: "*Payment of Fines.* No stockholder or employee of this corporation who has been fined * * * shall receive any wages, dividends or other compensation from this corporation until said fine has been paid. Said employee or stockholder shall be suspended from doing any work for this corporation from the time said fine is assessed, until it has been paid."

A study of the by-laws shows (1) that it was contemplated that all stockholders would work in the business; (2) that such work should be continuous except when excused by the director; (3) that for infractions of the rules or orders of the board, the stockholder could be fined, the fine to be deducted from any moneys, either wages or dividends, to which the stockholder might be entitled; (4) that for refusal to carry out orders the stockholder could be laid off work for one month; (5) that it was expected the stockholder would work for life, and on his death his place could be taken by a male relative if available and suitable; (6) that the board at all times had control of his stock and it could be sold only to whom and for a price determined by it (in practice, the stock could be sold only by the board and not by the stockholder); (7) that for time off a fixed amount was to be deducted from the stockholder's pay.

Member May Quit.

Although there is a provision for expelling a member, in which event he will receive the reasonable value of his stock, no provision is made in the by-laws for a member voluntarily severing his connection with the company. Although it would appear from article V, section 2, which requires the stock to remain with the board during the member's lifetime, that a member will work indefinitely for the corporation, defendant concedes that there legally could be no requirement that a member could never quit and must work for the corporation for the balance of his life. Such a requirement would constitute a form of peonage. All parties agree that by signing the by-laws and acceptance of stock a contractual relationship is formed between the member and the company and his fellow members. There is nothing, however, in that contract that prohibits, or could prohibit, a member from terminating that relationship. Nor does that relationship require, as contended by defendant, that after a member quits and while his stock is still being held by the corporation, he be not entitled to dividends. He still has a financial interest in the corporation. His money is still working for the corporation. As he is not rendering any service, he, of course, is not entitled to compensation, as distinguished from dividends.

[1] In construing the by-laws it is necessary to give them such an interpretation as to permit a stockholder who, for any or no reason, wants to quit, the right and opportunity to do so. Nor should any penalty be exacted unless there is a clear and definite provision authorizing such penalty. The by-laws provide none. Therefore, a member having the right to quit, and the by-laws providing no penalty therefor, the board had no right to impose a penalty. Particularly is this so, when it is remembered that under the by-laws and the practice of the corporation, a stockholder has no right to sell his stock, and moreover, it cannot be sold until the board determines when, to whom and for what price it may be sold. In practice, the board fixed a price for the stock and apparently would not sell it until such price was obtained. Were it not so, the board could penalize the quitting stockholder (as it attempted to do in the Rossi case) $100 per month and then hold up the sale of his stock until the penalties had accumulated to equal or exceed the sale price. It must be borne in mind that the stockholder cannot sell his stock at a loss.

In the Rossi case, the board, approximately 16 months after he quit, attempted to levy a retroactive fine against him of $100 per month. The provisions of the by-laws authorizing fines obviously contemplate nonexcused layoffs, violations of orders, etc., *during* the time the stockholder is still an employee of the corporation. They do not contemplate punishment for terminating service. There is a provision that if a stockholder refuses to carry out orders strictly he may be fined $10 and laid off for a period of one month. There were no orders which plaintiffs violated. If it be deemed that refusing to work after quitting constituted a violation of orders, still the by-laws cannot be interpreted to permit either a fine to be imposed on such member or a denial of his right to receive dividends with the other members as long as the board neither sells nor permits him to sell his stock. A reasonable interpretation of the by-laws is that a member may quit without penalty; that on quitting, he is no longer entitled to compensation for work, as he is no longer working. He is, however, entitled to whatever dividends are being paid other stockholders until such time as his stock is sold. This brings us to the question—

Did the Monthly Payments Include Dividends?

[2–4] The court found that they did and that the amount thereof was the difference between the payments and the going price for helpers who were paid on a daily wage basis. The monthly payments were carried on the books as wages and from them were deducted federal withholding, social security, and state unemployment taxes. Thus, there was no segregation of any portion to dividends. Nevertheless the evidence supports the court's finding that, at least, some portion was a dividend. Although there is testimony that some of the members did not ge the basic monthly rate, practically all di regardless of the service they rendered The president testified that the amoun paid the stockholder did not depend upon the time he worked. While most of the stockholders did similar work such as driving trucks, picking up garbage, making collections of service charges, etc., some of the members, because of age or otherwise, did not do as much work. During

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2. The president and vice-president received a higher monthly rate but were the only ones who did. As that fact does not affect the question under consideration, it will be ignored hereafter.

the war about 70 members went into the armed forces. The corporation paid them a flat $125 per month less withholding and other taxes. Gamba was paid on this basis for six months, and then, apparently because he was in the Merchant Marine and received pay therefrom much higher than that received by those in the armed forces, his pay was stopped altogether. The highest rate of pay during the period involved to any helper who performed somewhat similar services was $9.50 per day; whereas the payments to practically all members figured on a 26 working day month amounted to $15.38 per day. The payment of $350 per month until September, 1946, and thereafter of $400 per month, was called "basic rate." The income of the corporation supports the conclusion that a portion of this basic rate came out of what would otherwise have been profits. The president testified that one of the reasons why the working stockholders received more pay than a helper was because the former "has a certain amount of money invested in the company." If a helper took a day off, a full day's pay was deducted, while under article VII, section 12, only $6 a day was to be deducted from stockholders for the first 15 days and $8 per day thereafter. If a portion of the stockholder's pay was not a dividend, it would seem logical that for his day off his entire day's pay would have been deducted. Both Perata and Gamba testified that a portion of the monthly pay was a dividend. Although the officers of the corporation testified to the contrary, the credibility of the witnesses was for the trial court to determine. Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 105 P.2d 984. One member took approximately four years off, and was paid the full basic pay less only the cost replacement by a helper. At least three or four members took from nine months to a year off to visit Italy and were paid on the same basis, at least for six months. The foregoing constitutes ample evidence to support the court's conclusion that the monthly payments included dividends. As said in De Martini v. Scavenger's Protective Ass'n, 3 Cal.App.2d 691, 698, 40 P.2d 317, 320, "* * by merely calling the distribution wages, a corporation may not so distribute the profits as to deprive any stockholder of his rights thereto." In that case plaintiffs were stockholders in the defendant corporation, each owning the same number of shares as did each of the other stockholders. Most of the stockholders worked for the corporation, although there was no requirement that they must do so. Plaintiffs did not. The employee stockholders were paid $316 per month less $6.50 per working day for layoffs. The court held that the payments were only in part wages and the balance was a distribution of the profits. It quoted from Nichols v. Olympia Veneer Co., 139 Wash. 305, 246 P. 941, 48 A.L.R. 504; "The appellant's right is to share in the profits of the corporation. As a stockholder she is entitled to a just proportion of all the earnings of the corporation that may justly be classed as a division of the profits, whatever may be the form adopted for their distribution. The respondent is permitted to select the manner, and, if it chooses to do so in the form of wages, it is acting within its rights. But by calling the distribution wages it cannot deprive the appellant of her just proportion thereof. It cannot, by paying excessive or extravagant wages to the working stockholders, deprive the appellant of her share of the profits of the business." Ordinarily courts will not interfere with the sound judgment of the officers of a corporation in determining the wages to be paid. See Fornaseri v. Cosmosart Realty, etc., Corp., 96 Cal.App. 549, 274 P. 597; Reclamation Dist. No. 1500 v. Reclamation Bd., 197 Cal. 482, 241 P. 552, "'* * * but, in a suit brought by a protesting stockholder owning stock in a company, which is of no tangible value unless dividends are paid upon it, we have no hesitancy in saying that, when the amount allowed to stockholder employees becomes grossly disproportionate to the amount paid to hired employees in the plant, then the attempted action on the part of the trustees, called by whatever name, is in reality a distribution of dividends in which every stockholder is entitled to share.'" De Martini v. Scavenger's Protective Ass'n, supra, 3 Cal.App. 2d 691, 698, 40 P.2d 317, 320, quoting from Nichols v. Olympia Veneer Co., 135 Wash. 794, 236 P. 794.

In our case, it manifestly would be unfair to deprive the plaintiffs during the time they are awaiting the action of the board in selling their stock, and hence getting no return therefrom, of the same return by way of dividends that other stockholders receive. Sunset Scavenger Co. v. Commissioner of Internal Rev., 9 Cir., 84 F.2d 453, cited by defendant, does not support its contention. There a San Francisco scavenger corporation held a meeting of its members every two weeks where, after deducting certain estimated amounts of expenses for the next two weeks, the balance of the receipts were equally distributed among the members. In its income tax return the corporation took deductions as salaries and bonuses of these amounts so distributed to the members. The Board of Tax Appeals declined to allow such deductions but did allow as a deduction a uniform salary of $300 per month per member. In its petition to the United States Circuit Court of Appeals, the corporation contended that the board erred and that the corporation was entitled to deductions of the entire amounts distributed to its members. The court held, in effect, that these were unreasonable allowances for salary under the income tax act. It then held that the allowance by the board of the $300 per month deduction was " 'not inadequate, even upon the daily wage basis contended for * * *' " by the corporation. 84 F.2d at page 456. It pointed out that the evidence showed that a helper received $5.50 per day for a 12 hour day. The members worked about three and a half hours more per day than helpers. Computing these hours at double rate of pay, would entitle a member to $9.35 per day, which was approximately the amount the board allowed. The court held that this was substantial evidence to support the board's findings as to a reasonable amount to be considered salary. The corporation introduced evidence of members that the reasonable value of their services was $16 or $17 per day, and evidence that street sweepers received $5.50 for an eight hour day, and double time for overtime work. The corporation then introduced a table showing that if street sweepers worked as many hours as the members, they would be entitled to receive $510 per month. Therefore, it contended, members should receive no less. As to this argument the court said "it is incredible that a garbage collector is entitled to nearly $20 a day for garbage collection." 84 F.2d at page 456. Thus, instead of holding, as contended by defendant, that the court is bound by the determination of a corporate board of directors as to what is salary, the case holds just the contrary.

In Kohn v. Kohn, 95 Cal.App.2d 708, at page 715, 214 P.2d 71, at page 75, the court listed a number of cases commencing with De Martini v. Scavenger's Protective Ass'n, supra, 3 Cal.App.2d 691, 40 P.2d 317, which considered the question of whether dividends were actually included in salaries, and then said: "The rule to be gleaned from these cases is that, however denominated, a distribution of earnings to corporate stockholders may be treated as dividends where that is their practical effect and justice will be served by so treating them."

Having determined that the basic monthly pay includes dividends the next question is—

What Were the Dividends Included?

There was considerable evidence concerning the relative duties of members and helpers. While there was some evidence that the helpers did not do the same character of work as the members, such as driving trucks and making collections, there is substantial evidence that as regards some of the helpers the character of the work was the same. The main differences between the helpers and the members are the following: a member is bound by the obligations of the by-laws; the members take care of most of the money collections; the member is subject to fine if he does not take care of his truck and equipment, and is liable for any loss of tools or equipment or for any damage to persons or equipment done by his truck; members might work longer hours in order to make the collections and to drive the truck to and from the disposal plant (generally, however, the helpers worked at least as long if not longer than the members); members are required to wash their trucks once a week; members are required under penalty of fine to attend monthly meetings; members are required to do certain Sunday work not required of helpers (they receive extra pay for this but are fined if they do not do it). The rules required that only a member drive a truck, although this rule was broken in practice. While helpers did some collecting of service charges, the route books were kept only by members. The latter were responsible for the correctness of the collections and for proper accounting to the corporation. Plaintiff Gamba testified that while on the whole the helpers did the same character and amount of work as the members, the members had extra responsibilities, and therefore their value to the corporation was worth the difference between the amounts paid the helpers and the amounts the members received.

At the trial plaintiffs contended that the proper measure of dividends in the monthly pay was the difference between that pay and the $8 per day which under section 12 of article VII a member was to be charged for time off. They say that the by-laws thereby indirectly fixed as dividends any sum which a member might receive in excess thereof. This is a nonsequitur. There is nothing in the by-laws, that section included, that indicates that the salary of the members was being fixed. Necessarily, in the first instance, salaries are for the determination of the board. The trial court evidently rejected this theory, as it did not use the $8 per day as a basis for its computations. A study of section 12 in connection with the rest of the by-laws shows that it had no application to a situation where a member quits work altogether.

The trial court based its determination of what were dividends upon the difference between the monthly payments and the highest sum paid for helpers at a particular time. The court evidently did this on the basis that there was evidence which showed that on the whole, the type and amount of work done by the members and by the helpers were the same. As that evidence is substantial we are bound by the court's determination to that effect. There is no direct finding to that effect but it is implied in the court's findings that the reasonable daily wage of each member is no more than the sums mentioned, which sums are the highest wages paid helpers at the specified time. There is evidence that some stockholders performed less work than did the helpers, just as some stockholders did more, and as some helpers did less work than other helpers. But there is no evidence that taking the members as a whole they did any less work than the helpers as a whole. In Nichols v. Olympia Veneer Co., supra, 246 P. 941, where the court required that, over and above the amount of work done, consideration be given to the stockholders' responsibilities, the services rendered by the members were unequal in value. The court said in 246 P. at page 943: "Of the 90 or more working in the plant the far larger number do only routine work of the same character as that performed by the nonstockholders. It does not necessarily follow, however, that the services of these are not of greater value to the corporation than is the service of the nonstockholder." If in our case the court's implied finding is a finding that the services *and* responsibilities of a member are of no greater value than the wages paid helpers, then the finding is unsupported. While there is a conflict as to whether the type and amount of work done by helpers equals that of members, there is no conflict as to the fact that the members have, as we have heretofore pointed out, far greater responsibilities than the helpers. The responsibility for damage "to any person or thing" provided in section 5, article VII, alone would entitle the member to a greater compensation. (It does not apply to damage by truck or equipment.) The section provides that in the event of such damage the board may determine the extent of such damage and its determination shall be final and conclusive and it shall collect the amount of the damage from the member. Another difference of importance between a member and a helper is that helpers being hired directly must be paid full wages whether the corporation is in the black or not. Members' wages are dependent upon the corporation taking in sufficient funds to pay them. Another element to be considered is expressed in Nichols v. Olympia Veneer Co., supra, 246 P. 941, 943: "The stockholders have an interest in the success of the business aside from the wage received, and it would follow from the nature of the relation that they would take a greater care and exercise a higher degree of diligence in performing the work assigned them than would one whose sole remuneration was the wage he received." It is obvious that the court did not give consideration to this issue. It was an issue before the court, as the defendant contended at all times, in addition to its contention that the members actually worked harder and devoted more time than helpers, that the added responsibility of the members was worth the excess over a helper's wages. The court should have made a finding on the subject. If the court intended in the finding it did make as to the reasonable value of the services of members that the members did less work than the helpers and hence the allowance of the highest helper's wage included an allowance for the member's responsibilities, there is no evidence to support such a finding. The situation is identical with that in Nichols v. Olympia Veneer Co., supra, 246 P. 941. There nonstockholding employees in a plant were paid $4 per day. Stockholding employees were paid $8 per day. An action was brought by the widow of a deceased stockholder, contending that a portion of the $8 per day payment was a dividend and to collect such a dividend on her stock. The trial court found that the $4 per day was a reasonable sum to be paid for the character of services rendered by the nonstockholders and that $8 was a reasonable daily wage to be paid for the nature and value of the services rendered by the stockholders. The reviewing court, after pointing out that the question was complicated by the fact that the services of the stockholders, as between each other, were unequal in value, the services by most could be procured by hire at less than $8 per day while those by a few could be procured only at that rate, held that in considering the widow's right as a stockholder to share in the profits of the corporation, the wages allowed working stockholders were excessive. The corporation could not by paying such excessive wages to working stockholders deprive the nonworking stockholder of her share of the profits of the business. It then went on to determine what portion of the $8 over and above the amount of $4 which was the price at which, on the average, similar hire could be had, should be allowed for the interest in the work and the responsibilities which a stockholder has and which the hired worker does not have. It then said, 246 P. at page 943: "While there is no exact mathematical rule that can be applied and any rule of apportionment must be somewhat arbitrary, a more just division, we think, would be to hold that $6 per day represented the extreme value of the services rendered by the several stockholders, and that $2 per day of the sum paid them represented profits. Since the appellant is a stockholder and entitled to share in the profits, she is entitled to recover from the corporation a sum equal to that paid as profits to the other stockholders. This would be $2 per day for the number of working days * * *."

[5, 6] This difference of the value to a corporation of a member over that of an ordinary worker is, of course, somewhat of an intangible nature. We believe that its determination comes within the rule concerning the value of certain types of work, namely, that it is a matter of common knowledge. See Collier v. Landram, 67 Cal.App.2d 752, 155 P.2d 652; Schwartz v. Premium Products Co., 98 Cal.App.2d 780, 221 P.2d 334; Seedborg v. Lakewood Gardens, etc., Ass'n, 105 Cal.App.2d 449, 233 P.2d 943. A fair and just determination of the value of a member's services over those of a helper (assuming as we are required to do under the trial court's findings that the time and amount of services

are the same, but taking into consideration all the matters hereinbefore discussed), would be the highest pay of helpers at the particular time plus one-half the difference between that pay and the $15.38 per day paid members. Thus in the period when the highest helper's rate was $8 per day, the reasonable value of a member's services would be one-half of the difference between $8 and $15.38, or $3.69 plus $8, making a total of $11.69. During the period when the maximum helper's pay was $9.50 per day, the value of a member's services would be one-half the difference between $9.50 and $15.38, or $2.94 plus $9.50, making a total of $12.44. Therefore, the amount of the $15.38 chargeable as dividends would be $3.69 at the time the highest helper's pay was $8 per day, and $2.94 at the time such pay was $9.50 per day.

The trial court is directed to amend the findings, conclusions of law and judgment accordingly. This will require a new computation of the amounts due each plaintiff and the interest thereon. The determination by the trial court of the amount of moneys paid to stockholders by the corporation as designated dividends is in no wise changed.

Findings on Consent.

In addition to the findings made on the evidence hereinbefore discussed, defendant contends that the evidence fails to support the findings in which the court found that each of the plaintiffs had obtained the necessary consent to take time off and hence brought themselves within the provisions of the by-laws which entitled them to their pay less only a specified deduction per day. So far as plaintiff Perata is concerned, there is substantial evidence that because of his injured arm he was given consent by the director of men that he not work while awaiting the sale of his stock. As to plaintiff Gamba, the evidence shows that the time he was off during his service in the Merchant Marine was with consent. As to all plaintiffs, although there is no direct evidence of consent, the fact that the board and director of men knew that they had quit, and that no fines or other punitive action (except the attempted fine of Rossi 16 months later), might justify an inference of consent. However, whether these findings are supported or not is unimportant. The evidence shows that whether plaintiffs received consent or not, they were actually quitting the corporation and hence did not need any consent, and as we have heretofore shown, the penalties for time off provided in the by-laws do not apply. As to the period plaintiff Gamba was in the Merchant Marine he might technically be entitled to the difference between the individual month's pay being paid all stockholders and the $8 per day mentioned in section 12 of article VII. However, inasmuch as it appeared to be the custom and practice during that war period to pay all stockholders in the armed forces a less sum than that, and as the evidence shows that from time to time, in actual practice and without amending the by-laws, the board has deducted more than $8.00 per day for layoffs, it would seem fair to allow for that time off period the same amount as is allowed after he quit.

It is contended that there is some confusion in the findings as to whether plaintiffs had stopped working pursuant to article VII, section 12, or are not subject to the provisions of that section. Inasmuch as we have determined that that section does not apply to stockholders terminating their employment, such confusion, if it exists, is immaterial.

As herein set forth, the trial court is directed to make the necessary amendments to the findings of fact, conclusions of law and judgment to accord with the views herein expressed. As so modified the judgment is affirmed. The parties shall bear their own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

111 Cal.App.2d 519

DAUGHERTY v. BOARD OF TRUSTEES OF SOUTH BAY UNION HIGH SCHOOL DIST. et al.

Civ. 18927.

District Court of Appeal, Second District, Division 2, California.

June 5, 1952.

Mandamus proceeding by Evelyn Daugherty against Board of Trustees of South Bay Union High School District, etc., and others to compel defendants to pay petitioner her salary as a teacher for the first four and one-half months of the the 1950–51 school year. The Superior Court, Los Angeles County, Paul Nourse, J., entered judgment for petitioner and defendants appealed. The District Court of Appeal, Fox, J., held that prior mandamus proceeding to compel defendants to reinstate petitioner, classify her as a permanent employee, and fix her salary for certain years was not a bar to present proceeding.

Judgment affirmed.

1. Mandamus ⚷12

Mandamus is an independent proceeding, the purpose of which is to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Code Civ. Proc. § 1085.

2. Judgment ⚷717, 735

The expression that a judgment is conclusive of every matter which the parties might have litigated in the action means that a judgment is conclusive upon the issues tendered by the complaint, and matters not tendered as issues in the action are not affected by the judgment. Code Civ. Proc. § 1911.

3. Judgment ⚷725(1)

A former judgment is res judicata only as to matters which appear upon its face to have been adjudged or which were actually and necessarily included therein or necessary thereto. Code Civ. Proc. § 1911.

4. Judgment ⚷585(1)

A judgment does not operate as an estoppel to a subsequent action between same parties as respects rights, claims, or demands arising out of same subject-matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action.

5. Judgment ⚷585(3)

Where prior mandamus proceeding was to compel trustees of high school district to reinstate petitioner, classify her as a permanent employee, and fix her salary for certain years and subsequent mandamus proceeding was to compel the payment of petitioner's salary which trustees had previously fixed but refused to pay at her demand, the causes of action in the two proceedings were separate and distinct, although arising out of the same subject-matter and judgment for petitioner in prior proceeding was not a bar to subsequent proceeding for unpaid salary. Code Civ. Proc. §§ 1085, 1095, 1911.

6. Mandamus ⚷9

Failure of petitioner in prior mandamus proceeding to compel trustees of high school district to reinstate petitioner and fix her salary for certain years, to object to return on peremptory writ, where return showed trustees fully complied with writ which commanded them to reinstate petitioner and fix her salary for certain years did not estop petitioner from maintaining subsequent mandamus proceeding to compel the payment of her salary which trustees had refused to pay at her demand.

7. Appeal and Error ⚷907(3)

When appeal is taken on judgment roll alone, appellate court must assume that evidence supported the findings.

* * *

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for appellants.

Tanner, Odell & Taft, Los Angeles, for respondent.

FOX, Justice.

Defendants appeal from a judgment in a mandamus proceeding requiring the defendant High School District to pay petitioner her salary as a teacher for the first four and one-half months of the 1950–

51 school year. The appeal is on the judgment roll.

Petitioner had attained the status of a permanent teacher in the district some years prior to her resignation on June 14, 1946. She was re-employed by the district on August 4, 1948, for that school year. She was likewise re-employed for the school year 1949–50. On May 9, 1950, the board undertook to dismiss her by giving her written notice that her services would not be required for the ensuing school year. This action was taken under the provisions of section 13582 of the Education Code upon the theory that petitioner was then a probationary teacher. The board was in error in taking this action because section 13502 of the Education Code provides in substance that whenever any certificated employee of a school district, who at the time of his resignation was classified as permanent, is re-employed within thirty-nine months after his last day of paid service, the board shall classify him as and restore him to all the rights and benefits of a permanent employee. At the opening of school on September 5, 1950, petitioner presented herself to defendants, tendered her services as a teacher, and demanded that she be permitted to serve as a permanent employee of the district. Her demand was refused. On November 9, 1950, she filed a petition for a writ of mandate in the superior court setting forth the above facts and praying that a writ issue commanding defendants to proceed forthwith to classify her as a full-time permanent employee, that they reinstate her to her position as a permanent employee and admit her to teach in the schools of said district, that they assign her to active teaching duties as such employee and that they fix her salary for the school year 1948–49 at the rate of $4,600, and at the rate of $4,700 for the two succeeding years. In December, 1950, a peremptory writ as prayed was issued. On January 10, 1951, pursuant to said writ, the board classified petitioner as a full-time permanent employee and reinstated her as such and directed her to report for duty on January 15, 1951, and fixed her compensation at the rates specified.

Petitioner reported for duty at the appointed time and ever since has continued to serve as a full-time employee. The district, however, did not pay her any salary for the portion of the school year 1950–51 which elapsed prior to her reinstatement on January 15, 1951. On May 11, 1951, petitioner made written demand on defendants for the payment of her salary for such period. Upon the failure of defendants to comply therewith she filed this petition to compel such payment.

Defendants admitted all the allegations in the petition and set up two defenses: (1) that the judgment in the prior action is *res judicata* in this proceeding, and (2) that petitioner is estopped from maintaining this proceeding by her failure to object to the return on the peremptory writ in the former action. Neither of these defenses is well founded.

[1] In considering the *res judicata* defense it must be remembered that mandamus is an independent proceeding, and that its purpose is to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Code Civ.Proc. sec. 1085; Sheehan v. Board of Police Com'rs, 188 Cal. 525, 535, 206 P. 70; Boggs v. Jordan, 204 Cal. 207, 216, 267 P. 696. Also section 1911, Code of Civil Procedure, provides "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

[2–4] Defendants say that in the prior action for reinstatement the court had the discretion to include a judgment for back salary, and since the judgment did not include such an item that matter is now *res judicata*. In arriving at this conclusion defendants seek to apply the principle that a judgment is conclusive of every matter which the parties might have litigated in the action. Gaskill v. Wallace, 32 Cal.App. 2d 354, 89 P.2d 687. Defendants, however, are attempting to stretch this principle too far. It really means "that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in [her] complaint, * * * but, as long as these several matters are not tendered as issues in the action, they are not affected by it." Concannon v. Smith, 134 Cal. 14, 18, 66 P. 40, 42; City of San Diego v. California Water & Tel. Co., 71 Cal.App.2d 261, 276, 162 P.2d 684. It is also pointed out in Stark v. Coker, 20 Cal.2d 839, 843, 129 P.2d 390, 393, that only such matters are adjudicated in a former judgment which appear upon its face to have been adjudicated or which were actually and necessarily included therein or necessary thereto, and that "when it affirmatively appears that an issue was not determined by the judgment, it obviously is not *res judicata* upon that issue." Likewise, the rule is not applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former case. Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 631, 81 P.2d 944.

[5] Applying these principles it is clear defendants may not successfully rely on the doctrine of *res judicata.* The first mandamus proceeding was to compel defendants to reinstate petitioner, classify her as a permanent employee, and fix her salary for the years in question. Its purpose was to compel admission of petitioner to the enjoyment of a right to which she was entitled, and from which she was wrongfully excluded by defendants as public officials.

The present proceeding is to compel the performance of an act which the law specifically enjoins as a duty resulting from the office of defendants, viz.: the payment of petitioner's salary which they had previously fixed but refused to pay after her demand.

The causes of action in the two proceedings were thus separate and distinct, although arising out of the same subject-matter. Hence a favorable judgment in the first proceeding is not a bar to this proceeding for unpaid salary since no issue was tendered or adjudication had thereon in the first proceeding with respect to the payment of salary. Title Guarantee & Trust Co. v. Monson, supra; Stark v. Coker, supra; United Shoe Machinery Corp. v. United States, 258 U.S. 451, 42 S. Ct. 363, 66 L.Ed. 708.

In their reply brief defendants argue that by section 1095, Code of Civil Procedure, the question of damages has been made an integral part of a mandamus proceeding, hence the *res judicata* doctrine is applicable. That section can have no application here because the breach of official duty which was the foundation of the first petition and writ was separate and different from the breach of duty which formed the basis for the present petition and writ. For cases where the procedure adopted in this litigation was followed see Caminetti v. Board of Trustees, 1 Cal.2d 354, 34 P.2d 1021, and Comstock v. Board of Trustees, etc., 35 Cal.App.2d 466, 95 P.2d 969.

[6] There is no basis for an estoppel against the maintenance of this action by reason of petitioner's failure to object to to the return on the peremptory writ in the prior proceeding. The return showed defendants, on January 10, 1951, fully complied with the writ which commanded them to reinstate petitioner and fix her salary for the years in question. Hence she had no ground for any objection. Her right to reinstatement had been upheld and the board had complied with the court's order. She had the right to assume the board would thereafter perform its plain duty to pay all accrued salary.

[7] Defendants also suggest that petitioner's reinstatement in the first action was "as of January 15, 1951," hence no back salary is due. That date was merely the time when defendants were to report to the court the action they had taken pursuant to the command of the writ. Furthermore, the findings make it clear that petitioner was reinstated as of the commencement of the 1950–51 school year and not as of January 15, 1951. Since this appeal is on the judgment roll we must presume the evidence supports the findings. Tarvin v. Davey, 56 Cal.App.2d 846, 850, 133 P.2d 844.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

111 Cal.App.2d 500

DE BOER v. DE BOER.

Civ. 18892.

District Court of Appeal, Second District,
Division 3, California.
June 4, 1952.

Action by husband against wife for divorce wherein wife filed cross-complaint. The Superior Court of Los Angeles County, Ben Rosenthal, J., entered interlocutory judgment of divorce for wife determining that certain parcel of realty was community property, and defendant wife appealed. The District Court of Appeal, Vallée, J., held that evidence warranted finding that parties had intended that parcel of realty paid for primarily from funds of husband, and title to which was taken in name of wife, had been intended by parties to be community property.

Judgment affirmed.

1. Husband and Wife ⇨262(1), 270(9)

Except as against a bona fide purchaser for value, presumption that property, title to which is in wife alone, is her separate property, is disputable, and whether evidence against such presumption is sufficient to overthrow it, is question of fact. Civ. Code, § 164.

2. Husband and Wife ⇨263

In determining whether property, title to which is in name of wife alone, is her separate property and when seeking to overcome presumption to that effect, evidence tending to establish any facts overcoming presumption and showing that property is community property, is admissible. Civ.Code, § 164.

3. Husband and Wife ⇨249

Court, when determining whether property, title to which is in wife alone, is her separate property, may consider the motive for conveyance of property by husband to wife, and the situation of the parties at the time thereof. Civ.Code, § 164.

4. Appeal and Error ⇨1010(1)

A determination by a trial court that the presumption that property, title to which is in wife alone, is her separate property, has been rebutted, is conclusive on reviewing court unless it is manifestly without support in the evidence. Civ.Code, § 164.

5. Husband and Wife ⇨249

In divorce proceeding, real property may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple, and trial judge is not bound by form of deed alone.

6. Gifts ⇨15

There can be no executed gift in the absence of any intention to give on the part of the donor.

7. Husband and Wife ⇨49½(3), 266

Where controversy exists in divorce proceeding over ownership of property of parties, mere fact that in purchase of real property with separate funds of husband or with community funds, husband directed that deed should run to wife as grantee, does not necessarily compel conclusion that gift to wife was intended, but other facts may be considered and may tend to show another reason than desire and intent to make gift, and may warrant conclusion that no gift was intended or made.

8. Husband and Wife ⇨49½(3), 266

In determining in divorce proceeding whether transfer to wife of separate property of husband or of community property constituted gift to wife and changed status of property, intention of husband is controlling, and in absence of intention to make gift, no gift was made.

9. Husband and Wife ⇨49½(8), 266

Where controversy exists in divorce proceeding as to whether transfer of separate property of husband or of community property to wife constituted gift, intention of parties as to whether property became separate property of wife may be shown by circumstantial as well as by direct evidence. Civ.Code, § 164.

10. Husband and Wife ⇨264

Where title to realty stands in name of wife, testimony of husband in divorce proceeding that he did not intend to make a gift to his wife of his separate property or of his interest in community property, if believed by the court, is sufficient to overcome presumption that property is separate property of wife.

11. Husband and Wife ⚿249

The confusion of separate and community property of husband and wife, so that each is indistinguishable from the other, generally renders the mass community property.

12. Husband and Wife ⚿264

In action by husband against wife for divorce, wherein controversy existed over whether property, title to which had been taken in name of wife, was separate property of wife or community property, and it appeared that property had been purchased from separate funds of husband, and that title had been taken in name of wife because of attorney's advice and wife's insistence, evidence warranted finding that parties had intended that realty involved was to be community property.

13. Husband and Wife ⚿264

In action by husband against wife for divorce, wherein controversy existed as to whether property, title to which had been taken in name of wife, was separate property of wife or community property, evidence warranted finding that husband's permission to taking of title to such property in wife's name had been obtained by wife by imposition and abuse of confidence.

14. Equity ⚿65(2)

Where it appeared in divorce suit that title to property which had been purchased with funds of husband was permitted to be taken in name of wife by reason of wife's imposition on husband and abuse of confidence, rule of unclean hands, that it was duty of court to deny relief to husband on ground that he had unclean hands and that he permitted title to be taken in wife's name because of fear of lawsuits, was inapplicable.

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Floyd H. Norris and Clayton B. Thomas, Los Angeles, for appellant.

C. E. Clough, Visalia, and Richard M. Durall, Bellflower, for respondent.

VALLÉE, Justice.

Plaintiff-husband brought this action for divorce. He alleged that a parcel of realty, to the value of $11,000, located in El Monte, is his separate property and that defendant-wife has a small community interest therein. In her answer and cross-complaint defendant alleged that the parcel is her separate property. Defendant was granted a divorce. The court found that the parcel of realty is community property and awarded a half interest to each of the parties. Defendant-wife appealed from that part of the judgment adjudging that the parcel is community property, asserting that the evidence is insufficient to support the finding that it is community property.

The parties were married on April 11, 1939. At that time plaintiff-husband owned and operated a dairy in Hynes, now Paramount, with eighty head of cows, and had about $2,000 in a bank account. Plaintiff operated the dairy for a year after the marriage, and then sold the cows for $11,800 and paid off a mortgage of $4,000 on the herd.

About the time the dairy was sold defendant told plaintiff he was being sued, that someone was attempting to serve a paper on him, and suggested that his bank account be transferred to her name. Defendant testified that someone came to the house attempting to serve some papers on plaintiff, that she told him about it, and that his bank account was then transferred to her name to shield him from possible litigation.

Of the money remaining from the sale of the cows $2,250 was used to buy a house and two acres of land in Artesia and about $1,000 was used in improvements on the house. Title was taken in joint tenancy. At the same time, a ten-acre parcel was also acquired from funds provided by plaintiff from the sale of the cows and title taken in joint tenancy.

Before taking title to the parcels in joint tenancy plaintiff consulted an attorney. He asked the attorney if he would be jeopardizing his interest in the property if he placed it in joint tenancy. The attorney told him that it would be for his own protection and that he would not be jeopardizing his interest. The attorney did not explain to him the legal effect of holding property in joint tenancy or tell him that he would be making a gift to defendant, or say anything about a gift tax or the result in case either party died. He did not know at that time the legal effect of holding property in joint tenancy.

Plaintiff testified defendant insisted that title to the two-and ten-acre parcels be taken in joint tenancy and on the strength of the advice of the attorney and the insistence of his wife he placed the titles in joint tenancy.

In April, 1941, the two-acre parcel was sold. The El Monte parcel, equipment of a dairy thereon, and thirty-five cows, were then purchased. Title to the realty was taken in the name of defendant as her sole and separate property. The purchase price was about $11,000 made up of $2,366.26, the net proceeds from the sale of the two acres, $5,131 additional cash, and the assumption of a mortgage for the balance. When the El Monte property was purchased the ten-acre parcel was conveyed to the defendant-wife alone.

At the time the parties married plaintiff was a member of a milk sales agency which gave him "shipping rights" to sell his milk to a particular creamery. When he sold the dairy he also sold the "shipping rights." The bylaws of the agency apparently provided that upon sale of "shipping rights" a member could not go into the dairy business for a period of five years unless he bought cows with such rights. The El Monte property was operated as a dairy without "shipping rights." Before purchasing the El Monte property, which was two years after the sale of the eighty cows, plaintiff again consulted the same attorney with respect to purchasing the property in question in his own name. Defendant was present. The attorney advised him "that there was a liability that the association would sue me, because I would not be buying out another association member, which is required according to the by-laws." Plaintiff testified that the attorney suggested he put the property in defendant's name and "I didn't like the idea, but since he was my attorney, why, I took his advice." The attorney represented defendant-wife "at the escrow" and in this suit until substituted out immediately prior to the trial. Plaintiff testified that the reason he transferred his bank account to defendant and consented that title to the properties be taken in her name was because of defendant's insistence and because the attorney advised him to do so, and that he "considered it [the bank account and real property] belonged to both of us."

Plaintiff operated the dairy on the El Monte property and a retail milk route therefrom for one year, replaced cows constantly, and deposited the income in a bank account in the name of defendant. Expenses and payments on the mortgage were paid from this account. The parties lived on the property. At the end of one year it was leased. In 1947 plaintiff made improvements on the property costing about $5,000 with money he had earned during the war while employed in a manufacturing plant.

During the time plaintiff operated the Hynes and El Monte dairies defendant helped sell the milk, took care of some of the cash-and-carry trade, kept the books, made the deposits, wrote the checks, did the housework and some work in connection with the operation of the dairy. Plaintiff gave defendant the information that she used in making entries in the books.

Defendant testified she had no recollection of the conversations had with plaintiff at the time of the purchase of the two-and ten-acre parcels or of the El Monte property.

Defendant told a Mrs. Triplett on one occasion that as soon as she got plaintiff's property in her name she guessed she would get rid of him; on another occasion, that it was taking longer to get his property in her name than she had expected, and that as soon as she succeeded she would probably get rid of him and go back to the matrimonial bureau and get another sucker, and that defendant told her that she (defendant) was "getting somewhere at last. I am getting things into my own name that

I told you in the beginning I would do. But it takes longer than I thought it would." Defendant had met plaintiff at a matrimonial bureau.

[1–4] When title is in the wife alone the presumption is that the property is her separate property. Civ.Code, § 164. Except as against a bona fide purchaser for value, the presumption is disputable. Atteburv v. Wayland, 73 Cal.App.2d 1, 5, 165 P.2d 524. Whether the evidence against the presumption is sufficient to overthrow it, is a question of fact. Steward v. Paige, 90 Cal.App.2d 820, 824, 203 P.2d 858. Evidence tending to establish any facts overcoming the presumption and showing that the property is community property, is admissible in evidence. Huber v. Huber, 27 Cal.2d 784, 788, 167 P.2d 708; Killian v. Killian, 10 Cal.App. 312, 317–318, 101 P. 806. The court may consider the motive for the conveyance of property by a husband to his wife and the situation of the parties at the time. Williamson v. Kinney, 52 Cal.App.2d 98, 102, 125 P.2d 920. A determination by a trial court that the presumption has been rebutted is conclusive on a reviewing court unless it is manifestly without support in the evidence. In re Estate of Baer, 81 Cal.App.2d 830, 833, 185 P.2d 412.

[5–11] Real property may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905. In determining whether property is community or separate property of the spouses, a trial judge is not bound by the form of the deed alone. Faust v. Faust, 91 Cal.App.2d 304, 308, 204 P.2d 906. Real property may be found to be other than that indicated by the deed because of the intent with which the deed was made, or made and received. Idem. There can be no executed gift in the absence of any intention to give on the part of the donor. The mere fact that in the purchase of real property with separate funds of the husband or with community funds the husband directed that the deed should run to the wife as grantee, does not necessarily compel the conclusion that a gift to the wife was intended. Other facts and circumstances may so tend to show another reason than the desire and intent to make a gift, as to furnish ample warrant for a conclusion that no gift was intended, and, therefore, that there has been no executed gift. Fanning v. Green, 156 Cal. 279, 282–283, 104 P. 308. In determining whether the transfer of separate property of the husband or of community property to the wife constituted a gift to the wife and changed the status of the property to that of separate property of the wife, the intention of the husband is "the all-important and controlling question." Horsman v. Maden, 48 Cal.App.2d 635, 640–641, 120 P.2d 92, 95. The intention of the parties as to whether the property became the separate property of the wife under section 164 of the Civil Code may be shown by circumstantial as well as by direct evidence. Williamson v. Kinney, 52 Cal.App.2d 98, 102, 125 P.2d 920. Plaintiff's intention at the time of the purchase of the El Monte property was not secret or undisclosed, as defendant argues. Defendant was present when the attorney advised plaintiff to take title in her name. She knew he did not intend a gift. Where title is taken in the name of the wife the testimony of the husband that he did not intend to make a gift of his separate property or of his interest in the community property, if believed by the court, is sufficient to overcome the presumption that the property is the separate property of the wife. In re Estate of Baer, 81 Cal.App.2d 830, 835, 185 P.2d 412; Nilson v. Sarment, 153 Cal. 524, 528–529, 96 P. 315; Fanning v. Green, 156 Cal. 279, 285, 104 P. 308; Whitaker v. Whitaker, 137 Cal.App. 396, 399, 30 P.2d 538; Stephenson v. Brand, 122 Cal.App. 543, 545, 10 P.2d 476. The confusion of separate and community property, so that each is indistinguishable from the other, generally renders the mass community property. Grolemund v. Cafferata, 17 Cal.2d 679, 683, 111 P.2d 641.

[12] We think—in view of the evidence which we have recited in the light most favorable to plaintiff, the reasonable inferences to be drawn therefrom, and the rules of law stated—that the trial court was war-

ranted in its conclusion that the parties intended that the parcel of realty in question be, and that it is, community property. See Siberell v. Siberell, 214 Cal. 767, 774–775, 7 P.2d 1003; Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708; Sylvester v. Sellers, 110 Cal.App. 569, 294 P. 411; In re Estate of Bruggemeyer, 115 Cal.App. 525, 537, 2 P.2d 534; Truelsen v. Nelson, 42 Cal.App.2d 750, 109 P.2d 996; In re Estate of Sehabiague, 47 Cal.App.2d 793, 797, 119 P.2d 30; Horsman v. Maden, 48 Cal.App.2d 635, 120 P.2d 92; In re Estate of Piatt, 81 Cal.App.2d 348, 183 P.2d 919; Andrews v. Andrews, 82 Cal.App.2d 521, 186 P.2d 744.

It is argued that it was the duty of the trial court to deny relief to plaintiff on the ground "that he has unclean hands" because he permitted title to be taken in defendant's name because of fear of lawsuits. In Watson v. Poore, 18 Cal.2d 302, at page 312, 115 P.2d 478, at page 483, the court quoted from Birney v. Birney, 217 Cal. 353, 18 P.2d 672, as follows: "'As was said in Chamberlain v. Chamberlain, 7 Cal.App. 634, 95 P. 659, one cannot lay a trap for another, secure his confidence, induce him to make a conveyance of his property in expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that the donor too readily yielded to temptation to save himself at the possible expense of his creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken. Though a deed made for an improper purpose is unfairly procured through the undue influence of the grantee, in violation of a fiduciary relationship, abuse of confidence, oppression, or fraud, a court of equity will still grant relief to one in fault. Such relief will not be denied to a party least in fault against one who has led him into the act by a violation of confidence. They are not in equal wrong. Anderson v. Nelson, 83 Cal.App. 1, 256 P. 294. Under the circumstances plaintiff should not be denied the relief he seeks.'" See, also, 23 West's Cal.Digest, Fraudulent Conveyances, 🔑172(3) and cases there cited; 37 C.J.S., Fraudulent Conveyances, § 262, p. 1095.

[13, 14] The evidence is such that the court was justified in inferring, as it undoubtedly did, that plaintiff's permission to the taking of title to the El Monte property in defendant's name was obtained by her by imposition and abuse of confidence. The unclean hands rule is, therefore, not applicable.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

HANLEY v. MURPHY, Sheriff, et al.
(two cases).

REILLY v. CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 14947–14949.

District Court of Appeal, First District,
Division 2, California.

June 4, 1952.

Rehearing Denied July 3, 1952.

Hearing Granted July 31, 1952.

William Hanley filed a petition against Daniel C. Murphy, individually and as sheriff of the City and County of San Francisco, and others, for writ of mandate compelling restoration of petitioner to position of superintendent of jail under sheriff of City and County of San Francisco, and for payment of salary of such position, and Bernard Reilly filed a petition against the City and County of San Francisco, a municipal corporation, and others for the same relief. The Superior Court, City and County of San Francisco, Samuel F. Finley, J., rendered judgments ordering writs of mandate to issue and the defendants appealed. The District Court of Appeal, Dooling, J., held that where sheriff submitted a proposed budget for year which eliminated position of superintendent of jail the board of supervisors were without authority to add to appropriation ordinance an appropriation for such positions.

Judgments reversed with directions.

1. Municipal Corporations 🔑8

Sections of city charter relating to same subject were required to be construed together, giving effect so far as possible to all parts thereof so as to harmonize them and effectuate legislative intention as expressed therein.

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* Subsequent opinion 255 P.2d 1.

2. Counties ⚿162
Municipal Corporations ⚿890

Under San Francisco charter, where sheriff submitted a proposed budget for year which eliminated positions of superintendent of jail, board of supervisors was without authority to add to appropriation ordinance an appropriation for such positions.

3. Prisons ⚿6

Where sheriff submitted proposed budget for year which eliminated positions of superintendent of jail, and board of supervisors exceeded its authority by adding to appropriation ordinance an appropriation for such positions, and mayor vetoed added item and supervisors failed to pass such item over veto, failure of sheriff to give civil service commission immediate notice of abolition of such positions as provided by statute could not recreate such positions.

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Dion R. Holm, City Atty., of City and County of San Francisco, Bernard J. Ward, Jr., Deputy City Atty., San Francisco, for appellants.

Alfred J. Hennessy, San Francisco, for respondent Bernard Reilly.

Charles P. Scully, San Francisco, for respondent William Hanley.

DOOLING, Justice.

These appeals are from judgments ordering writs of mandate to issue to compel the restoration of the two petitioners to the positions of superintendent of jail under the sheriff of the City and County of San Francisco and the payment to them of the salary fixed for those positions. The cases were consolidated for trial and present identical questions.

There are two jails operated by the City and County and prior to July 1, 1947 two positions of superintendent of jail had been created by the board of supervisors and the petitioners below, Hanley and Reilly, had been regularly appointed to and were occupying those positions.

As a foundation for the determination of the legal effect of the actions taken in the preparation and adoption of the budget and appropriation ordinance for the fiscal year 1947–1948 (which began on July 1, 1947) insofar as they affect these cases a detailed consideration of the meaning and effect of certain provisions of the San Francisco charter is essential.

By sec. 5 of the charter the sheriff is made an elective officer. Section 20 provides that each elective officer in charge of an administrative office shall have the powers and duties of a department head. That section contains the following provision:

"Each department head may suggest the creation of positions subject to the provisions of this charter, and *may reduce the forces under his jurisdiction to conform to the needs of the work for which he is responsible, any other provision of this charter to the contrary notwithstanding.*" (The emphasis throughout the quotations from the charter is ours.)

Sec. 143 provides:

> "Positions in any department or office * * * may be created, as provided by this charter, *by appropriation ordinance* of the board of supervisors. Copy of each such ordinance creating or *abolishing* positions shall be filed * * * with the civil service commission by the clerk of the board of supervisors * * *
>
> "Immediate notice in writing shall be given to the civil service commission by the appointing officer of each department and office * * * of the creation or abolition of any position * * *".

Sec. 69 provides for the preparation each year of a budget estimate by every elective and appointive officer and commission which must be filed not later than February 15 with the controller. Not later than March 15 the controller must consolidate such budget estimates and transmit the same to the mayor. The mayor may hold public hearings and increase, decrease or reject any items contained in the estimates, *"excepting that he shall not increase any* *amount nor add any new item for personal services* * * *".

Sec. 70 in providing for the form of budget estimates specifies that the estimates shall include or be accompanied by "(4) A schedule of positions and compensations showing any increases or *decreases requested in the number of positions* * * *".

Sec. 72 requires the mayor not later than May 1 to transmit the consolidated budget estimates and proposed budget to the board of supervisors with a draft of the annual appropriation ordinance for the ensuing fiscal year prepared by the controller and based on the proposed budget. The detail of the proposed burget shall include "2. A detail schedule of *positions* and compensations, *showing any* increases or *decreases* in any department or office."

Other provisions of this section are:

> "The board of supervisors * * * *shall not increase any amount or add any new item for personal services* * * *".
>
> "Any item in such appropriation ordinance except for bond interest, redemption or other fixed charges, may be vetoed in whole or in part by the mayor * * *".

Section 73 provides: "The number and rates of compensation for all positions *continued or created by the supervisors in adopting each annual budget, and each annual or supplemental appropriation ordinance,* shall be established and enumerated in an ordinance continuing and creating positions * * * and providing the rates of compensation therefor, which ordinance shall be passed or amended at the same time as the annual or supplemental appropriation ordinance is passed."

[1] Under settled principles of statutory construction these several sections must be construed together giving effect so far as possible to all parts thereof so as to harmonize them and effectuate the legislative intention as expressed therein.

Commencing with sec. 20 we find at the outset that each department head (here the sheriff) "may suggest the creation of positions * * * and may reduce the forces under his jurisdiction * * * any other provision of this charter to the contrary notwithstanding."

This language, upon analysis, indicates: 1. The department head (here the sheriff) cannot create any position in his department. He can only *suggest* the creation. The creation of positions can only be done by the board of supervisors under the other sections of the charter hereinabove noticed. 2. The department head may *reduce* the forces under his jurisdiction (not merely suggest the reduction). 3. The power of a department head to *reduce* the forces under his jurisdiction is declared to be superior to any apparent limitations upon that power that may be found elsewhere in the charter by the language: "any other provision of this charter to the contrary notwithstanding."

When we come to the other provisions of the charter dealing with the same subject we find this power of a department head to reduce the forces under his jurisdiction implemented at every step of the budget-making and appropriation procedure of the charter. Under sec. 70(4) we find that in preparing his proposed budget the department head shall include "(a) schedule of positions showing any * * * decreases requested in the number of positions." Under sec. 69 the mayor is forbidden to add to this proposed budget "any new item for personal services"; and under sec. 72 the board of supervisors is under a like prohibition not to "increase any amount or *add any new item for personal services.*"

It thus appears that when the department head files a budget estimate which decreases the number of positions in his department (which action is declared by sec. 20 to be within his power "any other provision of this charter to the contrary notwithstanding") neither the mayor nor the board of supervisors may add the position or positions so eliminated by the department head to the budget or appropriation ordinance because both are forbidden "to add any new item for personal services".

The only manner in which a position omitted by the department head from his original budget estimate may later be added is spelled out in another provision of the charter found in sec. 72 as a qualification of the prohibition of the supervisors' adding any new item for personal services, that qualification reading: "unless requested in writing so to do by the mayor, *on the recommendation* of the chief administrative officer, board, commission or *elective officer, in charge of such department.*"

It further appears that non-charter positions in San Francisco are created, continued and abolished by the annual adoption of the appropriation ordinance. Sec. 143. It follows that since neither the mayor nor the supervisors can add to the proposed budget filed by a department head "any new item for personal services", if an existing position is omitted by the department head from his proposed budget the supervisors have no power to continue such position by adding it to the budget or to the appropriation ordinance which "shall be based on the proposed budget". Sec. 72.

[2] The evidence in this case shows that the sheriff in 1947 submitted a proposed budget which eliminated the two positions of superintendent of jail, that the supervisors added to the appropriation ordinance an appropriation for such two positions, that the mayor on advice of the city attorney vetoed this added item and that the supervisors failed to pass the vetoed item over the mayor's veto. From our analysis of the applicable charter provisions it is clear that the supervisors acted in excess of their charter power in attempting to add to the appropriation ordinance these two positions which were omitted by the sheriff from his budget and that the mayor's veto was justified on this ground. However entirely apart from this consideration since the positions were eliminated by the mayor's veto, since the mayor possesses the power to veto any item of this character in whole or in part (sec. 72), and since such positions are created or abolished by their inclusion in or exclusion from the appropriation ordinance (sec. 143) the positions of superintendent of jail were abolished as of July 1, 1947.

It is true that the salary ordinance for 1947–1948 which was finally adopted a few days in advance of the appropriation ordinance contained the enumeration of "2 * * * Superintendent of Jail". Under sec. 73 the salary ordinance "shall be passed or amended at the same time as the annual or supplemental appropriation ordinance" (not before), but more important it is limited in terms to "the number and rates of compensation for all positions *continued or created* by the supervisors *in adopting each annual budget,* and each annual or supplemental *appropriation ordinance.*" The positions under sec. 143 are created or abolished by the appropriation ordinance and sec. 73 is clear that the salary ordinance is but a codification of the positions included in the appropriation ordinance and unless a position is "*continued* or *created*" by the appropriation ordinance it cannot be validly included in the salary ordinance.

The evidence shows that after the abolition of the two positions of superintendent the civil service commission advised the sheriff that respondent Hanley should be returned to a position of captain of the watch from which he had been promoted to superintendent and respondent Reilly should be returned to the position of writ server from which he had been promoted and that the employment of the two individuals having the least seniority as captain of the watch and writ server should be terminated; and this was done by the sheriff.

It is clear that this is not such a case as Rexstrew v. City of Huntington Park, 20 Cal.2d 630, 128 P.2d 23, where the positions were not in fact abolished but were actually continued in effect and the pretended abolition was a mere subterfuge to substitute other persons in the positions formerly occupied by the discharged employees. Here there were actually two less positions and two less employees in the sheriff's office after the abolition of the two positions. Nor is the case similar to Childress v. Peterson, 18 Cal.2d 636, 117 P.2d 336, where the positions were not abolished because the charter provisions (which were different from those of San Francisco) were not properly followed in the attempted abolition of the positions.

Our case is similar to Livingstone v. MacGillivray, 1 Cal.2d 546, 36 P.2d 622, where the positions were actually abolished. The language from the opinion in that case, 1 Cal.2d at page 553, 36 P.2d at page 625, is appropriate to the case before us: "It must * * * be conceded that abolition of an office or position is not synonomous with discharge from employment although the effect upon the individual who loses employment is precisely the same. In the former instance the duties of the position are either absorbed by other persons or they are entirely discontinued while in the latter case the duties remain unchanged but some individual other than the discharged employee is selected to perform them." Cf. Kabisius v. Board of Playground, etc., 4 Cal.2d 488, 493, 50 P.2d 1040; Carr v. Fire Commission, 30 Cal.App.2d 208, 210, 85 P.2d 959.

The evidence shows that in our case no new employee was selected to perform the duties of superintendent of jail but the "duties of the position" were "absorbed" by other persons, partly by the under-sheriff, partly by the sheriff's secretary and largely by captains of the watch.

[3] Some point is attempted to be made of the fact that the sheriff did not notify the civil service commission immediately of the abolition of the positions. Sec. 143. The sheriff notified the civil service commission by letter of June 28, 1947 that the positions of superintendent of jail had been abolished. The appropriation ordinance abolishing the positions was effective July 1. This would seem to be a sufficient compliance, but in any event a failure to give immediate notice of the abolition of two positions by the failure to continue them in the appropriation ordinance could not recreate positions which had in fact been abolished by the combined action of the sheriff, the mayor and the supervisors.

The judgments appealed from are reversed with directions to enter judgments denying writs of mandate.

NOURSE, P. J., and GOODELL, J., concur.

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111 Cal.App.2d 540

REYNOLDS v. McEWEN.

McEWEN v. REYNOLDS et al.

Civ. 8053.

District Court of Appeal,
Third District, California.

June 6, 1952.

Rehearing Denied July 3, 1952.

H. A. Reynolds brought an action against A. R. McEwen for rent due under lease of land and saw mill and equipment, and defendant cross complained. The Superior Court, Mendocino County, Lilburn Gibson, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Peek, J., held that defendant under circumstances was not relieved from liability for rent on ground that contract had been breached by plaintiff and plaintiff's predecessor landlord by failing to put defendant in possession of all property set forth in inventory attached to lease.

Judgment affirmed.

1. Landlord and Tenant ⚷185

Generally duty of landlord to deliver possession of demised premises to tenant, in order to entitle landlord to payment of rent, does not extend to point of requiring actual delivery, and landlord's covenant is satisfied if there is no impediment in tenant's taking possession or if tenant is given a legal right of entry and enjoyment during term.

2. Landlord and Tenant ⚷185, 195(1)

A tenant cannot relieve himself from liability for rent to accrue under an executed lease for a definite term either by refusing to take possession of demised premises or by abandoning demised premises after he has taken possession.

3. Landlord and Tenant ⚷231(7)

In landlord's action for rent due under lease of land, and sawmill and equipment, wherein a defendant, to whom a new lease had been executed together with another person after original tenants were unable to meet obligations under lease, cross-complained for damages alleged to have been suffered by him in attempting to operate mill without two lumber carriers which were itemized in inventory attached to new lease, and for refund of rent, evidence did not establish that landlord placed any impediment in such defendant's path which prevented such defendant from taking possession of demised realty, and established that such defendant could have obtained the missing equipment which had been removed before lease was executed to him.

4. Partnership ⚷77

The possession of partnership property by one partner is possession of all partners.

5. Landlord and Tenant ⚷185

Where original tenants under lease of realty and sawmill and equipment located on such realty were unable to meet obligations to lessor, and lease was cancelled and a new lease substantially identical to old lease was executed whereunder one original tenant and defendant who was not a party to original lease became tenants, possession of equipment by original tenant under old lease, which equipment was not on demised premises when new lease was executed, was possession of both defendants and original tenant regardless of whether defendant and original tenant were considered as colessees or as partners, and defendant was not relieved from liability for rent on ground that contract was breached by landlord and his predecessor landlord because defendant was not put in possession of all property set forth in inventory attached to new lease. Civ. Code, § 3528.

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Fontaine Johnson, Sacramento, Kasch & Cook, Ukiah, John M. Roberts, for appellant.

Mannon & Brazier, Ukiah, for respondents.

PEEK, Justice.

This is an appeal by defendant McEwen from a judgment in favor of plaintiff Reynolds in an action arising out of the lease of a sawmill located in Mendocino county.

W. A. Thayer, one of the cross-defendants, was the owner of certain real property in said county. The mill in question was located on a one acre parcel of this property. On July 20, 1946, Thayer leased the land together with the mill and equipment for a term of five years to E. C. Fredericks and one of the defendants herein, William E. Stover. The lease contemplated the removal of the old mill and the construction of a new one and contained appropriate provisions relative thereto. The lessees entered into possession of the property and immediately proceeded with said plans, contracting with appellant McEwen, a general contractor, for certain construction work. Fredericks and Stover were unable to meet their obligations to the lessor Thayer and the contractor McEwen. Thayer, upon being asked to consent to an assignment of Frederick's interest as colessee to McEwen stated the lease was non-assignable but said, "if they could get a release from Fredericks and if McEwen and Stover would assume all the obligations as to inventory, the equipment, the property * * * (he) would be willing to make a lease with McEwen and Stover." As suggested Fredericks executed a release and on March 1, 1947, the old lease was cancelled and a new lease, substantially identical as to terms, was executed to A. R. McEwen and William E. Stover as copartners. Construction of the new mill continued. On May 20, 1947, Stover assigned his interest to McEwen who thereafter completed the mill and began operations. On December 1, 1948, Thayer conveyed the real property and assigned his interest as lessor together with the rents to become due thereunder to plaintiff Reynolds. The monthly rental of $600 was paid only to and including October 31, 1948.

On June 6, 1949 respondent Reynolds filed his complaint against McEwen and Stover by which he sought to obtain the rent due according to the terms of the lease. McEwen cross-complained for damages alleged to have been suffered by him in attempting to operate the mill without certain equipment which was itemized in the inventory attached to the lease and for a refund of the rent previously paid by him. The cause proceeded to trial on the issues so formed and at the conclusion thereof the court found the allegations of the complaint to be true, giving judgment accordingly.

McEwen has now appealed, the essence of his contention being that Thayer as lessor and Reynolds as his successor breached the contract by failing to put defendant in possession of all of the property set forth in the inventory attached to said lease. In particular he contends the judgment must be reversed for the reason that the evidence is wholly insufficient to support the finding of the trial court that "at all times since the date of said lease said defendants have been and now are in possession of said property described in said lease" since, the evidence, he says, conclusively shows that two lumber carriers listed in the inventory of equipment were never on the premises.

On the premise that the contract was breached in the above particular, appellant further contends that by accepting possession of a portion of the personal property he became liable only for the reasonable rental value of the property actually occupied by him and is entitled to recover damages suffered by him by reason of the failure of the lessor to place him in possession of all of the leased property.

[1, 2] The general rule as stated in 52 C.J.S., Landlord and Tenant, § 478, page 234, is that "The duty of the landlord to deliver possession of the demised premises to the tenant, in order to entitle him to the payment of rent, does not extend to the point of requiring actual delivery, and his covenant is satisfied if there is no impediment to the tenant's taking possession or if the tenant is given a legal right of entry and enjoyment during the term." See also Playter v. Cunningham, 21 Cal. 229; McCormick v. Marcy, 165 Cal. 386, 132 P. 449; Carty v. Blauth, 169 Cal. 713, 147 P. 949; Platner v. Vincent, 187 Cal. 443, 202 P. 655. It is also the rule that "a lessee cannot relieve himself from liability for rent to accrue under an executed lease for a definite term either by refusing to take possession of the premises or by abandoning the premises after he has taken possession." 32 Am.Jur. 389, sec. 475.

If Thayer, as lessor, performed the duty placed upon him by the above general rule, the finding that McEwen was in possession of the leased property must be sustained since it necessarily follows that under the stated rule and the record before us any failure to have taken actual corporeal possession must be deemed to have been his alone.

Nowhere in the record do we find any evidence of an impediment being placed in the way of appellant's taking possession of the premises; in fact the evidence shows without contradiction that McEwen was peacefully let into possession and occupation of the premises along with Stover, the continuing lessee, and that they proceeded with construction of the new mill.

All parties concede that the carriers and the other items of equipment were on the premises at the time Stover and Fredericks went into possession under the lease of July 20, 1946, and although McEwen's attack is directed primarily at the absence of the two lumber carriers from the premises on the date he became lessee, the record shows other items of equipment, specifically two planers, which likewise were included in the inventory, were also not on the premises on said date. The evidence also shows, undeniably, that all of the equipment removed from the premises had been so removed at the instance of either Fredericks or Stover, the lessees under the prior lease, and that McEwen was informed of and knew the whereabouts of each of these removed items of personal property. Specifically Stover had taken one of the planers to the city of Oakland for repairs and the second planer was taken to another lumber mill. Both of these items, which were usable in the new mill, were brought back to the premises by McEwen and installed therein, and as to them no contention is made that he was not placed in possession thereof. The record as to the carriers shows that Stover placed one carrier in a garage in Longvale to be repaired, at which time he authorized the garageman to take whatever parts were needed for such repairs from the second carrier which was standing on the railroad right of way immediately adjacent to the mill property. Thayer testified that McEwen never requested to be placed in manual custody of either of the lumber carriers (even assuming the lessor had a duty to personally deliver same to the lessee under the circumstances here disclosed); that to the contrary McEwen informed him that he (McEwen) had no use for the carrier and that he (Thayer) could get it from the garage and do whatever he wanted with it if he wished to do so, and that such repossession by Thayer was prevented by the garageman's assertion of a lien thereon for the repair work done. There is further evidence that the mill as reconstructed by McEwen required larger lumber carriers, to-wit, 66 inch instead of the 42 inch ones used in the old mill and also that the old carriers could not be utilized in the new mill.

It should also be noted that the lease, which appellant testified he read and then signed, contains the following paragraph:

> "The party of the second part has examined and knows the condition of said premises, and has received the same in good order and repair, and that no representations as to the condition or repair thereof, have been made by the party of the first part prior thereto, or at the execution of this agreement."

Also the

> "Inventory of Equipment on the Property of W. A. Thayer at Longvale, California, leased by McEwen and Stover",

which was attached to the lease sets forth in detail the equipment in question. At the bottom thereof the following statement appears in part:

> "I checked the items over several times and believe it to be as accurate as possible * * *.
>
> "McEwen & W. E. Stover
>
> "William E. Stover"

[3] Bearing in mind the rule that the lessor satisfies his duty to deliver possession of leased premises "if there is no impediment to the tenants taking possession or if the tenant is given a legal right of entry and enjoyment during the term" and that a "lessee cannot relieve himself from liability" for rent under a lease for a definite term "by refusing to take possession" of the premises, we must hold the above evidence fails to show any default on the lessor's part concerning such duty and therefore the finding of the lower court that the lessee was in possession of the leased property must be sustained. From the evidence it cannot be said that Thayer placed any impediment in appellant's path which prevented his taking possession of all of the leased property, and it appears that he did in fact take possession of the realty and also of the equipment Stover had removed from the premises and for which he had use in the new mill. These facts conclusively demonstrate that had he chosen to do so he could have brought all of the removed equipment back to the premises. The fact that a lien was being asserted against the carrier Stover had placed in the garage for repairs thereon cannot affect appellant's responsibility for the rent since the garageman asserting same holds under Stover, appellant's colessee, and not under Thayer or respondent.

Appellant also contended that even conceding that all of the equipment in dispute was on the premises on July 20, 1946, the date of the old lease, and that Stover was placed in possession thereof, that fact is of no importance because the lease of March 1, 1947 is an entirely new lease and the possession by Stover of the equipment under the old lease is not the possession of appellant McEwen under the new lease.

[4, 5] While a discussion of such contention is wholly unnecessary in view of our decision that the appellant must be charged with possession of the equipment in his own right, the contention is not well founded. Whatever may have been the relationship of Stover and McEwen under their lease, the appellant would still have been liable for the rent. The execution of the renewal lease did not operate to interrupt the possession of Stover, the lessee under both leases. See Ely v. Collins, 45 Misc. 255, 92 N.Y.S. 160; 51 C.J.S., Landlord and Tenant, § 308, page 969;

C.C. 3528. Therefore, it is immaterial whether Stover and McEwen be considered as colessees, in which case Stover's possession, whether actual or constructive, was possession for both, Barrow v. Simon, 2 Cal.App.2d 500, 38 P.2d 197, or as partners, in which case a like rule applies since "the possession of partnership property by one partner is the possession of all the partners." 68 C.J.S., Partnership, § 87, page 527.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

111 Cal.App.2d 559

GILL et al. v. CLARK et al.

Civ. 4382.

District Court of Appeal, Fourth District, California.
June 9, 1952.

Ronald Gill, a minor, by Rex E. Gill, his guardian ad litem, sued Maurice Emory Clark and others for injuries sustained when the plaintiff was struck by a truck while playing in the driveway of his father's lumber yard. The Superior Court, Kern County, Warren Stockton, J., rendered judgment in favor of defendant, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that no prejudicial error had been committed in admitting, over objection, testimony as to statements, made by plaintiff's father, to the effect that the truck driver was not to blame for the accident.

Affirmed.

1. Appeal and Error 🔑1051(1)
Witnesses 🔑389

In action to recover for personal injuries sustained by infant when he was struck by motor vehicle while playing in driveway of his father's lumber yard, where child's father testified that he didn't recall having told defendant that he didn't consider defendant responsible for accident but testified that if he had made such statement it was made while he was under emotional strain, testimony by defendant with regard to such statement by child's father was admissible as tending to impeach one part of father's answer, and, in any event, was not prejudicial, in view of fact that father had in effect, admitted by another part of his answer that he had made such statements.

2. Appeal and Error 🔑1066

In action to recover for personal injuries sustained by infant when he was struck by motor vehicle while playing in driveway of his father's lumber yard, no reversible error was committed with regard to trial court's reading of a portion of one instruction which implied that contributory negligence was factor, even though in fact no issue of contributory negligence was involved, where case was not a close one, and there was no basis for finding that defendant had been guilty of any negligence.

◆

James Vizzard, West, Vizzard, Howden & Baker, Bakersfield, Neil J. Clarke, Pasadena, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

BARNARD, Presiding Justice.

The minor plaintiff, then three years old, was injured in an accident at 3:30 P.M. on February 3, 1950. The accident occurred on a driveway running through a lumber yard owned by Rex E. Gill, the father of the plaintiff. This driveway ran the entire length of the lumber yard premises in a north and south direction, was some 30 or 35 feet wide, and was used by customers who could enter it either from the north or the south. On the west side of the driveway there was a lumber shed 108 feet long and an office.

The defendant Krier was engaged in construction work near by and had made numerous business visits to this lumber yard. On this occasion he came to talk business with Mr. Gill, entering at the south end of the driveway. There was a lumber truck parked on the east side of the driveway near a point where Mr. Gill was working at a saw. Krier parked his car west of the lumber truck and went over to talk to Mr. Gill. About that time a man named Springer drove a pickup truck in from the north, parked a short distance north of the Krier car, and went over to the lumber shed. About the same time a Mrs. Lee drove in from the north and parked a few feet behind and to one side of the Springer truck. She remained in her car, waiting for a chance to speak to Mr. Gill.

The defendant Krier talked with Gill near the saw for a few minutes, during which Gill was faced toward Krier's car. They then walked toward Krier's car, conversing as they walked. As they approached the Krier car they separated, Krier walking around the rear of his car to enter it on the left side, and Mr. Gill passing by the right front corner of Krier's car en route to the office to wait on Springer. Krier entered his car through the left door, started the motor, put the car in low gear and moved forward at a slow speed. He had gone no more than two to four feet when he felt an impact. He put the car in reverse and backed away a few feet, and at the same time Mr. Gill came running. Mr. Gill testified that he looked and saw his son on the ground, and not standing, at or near the right front wheel of the Krier car as it moved forward slowly. The boy received serious and permanent injuries.

It appears without conflict that Krier on his many previous visits had never seen any children loitering or playing in or near this driveway, and that Mr. Gill had not given him any warning or mentioned the presence of any children prior to the accident. Mr. Gill testified that he had last noticed the boy about eight or ten minutes before Krier arrived at the lumber yard, and that as he looked in the direction of the Krier car he had not seen the boy. Mrs. Lee testified that from the position in which she was parked she could see clearly to the south in the direction of the Krier car, that the right front half of the Krier car was within her line of vision, and that she did not see any child near that car at any time prior to the accident. From objects found afterwards it appears that the child was playing in the sand very close to, if not under, the front end of the Krier car. He was not seen by any of the witnesses, even by his father who knew that he was somewhere about the premises.

The complaint in this action alleged that the plaintiff's injuries were caused by the negligence of the defendants. Special damages for medical expenses and care were pleaded on the theory that such expenditures constituted a trust fund for the benefit of the child, but the father was not made a party to the action. The answer denied negligence and, as a separate defense, alleged that this was an unavoidable accident insofar as the defendants are concerned. No attempt was made to allege or prove contributory negligence. After being out eighteen minutes the jury returned a unanimous verdict in favor of the defendants. The plaintiff has appealed from the judgment which followed.

[1] It is first contended that the court committed prejudicial error in admitting, over objection, testimony of statements made by appellant's father to the effect that the respondent Krier was not to blame for the accident. It is argued that there was no theory under which these statements were admissible; that they were merely a conclusion and hearsay; that the father was not a party to the action; and that the statements could not be binding upon the plaintiff in any conceivable way.

When Mr. Gill was on the stand he was asked whether or not he had told Krier that he did not feel that this accident was Krier's fault, and that Krier should not take any blame for it. He replied "No, I don't recall that, if I did it was under emotional strain that I was under and after the accident occurred it could be possible I said such a thing." Later, Krier was asked with respect to such conversations and objections were overruled. He then testified that while they were at the hospital Mr. Gill had stated to him that: "I was not to feel at fault at all, that it was purely an accident and I was not to blame," and that about Easter time Mr. Gill had again made a similar statement to him.

Although this evidence was unnecessary it was admissible as tending to impeach one part of the answer of the witness Gill. Moreover, it was not prejudicial since another part of the answer in effect admitted that he had made such statements. The later testimony which is now objected to added little or nothing to the effect on the jury of the evidence previously brought out without objection.

[2] It is next contended that the court erred in reading "a portion of one instruction which implied that contributory negligence was a factor," and in refusing to read two instructions offered by the appellant. The first of these stated the general rule that a child is not held to the same standard of conduct as an adult, and the second was to the effect that any negligence on the part of the child's parents could not be imputed to the plaintiff.

The court modified and gave Instruction No. 113 from the book of approved jury instructions. It read the first part of that instruction stating that the issues to be determined were (1) was the defendant negligent, (2) was that negligence a proximate cause of any injury to the plaintiff, (3) was the plaintiff negligent. The court struck out that part of the instruction which reads: "If you find that plaintiff was negligent, you then must determine a fourth issue, namely: did that negligence contribute in any degree as a proximate cause of the accident. If you find that it did, your verdict must be for the defendant, but if you find that it did not, and you previously have found that there was negligence on defendant's part which proximately caused plaintiff's injury, you then must fix the amount of plaintiff's damages and return a verdict in his favor."

The main portions of that instruction which relate to contributory negligence were struck out but the court failed, apparently through inadvertence, to strike out the lines covering the third question as to whether the plaintiff was negligent. Contributory negligence was not pleaded, and it was conceded throughout the trial that contributory negligence was not a factor in this case. During the trial the judge asked whether contributory negligence had been pleaded and was told that it had not. Appellant's counsel, in his argument, told the jury that no issue of contributory negligence was involved, and that whether or not the child's parents were negligent had nothing to do with the case. In his argument, counsel for the respondents told the jury that contributory negligence was not being charged to the little boy, and that they were not contending that any carelessness on the part of the father had anything to do with this case. The evidence and the entire arguments were devoted to whether or not the defendant Krier had failed to use ordinary care, whether or not he had done or failed to do anything which an ordinary man would have done under the same or similar circumstances. Except as above stated, the court cut out all reference to contributory negligence in the instructions, and in accordance with the theory on which the case was tried did not read the proffered instructions on the standard of care required of a child and on the matter of imputing any negligence of the parents to the child. This was not a close case, and it rather clearly appears that the verdict was based upon a finding that the respondent Krier was not guilty of any negligence. It is difficult to see how this decision could have been otherwise if honest consideration was given to the evidence. The father, who knew that the child was somewhere about and who walked by the right front of the car immediately before the accident, did not see the child; Mrs. Lee did not see him; and the respondent Krier, who had no reason to know or expect that a child was anywhere in the vicinity, did exactly what any ordinary man would have done under the circumstances. No reversible error appears in this connection.

The only other point raised is that the verdict is contrary to the evidence if the verdict can be interpreted as finding that an agency relationship did not exist between the respondent Krier and the respondent Clark. This contention is based on the fact that the jury brought in two verdicts. In the first, it found in favor of both defendants Clark and Krier and against the plaintiff. In the second it found in favor of the defendant Clark and against the plaintiff. Immediately after the verdicts were returned it was stipulated that the second verdict should be disregarded. Any possible liability on the part of the respondent Clark would necessarily depend upon whether Krier was liable, and no prejudice appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

111 Cal.App.2d 490

FIELDING et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15267.

District Court of Appeal, First District, Division 2, California.

June 4, 1952.

Rehearing Denied July 3, 1952.

Hearing Denied July 31, 1952.

Petition by John Fielding, Jr., and another, individually and doing business as Obergfel Bros., for writ of mandamus to require the Superior Court of the State of California in and for the City and County of San Francisco to set aside an order of that Court which quashed a summons directed to two foreign corporations and served on the Secretary of State, and to require that Court to take jurisdiction over the two foreign corporations. The District Court of Appeal, Nourse, P. J., held that in view of fact that corporations did business in California through a distributor, trial court should vacate order quashing service and should reinstate pleadings.

Peremptory writ issued.

1. Mandamus 🔑34

Under general principles, mandamus is the proper remedy where the essence of the petition is to compel the court to take jurisdiction over the parties, even though it involves review of the court's order to quash service.

2. Appeal and Error 🔑2

September 1951 amendment to Code of Civil Procedure allowing appeal from order quashing service was not applicable to such an order made in May 1951. Code Civ. Proc. § 963.

3. Mandamus 🔑4(3)

Where it was uncertain prior to amendment of Code of Civil Procedure whether review of order quashing service was by appeal, or by mandate to require trial court to take jurisdiction, appellate court would not deny a remedy to petitioners who chose mandate even though it determined that the proper remedy was other than what petitioners deemed it to be. Code Civ.Proc. § 963.

4. Corporations 🔑642(1)

For service of process upon foreign corporations doing business within the state, the essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state.

5. Corporations 🔑642(4½)

On question of whether foreign corporation is doing business within state so as to be amenable to process, the technical distinction between an independent contractor and an agent is, for that purpose at least, immaterial, except as it may be evidence one way or the other.

6. Corporations 🔑642(4½)

On question of whether corporation is doing business in the state so as to be amenable to process, the essential thing is merely whether the corporation is present within the state, regardless of whether it operates through an independent contractor, agent, employee or in any other manner.

7. Corporations 🔑642(6)

The making of a few isolated trips to state by representatives of foreign corporations, or advertising alone by those corporations is not a sufficient doing of business in the state by the foreign corporations to make them amenable to process.

8. Courts ⚷89

In all cases where the problem stands on the facts of the case, the likelihood is that the facts will be different, and it is not then a question of taking isolated language out of prior cases but of attempting to extract a principle that preceding courts have themselves extracted from the facts before them.

9. Corporations ⚷642(4½)

Where New York corporations distributed their products in state through distributor, they were doing business in state so as to be amenable to process in action by resident for injuries from products bought at retail. Corporations Code, §§ 6400–6403; Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 301 et seq.

◆

Emmett R. Burns, Edward A. Friend, San Francisco, for petitioner John Fielding, Jr.

Hoberg & Finger, San Francisco, for petitioner Dolph Obergfel.

Hagar, Crosby, Crosby & Vendt, Oakland, for respondent and real party in interest.

NOURSE, Presiding Justice.

This is a petition for a writ of mandamus asking that an order of the superior court be set aside and that the court be required to take jurisdiction over two foreign corporations. The court has ordered that summons directed to the corporations and served on the Secretary of State be quashed. Apparently this was done on the basis that the two defendants were not doing business in the state at any time prior to the proceedings.

Complaint was filed and an order was granted allowing service on the Secretary of State on April 15, 1950; a motion to quash was made on August 29, 1950, and granted on May 15, 1951; affidavits in support of the motion to quash were filed but were not considered timely filed and hence were not considered at all by the court in granting its order to quash; what was considered was a deposition of one individual defendant taken on April 10, 1950. In September, 1951, petitioner moved to augment the record to include the affidavits but this was denied in October, 1951. The complaint does not appear in the record, nor does it appear that any affidavits were used in granting the original order directing that service be made on the Secretary of State. The essential question presented is whether the foreign corporations were doing business in this state at the time service was ordered to be made on the Secretary of State.

[1, 2] A more acute problem is whether the writ is appropriate in view of the possible appealability of the order. The essence of the petition is to compel the court to take jurisdiction over the parties although it involves review of its order to quash. Under general principles mandamus is the proper remedy. 16 Cal.Jur. 824; Miller v. Municipal Court, 22 Cal.2d 818, 852, 142 P.2d 297; Katenkamp v. Superior Court, 16 Cal.2d 696, 108 P.2d 1. However if this petition is viewed as a review of the order to quash it seems that the remedy is by appeal. In this respect it should be noted that by amendment effective September 22, 1951, Stats.1951, Ch. 234, sec. 1, section 963 Code of Civil Procedure now reads that an order quashing service is appealable. Such was not the case previously. Since the order was made in May, 1951, the amendment is not applicable here.

[3] The cases are not in full accord. In some the remedy was by appeal, either with or without discussion of the propriety of such proceedings. Fuller v. Lindenbaum, 29 Cal.App.2d 227, 84 P.2d 155; De Pier v. Maddox, 87 Cal.App.2d 460, 197 P.2d 87; In re Melekov, 9 Cir., 114 F.2d 727; Narum v. Cheatham, 127 Cal.App. 505, 15 P.2d 1106. In at least one other case it was implied that the remedy is not by appeal in that the order was held to be reviewable under section 956 Code of Civil Procedure, (matters reviewable after final judgment) and since no dismissal was here taken no appeal would lie. W. H. Marston Co. v. Kochritz, 80 Cal.App. 352, 251 P. 959. It appears probable on a review of all these

cases that appeal will lie from such an order as this. But it must also be said that the remedy is not clear cut. Thus, the appellate court should not deny petitioners a remedy even though it determines that the proper remedy was other than what petitioners deemed it to be. Robinson v. Superior Court, 35 Cal.2d 379, 383, 218 P.2d 10.

The merits of the case involve the following facts: The two corporate defendants (considered as one for purposes of this proceeding) are affiliated in the business of manufacturing and distributing pharmaceutical goods. They are organized and have their principal places of business in Buffalo, New York. Apparently plaintiff, petitioner, was injured by some of these goods after purchase at retail, although the complaint is not set forth nor any facts that could serve as the basis for a complaint. The manner of distribution of the goods was through a distributor. The corporations had a contract with one Obergfel, doing business as Obergfel Bros., in Los Angeles, California. Obergfel was a wholesaler. His contract provided that he would distribute the goods of defendants throughout this and other western states. He was the sole distributor for these goods and they arrived at retail outlets in no other way than through him (if the corporations sold direct they had to remit a commission to Obergfel, which was never done). Title to the goods was to remain in the corporations until the goods were sold although the agreement begins with a statement that the parties agree to buy and sell. Obergfel was to warehouse the goods and carry insurance on them in his own name. The corporations set the prices and required a report of stock on hand each month. They provided all the advertising for their products. They had no offices in this state and had no interest other than the title to the goods in the business of Obergfel. The latter ran his business entirely on his own. He managed his sales force and collected the accounts. He would represent himself to prospective purchasers as the representative of the corporations, but used his own cards and not those of the corporations. The officers or agents of any kind of the corporations did not come to California except twice, once for a medical convention and at one other time. At the convention the company had an exhibit with its own name on it and Obergfel was there along with one Oclassen, a representative of the company. Obergfel represented a number of companies in this line of goods other than the corporations, and he always held himself out as their representative. The corporations had agreed to insure Obergfel against any action on behalf of the Federal Government under the Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 301 et seq. It does not appear whether retailers' or consumers' orders were subject to approval by the corporations in New York, but they never in fact were rejected. The contract provides that the distributor is considered by the parties to be an independent contractor. Sections 6400–6403, Corp.Code, requiring the filing of articles of incorporation and statement, have not been complied with.

[4–6] On the basis of these facts the question is whether the corporations were doing business within this state within the meaning of the Corporations Code and to the extent that assumption of jurisdiction over them is consistent with due process. See George Frank Co. v. Leopold & Ferron Co., 13 Cal.App. 59, 108 P. 878. The essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state. Milbank v. Standard Motor Const. Co., 132 Cal.App. 67, 22 P.2d 271; Boote's Hatcheries, etc., Co. v. Superior Court, 91 Cal.App.2d 526, 528, 205 P.2d 31. The technical distinction between an independent contractor and an agent is, for this purpose at least, immaterial, except as it may be evidence one way or the other. Thew Shovel Co. v. Superior Court, 35 Cal.App.2d 183, 95 P.2d 149; Moore Machinery Co. v. Stewart-Warner Corp., D.C., 27 F.Supp. 526. It would seem, authority lacking, that the same principle should apply as to the difference between a factor and an agent or employee. Thus the provision in the contract that the parties consider Obergfel to be an independent contractor seems insufficient to absolve the corporation from amenability to service. Thew Shovel Co. v. Superior Court, supra. The essential thing is merely whether the corporations are present wthin the state, whether they operate through an independent contract, agent, employee or in any other manner.

Only one case has been found which holds that respondents are factors, and which on this basis alone apparently further holds that the respondents are therefore not doing business within this state. In McCarley v. Foster-Milburn Co., D.C., 93 F.Supp. 421, essentially the same facts as above stated were outlined and relied on to support this conclusion. That action arose on a motion to change venue to this state, but the issue of jurisdiction was the same as here, and it was the same Obergfel there, as here, that was sought to give the California courts jurisdiction over the same defendants in this case. It is not clear whether that decision turns on whether Obergfel was an agent capable of receiving process on behalf of the corporations or whether his activities constituted the "doing of business" by the corporation. There is a radical difference. 20 C.J.S., Corporations, § 1920, p. 159. The cases cited on behalf of the Federal court's decision are cases where the "doing of business" was sufficient to bring the corporation involved within the purview of some state regulatory statute. There is likewise a radical difference here. 20 C.J.S., Corporations, § 1920, p. 152; Thew Shovel Co. v. Superior Court, supra, 35 Cal.App.2d at page 185, 95 P.2d 149. No California cases have been found where the mere fact that a person is a factor decides the question whether the principal is doing business in the state. The case of Irvine Co. v. McColgan, 26 Cal.2d 160, 157 P.2d 847, 167 A.L.R. 934, cited by defendants to this effect, does not so hold. Fletcher on Corporations, Vol. 17, p. 520, brings out the point that doing business for the purpose of process is quite a different thing from the doing of business for the purpose of state regulatory or taxation statutes. Fletcher at another place expressly reiterates what is said above, that "the business activities of a foreign corporation in a state may be of such a nature as to render it amenable to service of process in an action brought against it in the state, and yet not be sufficient to render it necessary for the corporation to qualify under the requirements of a statute imposing conditions and restrictions upon the right to do business in the state. (Citing cases.)" Fletcher Vol. 17, p. 468, Vol. 18, p. 339. This would indicate that the McCarley case, supra, and the cases cited by defendants do not hold that the mere fact of factorage is sufficient to immunize the corporations from process in this state. If this is the case then the technical distinction, as said above, between a factor and any other relationship is merely one fact to be weighed with all the others in arriving at a decision. In all cases it is a question of fact. Fletcher, ibid., 470; Thew Shovel Co. v. Superior Court, supra.

[7, 8] It is true that the few isolated trips to this state by the representative of the corporations are not sufficient to give the court jurisdiction. Proctor & Schwartz v. Superior Court, 99 Cal.App.2d 376, 221 P.2d 972. It is also true that advertising alone is not sufficient. People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 S.Ct. 233, 62 L.Ed. 587. It is true that the cases relied on by petitioner are distinguishable on their facts. But in all cases where the problem must stand on the facts of the case the likelihood is that the facts will be different. It is not a question of taking isolated language out of a case in these situations as defendants contend but of attempting to extract a principle that preceding courts have themselves extracted from the facts before them. With this in mind the language in Sales Affiliates, Inc., v. Superior Court, 96 Cal.App.2d 134, at page 136, 214 P.2d 541, is not irrelevant. When this is combined with the fact situation in the Thew Shovel case (operation through a distributor) it might well be held that less connections with the state by a foreign corporation are required, at least for the purpose of service of process, than would at first glance appear.

It is proper to note that this is presumably a tort or warranty action; that the injured party is a resident of this state; that it would undoubtedly be burdensome for him to go to New York to sue; that the corporations felt that they were bound to stand behind their products at least as far as Federal regulations and actions were concerned. In the final analysis it would seem that this is really not a question of the power of the state, but whether there is afforded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere. See 20 C.J.S., Corporations § 1918, p. 148; International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. It can be assumed that adequate notice has been or will be received by the corporations. If this is the case the following language is pertinent: "In the former it is, of course, a more or less continuing course of business which is meant to be regulated, whereas in the latter the object sought is only to give notice to a corporation of a pending action. The tendency is to hold that whatever is reasonably effective for this purpose is a good service." Beach v. Kerr Turbine Co., D.C., 243 F. 706, 708.

Any distinction as to where, exactly, interstate commerce ends and local commerce begins seems to be largely immaterial in deciding the precise problem at hand. Whether the particular business of these corporations is denominated intra or inter state commerce does not change the fact that they are still doing business in this state. That distinction only poses the other question of burden on interstate commerce, which is not raised here, nor which would seem plausible if it were.

[9] We are satisfied that a liberal and reasonable view of the question of jurisdiction calls for a holding that the plaintiff and petitioner herein should be accorded the right to try out in the courts of this state the issues raised in his complaint. Accordingly the trial court should vacate its order quashing service of summons and reinstate the pleadings for a trial on the issues of the controversy.

Let a peremptory writ issue as prayed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

DIMON v. DIMON.*

Civ. 14504, 14894.

District Court of Appeal, First District,
Division 2, California.
May 27, 1952.

Rehearing Denied June 26, 1952.
Hearing Granted July 24, 1952.

Action by nonresident wife against her nonresident husband, based upon personal service within the jurisdiction, to recover support money for herself and her nonresident children from date of Connecticut divorce decree containing invalid alimony award. The Superior Court, City and County of San Francisco, I. L. Harris, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that the trial court had been without jurisdiction.

Reversed.

See also 101 Cal.App.2d 190, 225 P.2d 282.

1. Divorce ⚿200

Husband and Wife ⚿295

Existence of marriage is jurisdictional prerequisite for right of court to order support, costs, and counsel fees pendente lite in action for divorce or separate maintenance. Civ.Code. §§ 136, 137, 138, 139.

2. Husband and Wife ⚿286

Passage of Reciprocal Enforcement of Support Law was legislative recognition of need of some method to enforce obligation of the "traveling husband" to support his wife and children. Code Civ.Proc. § 1650 et seq.

3. Divorce ⚿327

Where Connecticut court which granted wife divorce was without jurisdiction over person of husband and no res was brought under control of court by any process, so as to give such court jurisdiction to adjudge alimony in rem, Connecticut court's judgment purporting to grant alimony was not res judicata.

4. Judgment ⚿577(2)

A judgment is not res judicata and is no bar to relitigation in so far as it is void for lack of jurisdiction.

5. Judgment ⚿493

Party at whose instance judgment is rendered is not entitled to contend in collateral proceeding that it is void, but this rule cannot be applied automatically and indiscriminately when party invoking it has not been induced to change its position, no rights of other parties have intervened, and application of rule will obstruct equity instead of protecting it.

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* Subsequent opinion 254 P.2d 528.

6. Divorce 🔑331

Wife who had obtained Connecticut divorce would not be estopped to challenge jurisdiction of Connecticut court to grant alimony, where husband had not made any payments on Connecticut award and did not deny that it was invalid as judgment in personam.

7. Parent and Child 🔑3(1)

Where mother has custody of child, it is primarily her duty to see that child receives what is necessary for its support and education, but father who has been deprived of custody is not released from that same duty, and proper court has power, in interest of child, at any time to order father to pay for its support and education, in whole or in part, in accordance with father's ability to pay and further circumstances of case, and to modify existing orders. Civ.Code, §§ 136, 137, 138, 139.

8. Equity 🔑55, 62

Equity follows law and frequently provides remedy where none exists under law, but in state where adequate remedy is provided in one of codes, court cannot go beyond limitations prescribed in codes and pursue remedy which they do not sanction. Civ.Code, §§ 136, 137, 138, 139.

9. Husband and Wife 🔑289, 295

Notwithstanding personal service upon husband in San Francisco, California court had no jurisdiction over action brought prior to effective date of Reciprocal Enforcement of Support Law, by wife, who resided with children in Oregon, to recover support and maintenance for herself and her children from date of Connecticut divorce decree, even though alimony order entered by Connecticut court had been invalid either as judgment in personam or in rem; and California court was likewise without jurisdiction to grant wife costs and counsel fees. Civ.Code, §§ 136, 137, 138, 139.

Johnson, Harmon & Henderson, San Francisco, for appellant.

Samuel L. Fendel, Gerald D. Marcus, San Francisco, for respondent.

NOURSE, Presiding Justice.

These are appeals by the former husband from an adverse judgment in the action of his former wife for maintenance and support for herself and the children of the parties and the husband's cross-action regarding property allegedly held by the wife in his behalf (No. 14,504) and from an order granting counsel fees, costs and support of the minor daughter pending the appeal from said judgment (No. 14,894).

At the outset it should be said that this is not one of those cases of the "traveling husband" calling for the outpouring of judicial tears. It is just the reverse. Here there was no abandonment by a traveling husband. To the contrary, when the husband became ill and unable to provide a sufficient number of servants to maintain the family home the wife kicked him out of the home he had provided for his family, seized all the estate which she sold, appropriated the proceeds and decamped to the state of Oregon with the two children. By her action she forced her husband to walk the sidewalks of New York begging money for his livelihood. Ever since the separation the wife and children have been well provided for while the husband has been the object of charity.

Plaintiff and defendant were married in Portland, Oregon, on May 12, 1926. Two children were born of the marriage: one on November 24, 1928, the other on January 20, 1933. At the time of their separation (September 1, 1945) the parties were living in Connecticut in a home purchased by defendant with his own funds, but title to which had been placed in the name of plaintiff.

For some years following the marriage the defendant had been gainfully employed, first, as vice-president in his father's shipping company, and, upon the death of the father, as president of the company. In 1944 the company lost at sea its only ship and went into bankruptcy. Since then the defendant has been unemployed. From his mother's estate defendant had received approximately $80,000 part of which he put in the Connecticut property.

On September 24, 1945, the wife filed a suit for divorce in Connecticut. Defendant husband, then in New York, was constructively served by registered mailing of a copy of the summons and complaint. Defendant made no appearance in that action and plaintiff was awarded a decree of divorce on March 1, 1946, and granted custody of the two children.

At the time of the trial in this action she still had over $12,000 left out of the proceeds of the home property. The Connecticut court also purported to award to the plaintiff $15 a week alimony for herself, and $25 per week for the support of the children. This decree was not appealed from or modified and became final.

On August 4, 1947, plaintiff commenced in San Francisco the suit now before this court. The wife and the two children were then domiciled in and residents of the State of Oregon, the husband domiciled in and a resident of Reno, Nevada. Defendant was personally served in San Francisco. Plaintiff sought in her first cause of action support for the children from the date of the divorce until their majority, and in her second cause of action "support and maintenance" for herself from the date of divorce until her remarriage on August 31, 1948. Plaintiff also requested costs and counsel fees. The action was not based on the awards of alimony and support in the Connecticut decree; it was alleged that they were without force and effect because the court did not obtain jurisdiction over the person of defendant.

Defendant answered and cross-complained. The first cause of action in his cross-complaint alleged that the plaintiff sold real estate which, though it stood in her name, she held for his use and benefit, and the second cause of action alleged, in essence, a conversion by plaintiff of personal property belonging to the defendant. Defendant asked for an accounting and a judgment for the proceeds of the real estate, and a judgment for the value of the personal property.

In the judgment filed November 25, 1949, plaintiff was awarded $1,950 "for alimony and support" for herself from the date of her divorce until her remarriage calculated at $15 a week; $1,850 for the "support, care and maintenance" of the two minor children from the date of the divorce, March 1, 1946, to the date of the commencement of this action on August 4, 1947, calculated at $25 a week; (both awards were precisely the same as those in the Connecticut decree) $75 per month for the support, care and education of the two children from August 4, 1947, until November 24, 1949, on which date one of the minors would attain his majority, the award then to be reduced to $37.50 per month for the support of the other minor until her majority and further order of the court, and $548.15 for counsel fees and costs. It was decreed that defendant take nothing by his cross-complaint.

After the husband had timely appealed from said judgment the wife moved for the award of counsel fees and costs and for support of the minor child pending the appeal, which motion defendant opposed. On September 15, 1950, the court made both a minute order for $750 counsel fees and $250 costs and a formal order, the latter ordering the same and moreover the payment pending appeal of $37.50 a month awarded as support of the daughter Diane, from which order appellant timely appealed.

As to the action instituted by Mrs. Dimon appellant contends that the court lacked authority to make the several awards stated and that moreover the awards were erroneous because the evidence showed that defendant was entirely without ability to pay.

With respect to the action for maintenance of the former wife it must be recognized that it is held as a general rule that when she has obtained a decree of divorce in which no provision for alimony is made and the court has not reserved the power to do so, no permanent alimony can subsequently be imposed. Puckett v. Puckett, 21 Cal.2d 833, 841, 136 P.2d 1, and cases there cited. Although this rule is generally accepted also in other states, even when the divorce decree was obtained in a foreign jurisdiction, 17 Am.Jur. 482; Divorce and Separation § 626, an exception is recognized—but not universally—when the wife secures the divorce from a nonresident husband on constructive notice so that the divorce court lacks jurisdiction to pass on the question of alimony in which case a subsequent application for alimony is held not to be barred. 17 Am.Jur. 482 and 443, Divorce and Separation §§ 627 and 554; Annotation 42 A.L.R. 1385, 1386 et seq.; Hutton v. Dodge, 58 Utah 228, 198 P. 165; Woods v. Waddle, 44 Ohio St. 449, 8 N.E. 297; Stephenson v. Stephenson, 54 Ohio App. 239, 6 N.E.2d 1005; Wick v. Wick, 58 Ohio App. 72, 15 N.E.2d 780; Nelson v. Nelson, 71 S.D. 342, 24 N.W.2d 327; Spradling v. Spradling, 74 Okl. 276, 181 P. 148; Adams v. Abbott, 21 Wash. 29, 56 P. 931. For the contrary view see Darby v. Darby, 152 Tenn. 287, 277 S.W. 894, 42 A.L.R. 1379; Kelley v. Kelley, 317 Ill. 104, 147 N.E. 659; Doeksen v. Doeksen, 202 Iowa 489, 210 N.W. 545; Staub v. Staub, 170 Md. 202, 183 A. 605. Eldred v. Eldred, 62 Neb. 613, 87 N.W. 340 cited by appellant for the latter view has been overruled by Bodie v. Bates, 95 Neb. 757, 146 N.W. 1002, 1007, L.R.A.1915E, 421.

In this state there is no specific decision as to the validity of the above exception in behalf of a wife who has obtained a divorce in a court that had no jurisdiction over the person of the husband. In Howell v. Howell, 104 Cal. 45, 37 P. 770, the wife brought an action for divorce in California, the husband, who then lived in Wyoming, being served by publication and making default. The complaint did not ask for alimony and the decree did not grant it. After the judgment had become final the wife filed a petition in the divorce suit for support for herself and her minor children on the ground of indigence in which matter the defendant appeared. The Supreme Court reversed an order granting the wife $100 a month on the ground that the court had no jurisdiction to grant alimony where the matter had not been litigated in the original action, and the final decree did not grant alimony or reserve jurisdiction to do so subsequently. Dicta in later California cases indicate a tendency to permit a separate action for alimony by a wife when the court in the divorce action had no jurisdiction over the person of the defendant. In Matter of McMullin, 164 Cal. 504, 129 P. 773, the holding was that a father was not criminally liable in California for nonsupport of his child after a decree of divorce had been obtained against him in another state on substituted service, which decree awarded the custody of the child to the mother, without requiring him to contribute to its support and after the mother obtained letters of guardianship of the child in this state but no order against the father for support. The court added however, 164 Cal. at page 507, 129 P. at page 774, that it was "within the power of the wife, under supplementary proceedings brought in this state, with personal service upon the former husband, to have procured, if the facts warranted, an award of the custody of the children, with provision for *her own and their support.*" (Emphasis ours.) In De Young v. De Young, 27 Cal.2d 521, 165 P.2d 457, the Supreme Court unanimously affirmed a judgment which denied *separate maintenance* to a wife on the ground that prior to the institution of her action the husband had obtained a divorce in Mexico on constructive service. In a concurring opinion three justices made the reservation that no implication was intended that such a foreign divorce decree validly terminating the marital status necessarily constituted a defense to an action *for support.* The concurring opinion distinguishes separate maintenance, involved in that case, as to which all justices agree that it presupposes a continuing marital status, and alimony, not involved. In Bernard v. Bernard, 79 Cal.App.2d 353, 179 P.2d 625, the wife brought a divorce action in California, the husband who then resided in Arizona being served constructively. The court granted an interlocutory decree by default, awarding plaintiff support for herself and her minor son. After the support provisions had been vacated on motion of the husband appearing specially the wife instituted a separate action in equity for permanent maintenance for herself, support for the minor son and attorney's fees and costs and moved for granting pendente lite of the same. The appeal was from the order granting temporary relief. With respect to the question whether in the given situation a wife could maintain an independent action in equity for alimony the court concluded, 79 Cal.App.2d at page 357, 179 P.2d at page 627: "Inasmuch as it was impossible for the plaintiff to have her right to alimony adjudicated at the time the interlocutory decree was granted she is entitled to her day in court, and may determine the question in an independent suit in equity, especially *since the action was commenced while the parties were still husband and wife.*" (Emphasis ours.) The reasoning of the Bernard case is in point when it is argued that sec. 139, Civil Code, does not necessarily limit the remedy for the right to permanent alimony to a proceeding in the action for divorce, where other jurisdictions with statutes similar in wording have allowed an independent action for alimony even after a final decree of divorce obtained on constructive service. Among the cases cited for this point was Wick v. Wick, 58 Ohio App. 72, 15 N.E.2d 780 supra, and Hutton v. Dodge, 58 Utah 228, 198 P. 165, supra. However, Patterson v. Patterson, 82 Cal.App.2d 838, 843, 187 P.2d 113, in a case similar to De Young v. De Young, supra, on which it relies, distinguishes Bernard v. Bernard because in that case the parties were still husband and wife when the support money was granted.

[1-9] When we turn to an examination of our statutory law there seems to be substantial merit in appellant's contention that a wife's right to sue for alimony or support was limited to the period when the parties were husband and wife. Sections 136, 137, 138 and 139 of the Civil Code. The pertinent language is found in section 137 reading: "[W]hen the husband or wife has any cause of action for divorce * * * he or she may * * * maintain in the superior court an action against her or him for permanent support and maintenance of himself or herself or of himself and children, or of herself and children." The section has been uniformly interpreted as limiting the court's jurisdiction to instances where there is an existing marital relation. This rule is positively stated in Colbert v. Colbert, 28 Cal.2d 276, 279, 169 P.2d 633, 635, as follows: "The existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce or separate maintenance. Carbone v. Superior Court, 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; Talbot v. Talbot, 218 Cal. 1, 2, 21 P.2d 110; Parmann v. Parmann, 56 Cal.App.2d 67, 69, 132 P.2d 851; In re Cook, 42 Cal.App.2d 1, 3, 108 P.2d 46."

Summarizing the foregoing it is apparent that we have no authority directly in point supporting plaintiff's right to pursue the remedy demanded herein. The concurring opinion in the De Young case and the opinion of the court in the Bernard case are both judicial expressions of sympathy for the indigent wife and children recognizing the legal difficulties confronting them under the circumstances there noted. In seeking to *provide* a remedy the justices purport to find a distinction between "support" and "maintenance" since all agreed that an action for "maintenance" would not lie after the parties had been divorced. The distinction attempted is on nebulous lines as a reference to any dictionary would disclose, but the humanitarian view cannot be lightly treated. The illness for which a cure is sought has long been recognized as an austere and unfortunate barrier in the maintenance and care of abandoned wives and children. Efforts made to enforce the abandoning party to support those upon whom the law casts the duty of support have been frequently frustrated through the conflicting laws of the various states. Fortunately we are not required to decide whether the expression of opinion of the minority in the De Young case should be followed because the legislature has met the difficulty by enacting the Reciprocal Enforcement of Support Law, Stats.

1951, Ch. 694, Code Civil Proc., section 1650 et seq. Briefly the act provides that the obligee (the party entitled to support) may file a complaint in the county of her residence upon which the court shall transmit a certificate to the court of defendant's residence for a hearing. The latter court may then enter an appropriate order commanding the defendant to pay into the court the award in favor of the wife and children. This act did not become effective until after the complaint herein was filed.

Though this statute has not been interpreted in any case of this state which we have found, it is fair to assume that its passage was a recognition by the legislature of the need of some such method to enforce the obligation of the traveling husband to support his wife and children under the circumstances noted.

However, without further speculation, this court is bound by the settled rule that, prior to this statute, the jurisdiction of the court herein was limited to the status while the marriage relation was still in existence and that the court was without jurisdiction to grant maintenance or support in the absence of that relation.

Appellant's contention that the Connecticut judgment is res judicata with respect to alimony because it purports to grant it and that therefore it prevents relitigation of that matter is without merit. It is not denied that the Connecticut court was without jurisdiction over the person of the defendant; neither was there any jurisdiction to adjudge alimony in rem, no res having been brought under the control of the court by any process, 50 C.J.S., Judgments, § 908, page 548. A judgment is not res judicata and is no bar to relitigation in so far as it is void, e.g., for lack of jurisdiction. 50 C.J.S., Judgments, § 617, pages 38, 39; for application to alimony in a foreign divorce decree compare 17 Am.Jur. 579–580, Divorce and Separation, § 763; compare also Restatement, Judgments, § 71.

Neither do we agree with appellant's contention that respondent was estopped to challenge the jurisdiction of the Connecticut court to grant alimony because the judgment was rendered at her instance and she accepted the divorce under it. In many situations it has been held that a party at whose instance a judgment was rendered is not entitled in a collateral proceeding to contend that it is void, and this rule has been applied frequently with respect to divorce decrees, Ann. 3 A.L.R. 535, 540, especially when one of the parties had remarried on the force of it. Rediker v. Rediker, 35 Cal.2d 796, 805–806, 221 P.2d 1, 20 A.L.R.2d 1152. Although it has been said that the reason on which these decisions rest is not technically the doctrine of estoppel, but the principle that a person, having invoked the jurisdiction of a court, cannot be heard thereafter in a collateral proceeding to question the jurisdiction he invoked, 1 Freeman on Judgments, 640, the rule cannot be applied automatically and indiscriminately when the party invoking it has not been induced to change his position, no rights of other parties have intervened, and application of the rule would obstruct equity instead of protecting it. In this case appellant did not make any payment on the Connecticut award and he does not deny that it is invalid as a judgment in personam.

Combining the different statutory provisions and decisions we understand the law to be that if the mother has the custody of a child it is primarily her duty to see that the child receives what is necessary for its support and education, but that the father who is deprived of the custody is not released from that same duty; also that a proper court has power in the interest of the child at any time to order the father to pay for its support and education in whole or in part in accordance with the father's ability to pay and the further circumstances of the case and to modify existing orders.

Ordinarily such proceedings are brought in the state where the minor child resides, frequently sanctioned on the theory that the state is a paternal guardian of all the minor children resident therein. We have not been informed of any case which is brought in a state where neither the mother, the father, nor the children reside. The suggestion that plaintiff should be permitted to proceed in equity is not persuasive. Equity follows the law and frequently provides a remedy where none exists under the law. But in a code state where an adequate remedy is provided in one of the codes, we cannot go beyond the limitations prescribed in the codes and pursue a remedy which they do not sanction.

Appellant contends that in this case no separate action for support of the children can be maintained in a California court because not only was the divorce not obtained in California but neither the parents nor the children had become domiciled in or residents of California, defendant had no property there and the State of California had no interest in the support of the minors. Respondent has not cited any case in which it was held that an action for support of children could be maintained under such circumstances and we have found none. Here the action was not brought by the minor children, nor by the mother as their guardian. The action was brought by the mother *mainly* to *reimburse* herself for moneys which she had paid out in the support of the minors. No reason has been advanced why there should be a distinction (in the matter of the court's jurisdiction) between a recovery for the wife's own support and a reimbursement of moneys paid by her for the children. Appellant also denies the court's power to grant counsel fees and costs in the main action because section 137, Civil Code is not applicable when no divorce action was pending, no award can be made for past services and because no motion and showing of necessity had preceded the award. It follows, of course, that if the court had no jurisdiction to entertain the action it could not grant counsel fees or costs. Section 137, Civil Code; Patterson v. Patterson, 82 Cal.App.2d 838, 842, 187 P.2d 113.

On the issue of appellant's ability to pay the awards made the facts are as follows:

At the time of the marriage of the parties appellant was employed by a steamship company of which his father was president. His father died prior to the year 1930. He succeeded his father as president of two companies connected with the steamship "Mandalay" from which employment together he had received a salary of from $500 to $1000 a month. When his mother died in 1930 he inherited about $80,000.

From 1926 to 1936, during which time the parties resided in Bronxsville, New York, they lived expensively keeping yachts and polo ponies. They had several servants in the later part of this period. In 1936 a farm in Roseberry, Connecticut, was acquired by appellant in the name of Mrs. Dimon. A mortgage loan of $5000 was given by a bank and the balance of the purchase price amounting to approximately $8000 was paid by appellant. He thereafter spent approximately $40,000 in improving the property. This property respondent sold after the separation and appropriated the proceeds for her support and the care of the minor children.

Appellant stopped working early in 1944 when the Mandalay companies lost at sea their remaining ship and went out of business. For several months before that appellant had not been able to collect his salary. The Dimon shipping company had gone through bankruptcy. When his earnings stopped the Dimons lived on savings and from the operation of dog kennels (breeding pedigreed dogs) on the farm and the liquidation of some of the assets of the place. Appellant tried to get other jobs with steamship companies without success. He then went into a long period of excessive drinking and became ill with bronchial pneumonia and nervous exhaustion.

On September 1, 1945, Mrs. Dimon told her husband to leave and he did. He went to New York where he lived for some weeks in a hotel borrowing money for his expenses until he got transportation to Reno, Nevada, where he has since been living with an aunt at her home; since his arrival there appellant has been supported completely by her. He has no business, employment, profession or any other source of income and he renders no services to his aunt. He testified that since his arrival in Reno he had not been able to work; he was under treatment by a physician for illness. He made a trip to Florida for his health and several shopping trips to San Francisco. Mrs. Dimon conceded that she did not know of any assets which her husband had.

The law relating to the above situation is found in Merritt v. Merritt, 220 Cal. 85, 88, 29 P.2d 190, 191, where it is said: " 'Alimony * * * should be ordered upon evidence that a husband himself has means of compliance or a capacity to acquire them if he make reasonable effort. * * * Alimony * * * where the husband is without property may not be based on the husband's hope of gratuities or the court's surmise that he will receive them.' " And in Webber v. Webber, 33 Cal.2d 153, 160, 199 P.2d 934, 939, it is said: "Not only the 'husband's [actual] earnings' but 'his ability to earn money' by the use of reasonable effort will affect the propriety of an alimony award." The same rule is mentioned in an action for support of a minor child of divorced parties in McGann v. McGann, 82 Cal.App.2d 382, 389, 186 P.2d 424, cited in the Webber case, supra. As there was no evidence of assets of appellant, and the wealth of the aunt may not be considered, the question to be decided is only whether there was any substantial support for the finding of the trial court to the effect that appellant, who in 1947 was 45 years old, had since the divorce decree of March 1, 1946, wilfully abstained from reasonable efforts to obtain gainful employment although he was in good health and was capable of earning $500 to $1000 a month as he had done before.

The undisputed evidence is that the only business in which the appellant had been gainfully employed was the shipping business and that had been lost to him without fault of his. The trial court's finding that he was still able to make from $500 to $1000 a month is not based on any evidence. He certainly could not make that amount in the shipping business on the deserts of Nevada. Where would the court send him to get such a job? The evidence is undisputed that for many years after his loss he tried to engage in that business without success. The award here amounts to several thousand dollars and is continually increasing. It is based on pure conjecture and is unsupported by any competent evidence.

Since the judgment must be reversed for want of jurisdiction it would serve no purpose to discuss the issues raised by appellant in his cross-complaint.

Judgment and order are reversed.

GOODELL, Justice.

I concur:

This concurrence is based primarily on the plain language of the statute.

Section 136, Civil Code, provides: "Though judgment of divorce is denied, the court may, *in an action for divorce,* provide for the maintenance by the husband, of the wife and children * * *." (Emphasis added.)

Section 137 provides: *"When an action for divorce is pending,* the court may, in its discretion" require the payment of alimony or support. It also provides: *"During the pendency of any such action"* the court may require payments for alimony, costs, attorney's fees and support and maintenance. (Emphasis added.)

Section 138 provides that: *"In actions for divorce* the court may, *during the pendency of the action",* or during minority, make orders for the custody and support of the children. (Emphasis added.)

Section 139 provides: *"Where a divorce is granted* for an offense of the husband" he may be compelled to provide for the maintenance of the children, and the support of the wife. (Emphasis added.)

Section 140 provides that the *husband or wife* may be required to give security for their payments.

The language of the 5 sections just emphasized shows a consistent and studied legislative purpose to confine and limit the powers of the court to the period of time when actions for divorce, annulment and separate maintenance are pending, which of course includes time on appeal, § 1049, Code Civ.Proc., and such further time (e. g., during minority, or by a reservation in a decree) as may be properly within the scope of the same action.

" 'The code establishes the law of this state respecting the subjects to which it relates' (Civ.Code, § 4), and section 137 of the same Code provides: *'While an* *action for divorce is pending* the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action.' * * * *An application for alimony can be made only 'while an action for divorce is pending,'* * * *. It is a *collateral proceeding or episode within the action,* authorized for a particular purpose, but *dependent for its maintenance upon the existence of the action.*" Harrison, J., concurring in Hite v. Hite, 124 Cal. 389, at pages 397–398, 57 P. 227, at page 231, 45 L.R.A. 793. (Emphasis added.) In Chief Justice Beatty's concurring opinion in the same case he says, 124 Cal. at page 395, 57 P. at page 230: "It is only a wife who can claim alimony (Civ.Code, § 137) * * *." In Sharon v. Sharon, 67 Cal. 185, 199, 7 P. 456, 465, 635, 8 P. 709, the court said: "It is, of course, indispensable to the granting of alimony at all, that the relation of husband and wife, in fact, exists." See, also, Dunphy v. Dunphy, 161 Cal. 87, 90–91, 118 P. 445.

In Howell v. Howell, 104 Cal. 45, 37 P. 770, 771, the wife sued in May, 1890 for divorce on the ground of desertion. The defendant lived in Wyoming territory and was served by publication and made default. In September, 1890 a decree for plaintiff was entered which awarded her certain property, but there "was nothing in either the complaint or the judgment about alimony." In January, 1892 plaintiff filed in the same action a petition for alimony for herself and support for the minor children. The court awarded her $100 a month commencing with the date of her petition (not, as here, from the date of the divorce decree). On appeal the order was reversed on the ground that the court had no jurisdiction to make the order because no action was pending; the judgment had become final. In its discussion, 104 Cal. at page 47, 37 P. at page 771, the Supreme Court refers to the language of § 137 "while an action for divorce is pending" (referred to above) and to the language of § 139 as well.

In the Howell case the plaintiff, a resident of California, had obtained her divorce here; in the instant case Mrs. Dimon was a resident of Connecticut and obtained her divorce there. In both cases the defendant was not served with process within the state of the residence or the forum; in neither case was there an enforcible alimony order. In the Howell case the wife, after the divorce judgment had become final, unsuccessfully sought alimony in the same action. In the pending case the wife, after her Connecticut divorce had become final, sought and obtained, in a new, independent action with no underlying California antecedents an alimony order in this state of which she was not a resident. It is difficult to see how this could be accomplished when Mrs. Howell, a resident of California, was denied the same remedy on the ground that her divorce decree had become final and her rights had become circumscribed by its provisions. In short, this plaintiff fared better than she could have had she been a resident of California. Howell v. Howell, supra.

The Howell case has been consistently followed in numerous cases, including McClure v. McClure, 4 Cal.2d 356, 359, 49 P.2d 584, 100 A.L.R. 1257; Tolle v. Superior Court, 10 Cal.2d 95, 97–98, 73 P.2d 607 and Puckett v. Puckett, 21 Cal.2d 833, 841, 136 P.2d 1. In Calhoun v. Calhoun, 70 Cal.App.2d 233, 160 P.2d 923, the argument was made that, after a divorce (in Nevada) the California courts under their equity powers and independently of statute, could award support to the former wife. At page 237 of 70 Cal.App.2d, at page 925 of 160 P.2d, the court said "The answer to this argument lies in the fact that the power to award support grows out of the marital relation", quoting Howell v. Howell, supra, and citing also Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793 and Bancroft v. Bancroft, 9 Cal.App.2d 464, 50 P.2d 465. The court added "As Mrs. Calhoun was not the wife of defendant at the time she instituted this action against him, we can find no error in the trial court's refusal to require him to support her." A hearing by the Supreme Court was denied. See, also, Patterson v. Patterson, 82 Cal.App.2d 838, 842, 187 P.2d 113 and Hinson v. Hinson, 100 Cal.App.2d 745, 746, 224 P.2d 405.

In De Young v. De Young, 27 Cal.2d 521, 165 P.2d 457, 460, the wife sued in Los Angeles County in 1942 for separate maintenance claiming that she was still the wife of defendant because a Mexican divorce which he had obtained in 1936 had no validity. The trial court held that on such an attack on the Mexican judgment the burden was on the plaintiff to show its invalidity; that she had not met that burden, and judgment went for defendant. It was affirmed on the ground already stated, the court holding that there was sufficient evidence to sustain the finding that the husband had acquired a bona fide residence in Mexico before he sued there. That is all the case holds.

In his concurring opinion Mr. Justice Schauer says:

> "Such concurrence in the opinion, however, is subject to the reservation that there is intended no implication that a foreign divorce decree, although fully valid insofar as the determination of marital status is concerned, necessarily constitutes a defense to an action for support."

Later in the concurring opinion he says: "The personal rights of the spouses in property not within the jurisdiction of the acting court remain subject to litigation in *the proper forum.* (Emphasis added.)" Later: "And I am of the view that rights to support in the form of alimony *as of the date of the divorce* (which alimony may continue into the single status), at least where there is no adjudication of fault [citation], may well be subject to judicial determination in a subsequent action in a proper forum having personal jurisdiction over both parties. Such an action, being based on the marital status as it existed prior to the divorce, would have to be instituted before the statute of limitations or laches barred it. The statute would normally start to run as of the date of the decree but would, of course, be tolled by absence of the party defendant from the state." (The emphasis is that in the concurring opinion.)

With respect to the language "a subsequent action in a proper forum having personal jurisdiction over both parties." While Mrs. Dimon sued in California, she was not a resident of California or of San Francisco, § 128, Civ.Code, never had been and is not now, so far as this record shows. When she filed this action after she had been divorced in Connecticut several years earlier, she could not have alleged residence in the county or the state. The court acquired jurisdiction of the person of the defendant husband only on an occasional trip of his to San Francisco from Nevada, where he was then living. The plaintiff-wife was in a California court only because she, then a resident of Oregon, and without any domiciliary background in California, entered the open door of our courts.

Referring now to the last sentence quoted above: Could "Such an action being based on the marital status as it existed prior to the divorce"—the Dimon divorce granted in Connecticut—be properly entertained in California when an application made after a final decree granted in our own courts "based on the marital status as it existed prior to the divorce" would have to be denied in this state for lack of jurisdiction, Howell v. Howell, supra? (What has just been said presupposes, of course, that there is no "full faith and credit" question in this case—as there is *not* at least with respect to alimony).

The distinction between the De Young case and the Dimon case is clear from the following sentence in the concurring opinion: "Here, however, the action * * * does not seek alimony based on the former marital status. It is for separate maintenance and plaintiff relies upon the allegation 'That she is the wife of Clarence De Young.' * * * Separate maintenance differs from alimony in that it presupposes a continuing marital status. The right to it cannot be established without proof that such status is existent as of the time of trial. Proof of prior dissolution of the marriage is, therefore, a complete defense to such an action."

In view of the reversal there is no reason to discuss the defendant's ability to pay, or his counter-claim.

DOOLING, Justice.

I dissent. By what, to my mind, is an unnecessarily strict construction of our statutory law my associates, by somewhat different routes of ratiocination, have concurred in a conclusion which places California, in the field which this case covers, among the most backward and unenlightened States of the Union. Its effect is to hold that if a husband deserts his wife and permanently flees from the matrimonial domicile the wife is put to the harsh election either of never divorcing him or of sacrificing forever all right of future support for herself however necessitous her circumstances, however affluent and able to support her her husband may be, and however flagrantly and brutally her husband may have treated her. She is perpetually foreclosed from support without ever having had a day in a court in which that right could be litigated. To these unjust and shocking lengths the court feels itself driven by a narrow construction of the language of sections 136–140, Civil Code.

In other jurisdictions with similar statutory language the courts have not found themselves so impotent. See the cases and statutes discussed in the note in 34 Cal.Law Rev. 192, 198–199. Nor unless a majority of our Supreme Court tells us so in language unmistakably clear will I acknowledge that our legislature has intended to enact such a barbarous rule of law. Until that time I shall believe the law to be as suggested in the concurring opinion in De Young v. De Young, 27 Cal.2d 521, 527, 165 P.2d 457, although this is a stronger case since in De Young the husband had secured the divorce on substituted service not the wife. Many of the cases from other jurisdictions supporting the view that where the court which grants the divorce lacks personal jurisdiction of the husband and hence cannot make a valid award of alimony to the wife, the wife after the divorce may obtain an alimony award against the husband in an action in another jurisdiction in which personal service on the husband can be obtained are cited in the opinion of the Presiding Justice. See also the cases cited in Bernard v. Bernard, 79 Cal.App.2d 353, 357, 179 P.2d 625, and in 34 Cal.Law Review, supra.

Being under no such assumed statutory compulsion in the matter of the award of maintenance for the minor children, since it is settled in California that a divorced wife who has the custody of minor children may bring an independent action in this state against the father for their support, Dixon v. Dixon, 216 Cal. 440, 14 P.2d 497; Davies v. Fisher, 34 Cal.App. 137, 166 P. 833, the Presiding Justice finds a want of jurisdiction to make an award for the children's support in the fact that "neither the parents nor the children had become domiciled in or residents of California, defendant had no property there and the State of California had no interest in the support of the minors." A reading of Mr. Justice Goodell's opinion leaves me uncertain as to the exact ground on which he concurs in reversing the award for the children's support. Actions for support of children are actions in personam and do not effect a change in status. It is for that reason that even the court of the matrimonial domicile cannot make a valid award against the father without personal service upon him. De La Montanya v. De La Montanya, 112 Cal. 101, 117, 44 P. 345, 32 L.R.A. 82. "As a general rule, personal actions are transitory and may be entertained wherever jurisdiction of the parties can be maintained." 21 C.J.S., Courts, § 40, page 48; 7 Cal. Jur. 586. If the rule announced by the majority is adopted it will result in the traveling father, who has sufficient means to flit from jurisdiction to jurisdiction while maintaining a domicile in some jurisdiction to which he seldom if ever returns, gaining a practical immunity from the liability to support even the most destitute of minor children. Such a rule is neither compelled by justice nor authority. I agree with the pragmatic approach of the Kansas Supreme Court which said in Riggs v. Riggs, 91 Kan. 593, 138 P. 628, 629–630:

> "The obligation of the father being personal, it must be enforced where he can be found * * *." Cf. Restatement Conflict of Laws, sec. 457 (c) and comment (a).

I refrain from discussing the defendant's ability to pay further than to say that in my judgment the evidence supports the findings of the court. I agree with Mr. Justice Goodell that if the judgment is reversed on jurisdictional grounds no purpose can be served by discussing issues which the court could only decide if it had jurisdiction.

I cannot find that the Reciprocal Enforcement of Support Law recently adopted by our legislature is an effective palliative for the harshness of the rules announced in this case. It is not and cannot be retroactive so that it furnishes no comfort to the wife and minor children in this case and the elusive husband of the future has only to pick as his asylum some jurisdiction in which it has not been enacted to avoid its perils.

The end product of the rules announced in this case will be to make California a welcome oasis for the carefree fugitive from all family responsibilities in a generally unfriendly world.

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111 Cal.App.2d 402

FINE v. DENNY.

Civ. 14989.

District Court of Appeal, First District,
Division 2, California.
May 28, 1952.

Action by mother against father to obtain custody of minor son. The father filed a cross-complaint. From a judgment of the Superior Court, in and for the County of San Mateo, A. R. Cotton, J., denying her application for custody, the mother appealed. The District Court of Appeal, Dooling, J., held that it was to the son's best interest that he live with the father.

Affirmed.

See also, 97 Cal.App.2d 763, 218 P.2d 792.

1. Parent and Child 🔑2(3.2)

In application of statute that, other things being equal, custody of child of tender years should be given to mother, trial court has wide discretion in determining whether other things are equal and primary consideration is what will promote best interests of child. Civ.Code, § 138.

2. Parent and Child 🔑2(3.6, 4)

In determining best interests of child in custody proceedings, trial court was not confined to question of fitness of each parent and suitability of each home but was entitled to give due weight to fact that from a tender age, child was accustomed to living with father except for a 14 month interruption when child lived with the mother, and trial court was assumed to have given proper consideration to fact that stability of home life of the child is an important and vital factor and that change of custody would disturb child's established mode of living. Civ.Code, § 138.

3. Divorce 🔑303(3)

Where, after divorce, father retained custody of two year old son until he was six, except for 14 months when mother refused to return him to father, and evidence showed that parties were equally fit and proper to have custody, trial court did not abuse discretion in finding that other things were not equal and that it was in the child's best interest not to have mode of living changed by awarding custody to the mother. Civ.Code, § 138.

4. Infants 🔑19

Remarks of trial judge at child custody hearing could not be used to impeach findings and judgment which embodied the final considered judicial action of the court.

◆

Richard B. Daley, Jones, Lane, Weaver & Daley, Stockton, for appellant.

Melbert B. Adams, Bruce E. Clark, Jack E. Frankel, East Palo Alto, for respondent.

DOOLING, Justice.

Appellant, hereinafter called the mother, and respondent, hereinafter called the father, have two children, a daughter Lynda and a son Edward. In 1946 when Edward was a few months past two years of age the mother took Lynda with her to Nevada, leaving Edward with the father. In Nevada the mother obtained a decree of divorce from the father which awarded the custody of Lynda to the mother and purported to award the custody of Edward to the father. Both mother and father have since remarried.

Much of the briefs is devoted to the question whether the Nevada court had jurisdiction of Edward to make the custody award as to him and if not whether the mother is estopped to deny the validity of that award. We find it unnecessary to decide those questions. Without regard to the effect of the Nevada decree it is undisputed that the father had exclusive actual custody of Edward from August 1946 when the mother left for Nevada until June 1949 when the father left Edward with the mother for a visit.

Instead of returning Edward to the father the mother thereupon commenced this action seeking an order of the Superior Court awarding the custody of Edward to her. She retained physical custody of Edward until August 14, 1950 when the court made its order directing her to return the custody of Edward to the father pending the trial of this proceeding. Edward was thereafter in the home of the father and on February 8, 1951 after a trial the court entered the judgment from which this appeal is taken denying the mother's application for Edward's custody and confirming the right to such custody in the father.

The mother's position on appeal is that since the evidence shows that both parents are equally fit and proper persons and each has a suitable home it was an abuse of the court's discretion to award custody of a boy of tender years to the father. In taking this position the mother relies upon that portion of section 138, Civil Code, which provides that "other things being equal, if the child is of tender years, it should be given to the mother".

[1–3] In the application of this statutory provision the court has a wide discretion and in determining whether other things are equal the primary consideration is what will promote the best interests of the child. Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268; Hamilton v. Hamilton, 104 Cal.App.2d 111, 117, 231 P.2d 69; Priest v. Priest, 90 Cal.App.2d 185, 187, 202 P.2d 561. Here in determining the best interests of the child the trial court was not confined to the question of the fitness of each parent and the suitability of each home, but was entitled to give due weight to the fact that from a very tender age Edward was accustomed to living in the custody of his father, and with only the fourteen month interruption when his mother refused to return him to his familiar home, his father had cared for him to the exclusion of the mother from age two to age six, from 1946 to 1951. We cannot be insensitive to the fact, to which we must assume the trial court gave proper consideration, "that the stability of the home life of the children is an important and vital factor", Washburn v. Washburn, 49 Cal.App.2d 581, 587, 122 P.2d 96, 100 and "that a change of custody would disturb the child's established mode of living", Bemis v. Bemis, 89 Cal.App.2d 80, 91, 200 P.2d 84, 91. In view of this factor we cannot hold that the trial judge in continuing Edward's custody in the father was not entitled to find that other things were not equal, and that it was to Edward's best interest not to have his accustomed mode of living and home environment again abruptly changed.

[4] Remarks of the trial judge at the hearing cannot be used to impeach the findings and judgment which embody the final considered judicial action of the court. Kalmus v. Kalmus, 103 Cal.App.2d 405, 421, 230 P.2d 57; Strudthoff v. Yates, 28 Cal.2d 602, 615–616, 170 P.2d 873.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

111 Cal.App.2d 514

KROUPA v. OAK PARK THEATRE CO., Inc., et al.

Civ. 8102.

District Court of Appeal, Third District, California.

June 4, 1952.

Hearing Denied July 31, 1952.

Action by Richard W. Kroupa against Oak Park Theatre Company, Inc., and others for injuries sustained in accident involving automobile of general manager of theater operated by defendants, being driven by assistant manager in performance of errand for manager. The Superior Court, Sacramento County, John Quincy Brown, J., entered a judgment of nonsuit and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that the evidence was sufficient to take case to jury.

Judgment reversed.

1. Automobiles ⚷245(31)

In action against operators of theater, who paid weekly sum for use of general manager's automobile in operation of theater, for injuries sustained by plaintiff in accident involving manager's automobile, being driven by assistant manager as he returned to theater after taking manager's wife to home of a friend, evidence was sufficient to take case to jury on question of whether assistant manager at time of accident was acting upon order given by general manager in exercise of his managerial powers or on mere personal request that assistant manager in his free time favor manager by performing an errand which manager could have taken time off to perform.

2. Trial ⚷139(1)

A nonsuit may not be granted if, viewing the evidence in light most favorable to plaintiff, there is any substantial evidence, including inferences from evidence, which would support a finding for plaintiff.

◆

Goldstein, Lewis & Barceloux, San Francisco, for appellant.

Gerald M. Desmond, Sacramento, for respondents.

VAN DYKE, Justice.

Respondents operated a motion picture theater in Sacramento. The general manager for that theater was Kay J. Naify and the assistant manager was Nick Yiamkis. While he bore the title of assistant manager, he was described in the testimony as being a general handyman. He testified he did everything in general, was the floor manager and maintenance man. His immediate superior was Naify. The manager lived in an apartment above the theater; he owned a car, which was occasionally used in running errands connected with the operation of the theater and for that use the respondents paid him a weekly sum. Yiamkis was supposed to work eight or nine hours a day, but he went to work as early as 11 A. M. and had to be on hand between 11:30 and 12 P. M. when the theater closed for the day. He could take compensating time off in the meantime. Sometimes Naify sent Yiamkis on theater errands in Naify's car. Naify had been employed twelve years and had risen to the position of manager which he had held for about five years. He described his duties as having to see that a show was given, that films were supplied, that the house was properly maintained, that advertising and publicity campaigns were conducted, in effect to see "that the theater had merchandise to sell in the form of sound and seats". It was his job to see that all was in order, that help was courteous, that patrons were satisfied and generally to promote the business. He stated he was in charge of the entire operation of the theater. Under his management and control were 13 or 14 other employees whom it was his duty to supervise. He had personally hired Yiamkis. Naify's own hours of employment varied. If he worked late he began late the next day. On May 18, 1948 Yiamkis came to work at 11 A. M. and about an hour later Naify tossed to him the keys to Naify's automobile and asked him to take his (Naify's) wife to the home of her friend. Yiamkis took the keys and the car and drove Mrs. Naify to the friend's home and while returning to the theater was involved in an accident in which appellant was injured. At the trial evidence was introduced sufficient to show that the accident was proximately caused by the negligence of Yiamkis in the operation of the Naify car. At the close of appellant's evidence respondents moved for a nonsuit, which was granted. From the judgment entered thereafter this appeal was taken. The sole question presented is whether or not under the evidence, taken in its aspect most favorable to appellant, a verdict in his favor would have been sustained as against respondents. More specifically, were respondents responsible for the tort of Yiamkis?

Appellant, contending that under the foregoing facts he had made out at least a prima facie case for the application of the doctrine of respondeat superior, relies in main part upon the case of Harrison v. Taxicab Co., Ltd., 3 King's Bench 588, and Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 P. 25. The facts in the English case were that a taxicab company, which the plaintiff sought to hold liable for injuries incurred by him when one of its taxicabs was negligently operated to his damage, employed a general manager, and, subordinate to him, a taxi driver whose duty it was to obey the orders of the manager. When the accident occurred this driver was driving the cab in which the manager was riding, the purpose of the trip being to carry the manager on a visit to his friends. The general business of the taxi company was not involved and the manager had no authority to use the company's cabs for such purposes; but the taxi driver had been directed by the manager to drive him to that destination. Responsive to the taxi company's arguments that they were not liable because their manager was guilty of a breach of duty to them in so ordering the taxi driver to transport the manager for his private purposes outside the business of the company, the court replied that the driver was bound to obey the manager's orders, was driving the company car pursuant to such orders and thus acting within the scope of his (the driver's) employment under the orders of his master, the taxi company, at the time he was guilty of negligence. Said the court:

> "* * * If a master directs a servant to take his orders in respect of matters within his contract of service from A. B., such orders, when given, become the orders of the master. A master can always delegate his authority and he does so when either expressly or impliedly he designates a person as authorized to give orders for him and on his behalf. In the present case the fact that Black was the general manager implied that it was the duty of a servant in the position of Bird to obey the orders given to him in the ordinary matters of his service. His driving the car on this occasion was thus in fulfilment of his duty of obedience to his masters, the defendant company, and therefore he was at the time their servant doing what he was engaged upon by their orders. Nothing more than this is needed to make the principle respondeat superior apply."

In Chamberlain v. Southern California Edison Co., supra, the facts were that Sterling, a general storekeeper for the corporation defendant who had authority to give orders to a truck driver, one Rosso, for the use of his truck in distributing supplies, ordered the truck driver to tow the automobile of Lighthipe, another employee, to the corporation's repair yard and while this was being done the plaintiff was injured through the negligence of the truck driver. The automobile was thereafter repaired at the company's shop, the cost billed to Lighthipe and paid by him. Said the court, 167 Cal. at pages 501–503, 140 P. at page 25:

> "The sole attack of the appellant is upon that part of the findings which declares that the motor truck was in charge of a servant of the Southern California Edison Company at the time of the infliction of the injuries upon Chamberlain. * * *
>
> "The contention of appellant is that Rosso was not engaged in his master's business at the time of the infliction of

the injuries upon plaintiff but was acting for Lighthipe. It is true that Rosso in the course of his examination said: 'I was in charge of that machine but I was not exactly doing work for them, I was towing a machine for Lighthipe.' But in almost the next breath he said: 'I got my orders from W. T. Sterling, the general storekeeper of the Southern California Edison Company, the one I was employed under.' Later in his examination Rosso admitted that Lighthipe had never spoken to him about the motor car. Consequently the court was justified in rejecting Rosso's conclusion that he was working for the owner of the vehicle which was being towed at a time when Rosso was acting under the orders of his superior in the defendant's employ, driving the defendant's motor truck and drawing pay from the defendant as its servant. According to the undisputed facts in the case the defendant was clearly liable. It makes no difference that Rosso's usual employment was the distribution of supplies. His business was to operate his motor truck under the orders of his superior, and that was exactly what he was doing at the moment when his carelessness caused the injury to plaintiff. The defense of ultra vires is untenable. If the defendant were a natural person and should order his servant to bring an automobile to his place of business, there would be no doubt of his liability for such a tort as this occurring during the time when his command was in process of execution. He could not justly defend upon the theory that he was a banker and not a blacksmith. It would make no difference if he intended to use the automobile, after repairing it, in transporting firearms across the Mexican border. Upon a like principle the defendant corporation may not escape liability for the torts of its servants, acting under its orders, upon the theory that it is not authorized to make repairs upon the instrumentality which caused the damage. To hold otherwise would be to give to an artificial person immunity not enjoyed by a natural one. A corporation acts through its officers and servants. When the plaintiff established the fact that the driver of the motor truck was a servant of the defendant acting under orders of one of its officers who had authority to direct him in his work, a prima facie case was established in favor of plaintiff."

[1,2] When the foregoing rules are applied to the instant case we think a situation was presented necessitating the submission of factual issues to the jury. Naify had been given wide general authority by the respondents. He had been placed in a position where he had broad powers to decide what he should direct his subordinates to do in furtherance of respondents' business. If, as the superior of Yiamkis and in the exercise of his managerial powers, he ordered Yiamkis to perform the errand on which Yiamkis was engaged at the time of the injury to appellant, then Yiamkis was acting as a servant of respondents as truly as though his employer had been an individual person and had given him such an order. But whether or not Naify did give an order to Yiamkis was under the facts a matter for the jury to determine. The hours of both Naify and Yiamkis were irregular. The jury could have inferred that Naify, without violating his duties to his employers, could have absented himself from the theater as upon his own free time and, using his own car for his own purposes, could have driven his wife to her destination. The jury could also have inferred that Yiamkis could at the same time have taken time off, and, finally, the jury could have inferred that nothing more was involved than a mere personal request from Naify to Yiamkis that upon such free time he favor Naify by running the errand for him. The foregoing necessitates a reversal of the judgment for a nonsuit may not be granted if, viewing the evidence in the light most favorable to the plaintiff, there is any substantial evidence, including inferences

from evidence, which would support a finding for plaintiff. Seckel v. Allen, 67 Cal. App.2d 146, 150, 153 P.2d 394; Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 197, 64 P.2d 946.

The judgment is reversed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

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111 Cal.App.2d 472

PEOPLE v. RODRIGUEZ et al.

Cr. 4758.

District Court of Appeal Second District, Division 3, California.

June 2, 1952.

Defendant was convicted in the Superior Court, Los Angeles County, William B. Neeley, J., of unlawful possession of flowering tops and leaves of Indian Hemp, and he appealed. The District Court of Appeal, Parker Wood, J., held that the evidence sustained the conviction.

Judgment affirmed.

Poisons 🔑9

Evidence sustained conviction of unlawful possession of the flowering tops and leaves of Indian Hemp. Health and Safety Code, § 11500.

◆

William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants Jose, Carmen and Thomas Rodriguez were accused of violating section 11500 of the Health and Safety Code in that they unlawfully had in their possession flowering tops and leaves of Indian Hemp (cannabis sativa). Thomas Rodriguez admitted an allegation in the information that he had been convicted previously of the crime of violating said section 11500, a felony. Trial by jury was waived. By stipulation the People's case was submitted upon the transcript of the preliminary examination and the exhibits referred to therein. Evidence was received on behalf of defendants and rebuttal evidence was received on behalf of the People. Carmen Rodriguez was adjudged not guilty. Jose and Thomas Rodriguez were adjudged guilty. Jose was granted probation. Thomas' application for probation was denied. Judgment was that he be imprisoned in the state prison. He appeals from the judgment.

Appellant contends that the "verdict" is against the evidence—that there is nothing to establish appellant's connection with the commission of the offense. This contention is not sustainable. The evidence shows that on April 5, 1951, two police officers went in a panel truck to a place which was across the street from a house at 11418 Maxine Street in Whittier; they arrived at that location about 7:30 a. m. and left there about 8 p. m.; about 10 a. m. they saw appellant come out of the house at that address, pick up the paper, open it and look at it; approximately five minutes later he walked into the house; about 2 p. m. he came out of the house, moved the hose and watered the grass; about 5:30 p. m. Jose drove an automobile into the driveway, and then went into the house; about 6 p. m. appellant came out of the house, entered the automobile and drove away; about 7 p. m. the officers entered the house; Jose and Carmen (husband and wife) and a Mr. and Mrs. Vasquez were in the house at that time; the officers searched the house; in a "recess" in the linen closet one of the officers found a brown paper bag containing sixteen small paper bags each of which contained approximately 1 ounce of crushed marihuana leaves and stem fragments; in a broom closet he found a package of empty brown paper bags (about 1,300) which were similar to the bags the marihuana was in; in the den the officers found a paper box which contained approximately 30 booklets of cigarette papers, and in a cabinet in the kitchen they found a tobacco can which contained a few marihuana leaves; about this time a man named "Gil" came to the house and asked for appellant; Jose told the officers that appellant (his brother) was probably at the home of a friend at 526 South Margaret Street; the officers later went to that house and arrested appellant; appellant told the officers that he and his brother lived at 4952 Floral Street; one of the officers searched appellant and found a key in his pocket.

The officer testified that appellant stated that he had found the key; the officers and appellant then returned to the house on Maxine Street; the witness (officer) opened the door to the house with the key which he had found in appellant's pocket; he took appellant into a bedroom, opened the wardrobe and told appellant that he (officer) was going to try the clothing on appellant to see if it was his; appellant then stated that the clothing was his, the bedroom was his and that he was living in the house; the officer asked appellant if he had any marihuana there, and the appellant replied, "I am not going to answer you. After you take me to jail, I will probably tell you all about it"; on the following day appellant told the officer that none of the other persons knew anything about the marihuana; the officer told appellant that he (officer) had the marihuana and asked appellant where he had hidden it; appellant replied "in the linen closet"; the officer then asked appellant how many bags of marihuana he had, and the appellant said he was not positive, that it might be 13.

The decision of the trial court is supported by the evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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